



**FROM STRESS TO SUCCESS: LET'S TALK THE LEGAL STUFF YOU NEED
TO KNOW FOR MENTAL HEALTH CLAIMS WITH PUBLIC EMPLOYERS**

PRESENTED BY
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LITTLE BIT ABOUT ME



Lorrie Heape Spencer is a senior litigation attorney in the Oregon workers' compensation practice group. Prior to joining Reinisch Wilson PC in 2021, Lorrie was a litigator in the public sector then practiced workers' compensation defense in Honolulu, Hawaii. Lorrie has defended her respective clients in dozens of jury trials, bench trials, and Hearings.

Lorrie, a native of the Chicago suburbs, received her bachelor's degree from Michigan State University before receiving her Juris Doctor from the University of Oregon School of Law. There, she was an Executive Editor of the Journal of Environmental Law and Litigation. While in law school, Lorrie clerked at the Oregon Department of Justice and Multnomah County District Attorney's Office gaining valuable experience researching, writing, litigating, and negotiating complex cases as well as providing advice to clients.

TWO TYPES OF PSYCH CLAIMS

1. Primary/direct claim: work exposure caused a psych condition directly.
2. Indirect/consequential condition: a physical injury traumatized me, or the claim/pain/disability has caused me to become depressed.
 - Today's presentation focuses on #1
 - Higher standard for psych claims.

ORS 656.802 “THE PSYCH CLAIMS STATUTE”

- **656.802** (1)(a) “occupational disease” means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is **not ordinarily subjected or exposed** other than during...regular actual employment...including...(B) Any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death.
- (2)(a) Worker must prove that **employment conditions were the major contributing cause** of the disease.
(b) If...based on the worsening of a preexisting disease or condition...the worker must prove employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease.
- (3) ...a mental disorder is not compensable under this chapter unless the worker establishes ALL of the following:**
- (a) The employment conditions producing the mental disorder **exist in a real and objective sense.**
 - (b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions...or cessation of employment or employment decisions attendant upon ordinary business or financial cycles.
 - (c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.
 - (d) There is **clear and convincing evidence** that the mental disorder arose out of and in the course of employment.

ORS 656.802 “THE PSYCH CLAIMS STATUTE”

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



- “exist in a real and objective sense”
- Murder clowns = no
- WC Hearing becomes a “mini trial” as to what happened in workplace

(b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles.

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- Generally inherent

- Asks about any job, a more stressful job (e.g. 911 operator) does not trigger a higher standard.

- Reasonable disciplinary/corrective/job performance evaluation actions

- Cessation of employment or employment decisions based on ordinary business

- Again, WC Hearing becomes a "mini trial" as to what happened in workplace

ORS 656.802 - “GENERALLY INHERENT”

- The phrase “**generally inherent** in every working situation” means those conditions that are usually present in all jobs and not merely in the specific occupation involved. *Whitlock v. Klamath County Sch. Dist.*, 158 Or App 464 (1999). The reasonableness of the employer's action is decided on a case-by-case basis. *Katherine S. Tatum*, 58 Van Natta 1774 (2006).

ORS 656.802: SPECIFIC SCENARIOS RE “GENERALLY INHERENT”

- *Heather D. Whitaker*, 65 Van Natta 1793 (2013), (understaffing of dispatchers at claimant's workplace (which involved crucial public safety decision making) was not a condition generally inherent in most employment)
- *See Kelly D. Shepard*, 61 Van Natta 592, 593-94 (2009) (the claimant's being bypassed for several promotions constituted working conditions that were **generally inherent** in every working situation);
- *Tamara L. Oates*, 47 Van Natta 1714 (1995) (the claimant's frequent reassignment of positions due to under-staffing, performance of double shifts, and lack of time off, were considered to be conditions **generally inherent** in every working situation);
- *Karen M. Colerick*, 46 Van Natta 930 (1994) (changes in procedures, turnover in personnel, under- staffing and altered job duties at the claimant's employment were considered conditions **generally** encountered in every working situation);
- *Gregory L. Brodell*, 45 Van Natta 924, 925 (1993) (“general stressors such as interpersonal conflict, frustration and boredom at work and stress over termination from the job,” were considered to be nonspecific stressors that were likely **generally inherent** in every working situation).
- “It is not reasonable, nor is it a condition generally inherent in all work situations, for a worker to be shouted at, berated by, or threatened by, his or her supervisor.” *Patti E. Bolles*, 49 Van Natta 1159, 1161 (1997), *aff'd without opinion*, 160 Or App 700 (1999); *see also Kenneth G. Abel*, 48 Van Natta 1603 (1996) (where the claimant established that his manager regularly shouted at him, sometimes in front of customers, using demeaning language and throwing objects, such treatment was not generally inherent in all work situations).

ORS 656.802: REASONABLE DISCIPLINARY ACTIONS

- (a) The employment conditions producing the mental disorder exist in a real and objective sense.
- (b) **The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles.**
- (c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.
- (d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

- Difficult for Judges to decide what is “reasonable” discipline
- Public employers may have an advantages given CBAs in union environments - may mandate the discipline is in certain scenarios
- Discipline at public employers may be more likely to be seen as reasonable, at least more so than an HR person’s discipline decisions at a private employer
- WC litigation and grievance processes should work in tandem – often WC litigation occurs before grievance process over, and that evidence from WC can/will be used in grievance process

ORS 656.802 “THE PSYCH CLAIMS STATUTE”

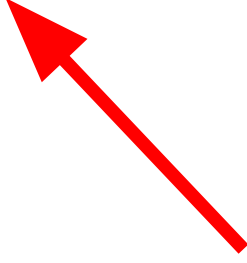
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(c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.

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

- A legitimate psychological diagnosis.
- PTSD, DEPRESSION, ETC.
- Bad vibes = not enough



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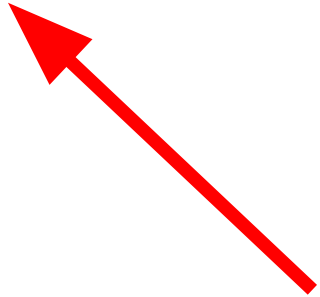
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■ Normal AOE/COE analysis

■ "Clear and Convincing" is the highest standard in ORS 656



CAUSATION TO SUPPORT A PSYCH CLAIM

- Requires both (1) factual and (2) medical work up.
- If we invoke a purely factual defense, i.e. there are zero legally cognizable factors, then we could deny without medical evidence.
 - But we might not be able to predict what claimant is going to allege at Hearing. Recorded statement vital for this.
- If some legally-cognizable factors, then we need medical evidence before denial because only doctors can do weighing.

CAUSATION TO SUPPORT A PSYCH CLAIM

■ Factual Questions:

- “employment conditions producing the mental disorder are conditions other than conditions **generally inherent** in every working situation or **reasonable disciplinary**, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles.
- Which factors can be considered in the major cause “weighing” is a factual/legal question.

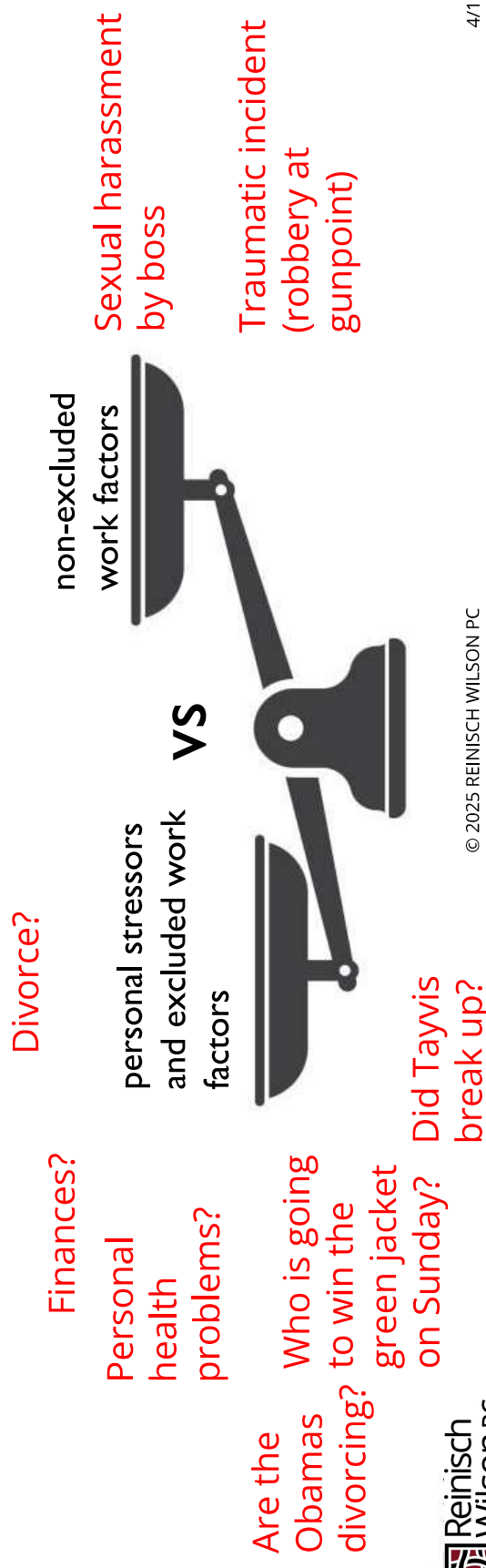
CAUSATION TO SUPPORT A PSYCH CLAIM

- Nail down the alleged harmful work factors:
 - Recorded statement of claimant
 - Witness statements/declarations by co-workers and supervisors
 - Disciplinary documents?
 - Other documents to rebut claimant allegations of harmful factor

MEDICAL CAUSATION TO SUPPORT A PSYCH CLAIM

■ Medical Question

- Doctors are asked to do a weighing of the harmful stressors:



MEDICAL CAUSATION – ASSIGN A PERCENT VALUE TO EACH FACTOR

- Judge determines which factors can be considered (i.e. not generally inherent and not reasonable discipline) based on the evidence and testimony at Hearing.
- *Sheila L. Minor, 71 Van Natta 354 (2019)*(exposure to traumatic experiences at work can persuasively establish a compensable mental health claim even when claimant also experiences contemporaneous excludable workplace causes of stress (such as a supervisor’s reprimand for conduct), and off work stressors, which would not ordinary cause PTSD)
- Therefore, it is best to ask IME doctor to assign a % “value” to each stressor/factor, then Judge can add the values to determine if the considerable factors exceed 50% threshold.

A HYPOTHETICAL: THE FIRE DRILL

- Dwight, self-proclaimed office safety expert, decides to have a fire drill;
- Dwight locks all points of exit and lights a small trash can on fire;
- Chaos ensues and office workers believe they are going to face imminent danger;
- Oscar attempts to exit the building through a space in the ceiling;
- Andy attempts to break a window with the copy machine;
- Creed sits oblivious in the corner



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PHYLLIS DOING POORLY AFTER THE DRILL

PHYLLIS'S PTSD

- Phyllis is assessed PTSD by her primary care physician;
- Phyllis alleges PTSD resulted from the fire drill, bringing a mental disorder claim;
- Phyllis has a lengthy history of treatment for PTSD, up until a week prior to the fire drill

LET'S ANALYZE

- (a) The employment conditions producing the mental disorder **exist in a real and objective sense.** YES, fire drill and threat to life real
- (b) The employment conditions producing the mental disorder are conditions **other than conditions generally inherent in every working situation** or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles. YES, trapped in life threatening fire not generally inherent
- (c) There is a **diagnosis of a mental or emotional disorder which is generally recognized** in the medical or psychological community YES, Phyllis diagnosed with PTSD.
- (d) There is **clear and convincing evidence** that the mental disorder **arose out of and in the course of employment.** YES, fire drill at work, during regular course of business.

LET'S ANALYZE—ADD'L STEP OF PREEXISTING CONDITION

- Is the fire drill the major contributing cause of the disease? **MAYBE?**
- Is the fire drill the major contributing cause of the combined condition and a pathological worsening? **MAYBE?**

PSYCH CLAIM COSTS



ONGOING
PSYCHOTHERAPY,
MEDICATIONS



TIME LOSS/TTD



PPD

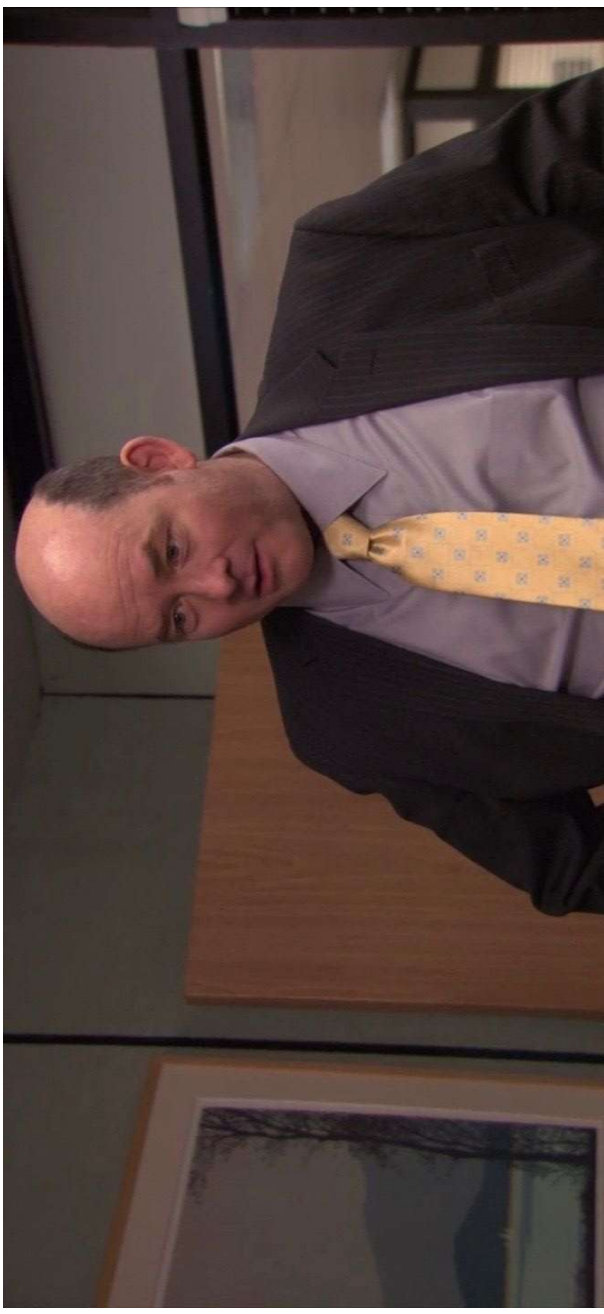


VOCATIONAL
RETRAINING

PERMANENCY AWARDS

OAR 436-035-0400(3): Physician describes permanent changes in mental function in terms of their affect on the worker's activities of daily living (ADLs)...describes the affect on social functioning and deterioration or decompensation in work or work-like settings.

Class of Impairment (1 vs. 2)...then minimal vs. mild vs. moderate.



PPD HYPOTHETICAL: RACIST REMARKS AT WORK

PPD HYPOTHETICAL

- Racist remarks made to claimant at work.
- PTSD and generalized anxiety disorder diagnosed. No pre-DOI psych treatment.
- Symptoms are that he cannot return to that workplace, afraid of large groups of people who are ethnically dissimilar to himself, self-harm thoughts, low motivation, easily tearful, no social or other interactions other than church.
- AP put claimant at “Class 2 Moderate” = 35% impairment.
- 35% impairment + work disability benefits= \$124,575.67 PPD award.
 - If Class 2 “mild” instead of “moderate”, PPD award decreases to \$84,428.23.

CONSIDERATIONS FOR PUBLIC EMPLOYERS

- PR Aspects, some information public record
- These claims are sexy for newspaper headlines whether claims are accepted/denied
- Sometimes less options for quick claim resolution while grievance process is taking more time. Claims can be protracted
- More career-centered folks (teachers, firefighters, etc..) when compared to some public employers (Target, Safeway, etc.) means sometimes less eager to settle.
- Public employees may be more likely to take a principled stance given their work is often seen as a thankless public service

QUESTIONS NOW? LATER? WANT TO RUN THROUGH A HYPOTHETICAL SCENARIO?

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