ORIGINAL

IN THE SUPREME COURT OF OHIO

Shaun Armstrong, Plaintiff-Appellant, vs. John R. Jurgensen Co., et al., Defendants-Appellees.	:	Case No. 2012-0244 On Appeal from the Clark County Court of Appeals Second Appellate District Case No. 2011-CA-6

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FILED
AUG 09 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION

Ohio's Workers' Compensation system is a creature of statute and the General Assembly, pursuant to Section 35, Article II of the Ohio Constitution, possesses the sole authority to determine workers' compensation coverage. To that end, the General Assembly has defined "injury" to exclude psychiatric conditions, "except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant[.]" (Emphasis added) R.C. 4123.01(C)(1). Thus, in Ohio, a claimant must establish a direct and proximate causal relationship between the mental condition and a physical injury or occupational disease sustained by that claimant.

Here, Appellant Shaun Armstrong ("Appellant") seeks workers' compensation benefits based upon a causal connection between a traumatic event — witnessing an auto accident fatality — and the onset of posttraumatic stress disorder (PTSD). As support, Appellant maintains this Court's decision in *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, permits the compensability of a psychological condition, which exists along with a contemporaneous physical injury, despite the lack of causal connection between the mental condition and injury. As explained below, Appellant's characterization of the holding in *McCrone* is not accurate. In Ohio, a mental condition simply existing along with, but not the result of, a physical injury or disease does not give rise to a compensable workers' compensation claim.

Despite the unambiguous statutory language, in addition to established case law, which require that, to be compensable, mental injuries must "arise from" a physical injury or occupational disease, Appellant requests that this Court interpret the statute in a fashion that nullifies the statute's causation language. Clearly, Appellant is unhappy with both the trial and appellate courts' application of the statutory definition of a covered injury, and, in turn, asks this

Court to amend the statute in order to obtain a favorable result. Specifically, Appellant seeks to remove the statute's causative "arisen from" element while inserting only a temporal requirement—that the psychological condition only need "arise contemporaneous to" a work-related physical injury. In essence, Appellant asks this Court to legislate a new definition of "injury" that conflicts with the unambiguous definition set forth by the General Assembly.

Put simply, the lower courts' decisions reflect routine evidentiary rulings based upon a straightforward application of the definition of "injury,[1]" as set forth in the amended version of R.C. 4123.01(C). *See Armstrong v. John R. Jurgensen Co.*, 2nd Dist. No. 2011-CA-6, 2011-Ohio-6708. The evidence relied upon by the trial court establishes that Appellant's mental condition was not caused by his allowed physical injuries, but solely due to "being a visual witness" of another person's fatality. Thus, Appellant's psychological condition did not arise out of his injury. To the contrary, the PTSD occurred independent of the physical injuries sustained by Appellant, and, thus, does not fall within the parameters of a compensable "injury" as defined by R.C. 4123.01(C)(1).

II. STATEMENT OF THE CASE AND FACTS

This matter stems from a workers' compensation appeal to the Clark County Court of Common Pleas, pursuant to Ohio Revised Code Section 4123.512. The triable issue involved Appellant's right to participate in the workers' compensation program for the psychiatric condition of PTSD. Appellant's claim arises from an auto accident occurring during the course of his employment.

[1] Effective June 30, 2006, the General Assembly further limited the definition of compensable psychiatric conditions to those suffered by an injured worker which "have arisen from an injury or occupational disease sustained by that claimant[.]" Because Appellant's accident occurred on August 27, 2009, his claim for benefits is controlled by the amended version of R.C. 4123.01(C).

On August 27, 2009, Appellant was working as a truck driver for Jurgensen, a general highway contractor, on its Interstate 70 paving project. Appellant was instructed to backfill the median strip of Interstate 70. To perform the assignment, he loaded a one-ton dump truck with dirt. Appellant then drove the dump truck up the access ramp in order to merge onto I-70. He then stopped at the yield sign to allow heavy traffic to clear before attempting to merge onto Interstate 70. (Tr. p. 12).

While idling, Appellant observed, in a side view mirror, a van approaching at a high rate of speed. Observing the van draw closer, Appellant braced himself on the truck's steering wheel. (Tr. pp. 12-13, 16). At that moment, Appellant thought he was going to "get hurt real bad" and "was never going to see his loved ones ever again". (Tr. pp. 12-13, 16). Not stopping, the van slammed into the rear of the dump truck. Upon impact, Appellant pushed on the brakes as hard as he could and managed to prevent the truck from being pushed into oncoming traffic on Interstate 70. As the vehicles stopped, Appellant stared into the side view mirror and observed the other driver's head down. (Tr. p. 13). Appellant was in total shock and surprise that he was alive. He momentarily sat in the truck before putting it into park and calling 911. (Tr. p. 16). Appellant then noticed fluid leaking from underneath his truck, which alarmed him over the prospect of the vehicle catching fire. (Tr. p. 13-14). Appellant quickly exited the truck and walked around the front of the truck before proceeding back along its passenger side toward the van. (Tr. p. 17). Appellant then observed the other driver sitting behind the wheel of his van with his head down and blood coming out of his nose. (Tr. p. 17-18). Appellant thought the other driver was dead. (Tr. pp. 18). At that point, Appellant stood and waited "in total shock" until the emergency squad arrived. (Id.) Appellant was transported by ambulance to a local emergency room. At the emergency room, Appellant experienced a great deal of anguish upon

learning of the other driver's death. (Tr. pp. 17-19). Armstrong was examined and released to the care of his fiancé. (Tr. pp. 18-19). Following the accident, Armstrong filed a claim for workers' compensation benefits, which was recognized for the conditions of "cervical", "thoracic" and "lumbar" strain. Subsequently, Armstrong filed a motion to additionally allow his claim for PTSD.

At trial, Appellant testified that post-accident, he experienced nightmares and woke up with severe anxiety, shaking, and sweats. Appellant's dream content consisted of seeing himself in the dump truck and unable to get out; seeing the other driver's face; and a slow motion reenactment of the van running into the back of the dump truck. (Tr. pp. 23-24). Appellant also described occasions in which he woke up in bed kicking and thrashing in response to nightmares of being trapped in the dump truck. (Tr. p. 24). Additionally, Appellant experienced revivification in the form of flashbacks of the accident and of the other driver's face. Appellant also developed a phobia of driving, as well as, experiencing panic attacks while a passenger in the car driven by his fiancé. (Tr. pp. 24-25). Appellant also testified that he suffered bouts of sadness and crying spells for five or six months after the accident, which spells were triggered by references to the other driver and his family. (Tr. p. 19). Significantly, on cross-examination, Appellant himself attributed his psychiatric symptoms to his traffic accident and not his physical injuries. (Tr. pp. 19-20 and 22-23).

It is against this background that Appellant underwent a psychological evaluation by Jennifer J. Stoeckel, Ph.D., in September, 2009. At that time, Dr. Stoeckel diagnosed Appellant as suffering from PTSD. In reaching that diagnosis, Dr. Stoeckel identified Appellant's presentation, his recurrent nightmares, flashbacks, irritability, inability to sleep, fearfulness and an almost phobic response to driving. (Stoeckel Tr. p. 9, 11-12). Specifically, Dr. Stoeckel

testified that "Mr. Armstrong did, in fact, develop PTSD as a result of that motor vehicle accident".

Equally telling, while Dr. Stoeckel believed that Appellant's physical injuries sustained in the traumatic motor vehicle accident "contributed" to the development of PTSD, she offered no testimony that Appellant's psychiatric condition arose from his compensable physical injuries. (Stoeckel Tr. pp. 18-19). Along these lines, Dr. Stoeckel acknowledged that Appellant's injuries did not rise to the level of any broken bones, crush injuries, amputations, or severe lacerations, but, at the time of her diagnosis, Appellant's injuries were limited to a cervical, thoracic, and low back strain. (Stoeckel Tr. pp. 27-30). Not surprisingly, Appellant never experienced an avoidance reaction or a flashback associated with the trip to the emergency room, his doctors, or his medical treatments. (Stoeckel Tr. pp. 30, 32).

Appellant also underwent a psychological evaluation by Lee Howard, Ph.D., in October, 2009. Dr. Howard also found Appellant's complaints correlated with the symptom criteria associated with PTSD. Dr. Howard, however, attributed Appellant's PTSD to his observation of the auto fatality and his fear of injury or death engendered by the incident. Dr. Howard also testified that Appellant's PTSD lacked any causal relationship to his physical injuries. Specifically, Dr. Howard testified that even without physical injuries, Appellant still would have developed his PTSD in response to the life threatening nature of his accident and his observation of the fatally injured driver. (Howard Tr. pp. 19-21). Dr. Howard explained that his conclusion was bolstered by Appellant's failure to describe any connection between his physical injuries and emotional trauma. Dr. Howard also observed that Appellant's injuries were not severe, nor were the injuries typically associated with creating an indelible effect on an individual's personality or

mental state. (Howard Tr. pp. 11, 21). Put simply, Appellant's injuries had no impact on his PTSD. (Howard Tr. pp. 23, 27, 29).

Upon consideration of Appellant's testimony and the testimony of medical experts, in conjunction with Ohio R.C. 4123.01(C), the Trial Court found that Armstrong's psychiatric condition of PTSD did not "arise out of" his compensable physical injuries. Thereafter, Appellant filed a Notice of Appeal to the Second District Court of Appeals on February 24, 2011. On December 23, 2011, the Court of Appeals issued its decision finding that the trial court properly denied Armstrong's request to participate in the workers' compensation program because his psychiatric condition of PTSD did not "arise from" his physical injuries.

III. LAW AND ARGUMENT

Appellant's Proposition of Law No.1: Psychological conditions which arise contemporaneous to work related physical injuries are compensable under the Ohio Workers' Compensation system. The appellate court decision that contemporaneous psychological conditions are not compensable was in error, as it directly contrasts McCrone v. Bank One Corp., and a host of other decisions indicating that such conditions are compensable.

A. Standard of Review.

Although Jurgensen asserts that this matter involves the application of settled law to the facts of the case, Appellant maintains that it involves the construction and application of statutory law and, therefore, presents a mixed standard of review. When interpreting a statute, the court will conduct a plenary review of the interpretation and application of the relevant statutory provision to the historical facts of the case. *State v. Guysinger*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (1993). However, the court is required to accept the trial court's finding of facts if they are based on some evidence in the record. *Id.*

In construing a statute, a court's paramount concern is the legislative intent. *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d

62, 65, 647 N.E.2d 486 (1995). This Court has repeatedly acknowledged "if the meaning of a statute is clear on its face, then it must be applied as it is written." *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, 768 N.E.2d 1170, ¶ 8, quoting *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E.2d 611 (1994). "In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words or to insert words not used." *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236, 741 N.E.2d 121. Thus, if the meaning of a statute is unambiguous and definite, there is no need for further interpretation and it must be applied as written. *Id.* "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Lake Hosp. Sys.*, 69 Ohio St.3d at 524, 634 N.E.2d 611, quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 98 N.E.2d 827 (1951). As explained below, the statute defining injury for the purpose of workers' compensation eligibility is clear and unambiguous on its face.

B. Definition of "Injury"

The workers' compensation system is designed to manage the compensation of individuals who suffer work-related physical injuries or contract occupational diseases. *Bunger v. Lawson*, 82 Ohio St.3d 463, 465, 1998-Ohio-407, 696 N.E.2d 1029; *Ruddy v. Indus. Comm.*, 153 Ohio St. 475, 92 Ohio N.E.2d 673 (1950). The rights conferred by the Act are statutory in nature and not based upon principles of common law. *Westenberger v. Indus. Comm.*, 135 Ohio St. 211, 20 N.E.2d 252 (1939). Thus, in order to receive benefits under Ohio's Workers' Compensation Fund, an employee must have sustained an "injury" as defined by statute.

The General Assembly first defined "injury" for workers' compensation purposes as "any injury received in the course of, and arising out of, the injured employee's employment." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at ¶12 citing

G.C. 1465-6 through 68, 117 Ohio Laws 109, effective July 10, 1937. This definition has been modified over the years, most recently in 2006 with the enactment of SB 7. R.C. 4123.01(C) now provides:

> "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:
>
> (1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease sustained by that claimant; or
>
> (2) 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.

Despite the various amendments, courts have consistently held that Ohio's Workers' Compensation System requires a physical component suffered by the claimant in order for an injury to be compensable. *McCrone* at ¶16. In the past, this Court has explained that the term "injury" "comprehends a physical or traumatic damage or harm[.]" *Id.* citing *Malone v. Indus. Comm.*, 140 Ohio St. 292, 43 N.E.2d 266 (1942), paragraph one of the syllabus; *Dripps v. Indus. Comm.*, 165 Ohio St. 407, 135 N.E.2d 873 (1956), paragraph one of the syllabus. As the definition of "injury" refers to something that is "caused by," while "excluding" the external accidental means--it is, thus, limited to the end result, the actual physical damage or harm, and not events that make up the external accidental means from start to finish. Thus, the predicate element for a compensable psychiatric condition is a physical injury or occupational disease that was received in the course of, and arising out of, the injured employee's employment.

Once an employee satisfies this burden, the next step, per the plain language of R.C. 4123.01(C)(1), is to determine whether the alleged psychiatric condition has actually "arisen from" the claimant's allowed physical injury or occupational disease. The appellate court described this express statutory limitation as "the required nexus between a compensable

psychiatric condition and an injury sustained by the claimant[.]" *Armstrong*, 2nd Dist. No. 2011-CA-6, 2012-Ohio-6708 at ¶35. The court further noted that

> "From" is a preposition "used as a function word to indicate a starting point." Webster's Third New International Dictionary. To be compensable, a psychiatric condition must have been started by and therefore result from a physical injury or occupational disease the claimant suffered. Conversely, "for purposes of R.C. Chapter 4123, psychiatric conditions that do not result from a physical injury do not constitute an 'injury.'" *Bunger v. Lawson Milk Co.*, 82 Ohio St.3d 463, 464 (1998).

Armstrong at ¶35.

Although Appellant asks this Court to ignore this straightforward interpretation of the statute, numerous appellate districts have recognized "established Ohio law that an emotional injury is not compensable, despite a contemporaneous physical injury, unless that physical injury causes the emotional injury." *Dunn v. Mayfield*, 66 Ohio App.3d 336, 341, 584 N.E.2d 37 (1990) citing R.C. 4123.01(C)(1) and *Lengel v. Griswold*, 8th Dist. App. No. 53054, 1987 WL 20459, *2 (Nov. 25, 1987) (referring to "established Ohio case law that an emotional injury is not compensable, despite a contemporaneous physical injury, unless the physical injury causes the emotional injury"). *See also*, *Neil v. Mayfield*, 2nd Dist. App. No. 10881, 1988 WL 76179 (July 22, 1988), *1 ("an emotional injury is not compensable, despite a contemporaneous physical injury, unless the physical injury causes the emotional problems"); *Jones v. Medical Mutual of Ohio*, 8th Dist. App. No. 82924, 2004-Ohio-746, ¶12 (explaining that because the injured worker was unable to make anything other than a possible causal link between the alleged mental condition and the allowed lumbar conditions, there existed competent, credible evidence to support the determination that the work injury was not a proximate cause of the psychiatric condition). Accordingly,

> to state a claim upon which relief can be granted for an emotional disability, an employee must allege either that a physical injury proximately caused the

> emotional disability *** or that that the emotional stress proximately caused a physical injury[.]

Dunn at 341, citing *State, ex rel. Buckeye Internatl., Inc. v. Indus. Comm.*, 70 Ohio St.2d 200, 436 N.E.2d 533 (1982) and *Ryan v. Connor*, 28 Ohio St.3d 406, 503 N.E.2d 1379 (1986).

C. Analysis

When crafting the definition of "injury," the General Assembly intended to restrict claims for psychiatric conditions and, thus, provided for their exclusion. An exception exists for those psychiatric conditions that have "arisen from" an injury or occupational disease sustained by that claimant. A plain reading of the statute reveals the intent of the General Assembly to limit claims for psychiatric conditions to conditions that "arise from" a compensable injury or occupational disease, as opposed to, mental conditions that exist "along with" a compensable physical injury, but lacking causal connection. It is the latter scenario upon which Appellant premises his claim, but it is the former mandate that forecloses his eligibility.

Despite Appellant's attempt to argue otherwise, case law confirms that courts have consistently recognized as compensable "injuries" only mental disorders that arise from a physical injury. *McCrone*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at ¶16 ("[c]onditions suffered by the claimant could be mental disorders, provided that they arose from a physical injury) *referencing State ex rel. Clark v. Indus. Comm.*, 92 Ohio St.3d 455, 751 N.E.2d 967 (2001). *See also*, *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 696 N.E.2d 1029 (1998) (psychiatric conditions that do not result from a physical injury do not constitute an 'injury') and *Wood v. Ohio State Highway Patrol*, 156 Ohio App.3d 725, 2004-Ohio-1765, 808 N.E.2d 887, ¶39 ("the General Assembly chose to define the terms "injury" and "occupational disease" in such a way as to exclude psychological conditions not arising from compensable physical injury"). Put simply, an emotional injury is not compensable, despite a claimant's

contemporaneous physical injury, unless the physical injury causes the emotional injury. *State ex rel. Anderson v. Indus. Comm.* (1980), 62 Ohio St. 2d 166, 404 N.E.2d 153 (1980); and *Dunn*, 66 Ohio App. 3d at 341, 584 N.E.2d 37.

1. R.C. 4123.01(C) requires that psychiatric conditions arise from a physical injury sustained by the claimant in order to be compensable.

Appellant argues that psychiatric conditions that arise contemporaneous to allowed physical injuries are compensable pursuant to *McCrone*. In making that argument, Appellant misconstrues the holding in *McCrone*, in addition to the principles set forth in the other cases upon which he relies.

For injuries that are sustained after June 30, 2006, the amendment's effective date, a psychiatric condition must not only have "arisen from" any compensable injury or occupational disease, but also be sustained by that particular claimant. *See*, R.C. 4123.01(C)(1). Although Appellant maintains that the decision in *McCrone* "indicate[s] that psychological conditions arising contemporaneous to physical injuries are compensable under the Ohio workers' compensation system[,]"[2] the actual holding in *McCrone* uses the "arising from" language contained in the statute:

> Psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of "injury[.]"

McCrone, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at paragraph one of the syllabus. The phrase "arise contemporaneous to" is not used. The *McCrone* Court further explained that:

> when the entire definition of "injury" in R.C. 4123.01(C) is examined, it is clear that workers' compensation covers physical injuries and psychiatric injuries that arise *directly out of* physical injuries or occupational disease to the claimant.

(Emphasis added). *McCrone* at ¶23.

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[2] Appellant's Brief p. 1-2

In sum, a claimant must not only sustain a compensable physical injury or occupational disease, but also establish that the physical injury or occupational disease proximately caused the mental disorder. The fact that a psychiatric condition may have "arisen contemporaneous to" work related physical injuries, absent causal connection, is not sufficient per R.C. 4123.01(C)(1). This principle was echoed by the Appellate Court, which noted:

> Armstrong, relying on case law decided prior to the enactment of 2006 S 7, argues that, to be compensable, a psychiatric condition need only be contemporaneous with a compensable physical injury. We do not agree.
>
> The required nexus between a compensable psychiatric condition and an injury sustained by the claimant that R.C. 4123.01 (C)(1) imposes is that the psychiatric condition must have "arisen from" the injury.
>
> ***
>
> The term "contemporaneous" connotes a temporal nexus, not a causative nexus. Two things are contemporaneous when they arise, exist, or occur at the same time. *State ex rel. Clark* used the term contemporaneous to illustrate the lack of any causative nexus, because in that case the claimant suffered no physical injury at all. Neither *State ex rel. Clark* nor *McCrone v. Banc One Corp.*, hold that a psychiatric or psychological condition arises from a physical injury because the two coincide in time. Both cases hold that the condition must also be a product of a physical injury. As amended by 2006 S 7, R.C. 4123.01(C)(1) requires that, in addition, the physical injury must be one that the claimant suffered in order for the claimant's psychological injury to be compensable.

Armstrong, 2nd Dist No. 2011-CA-6, 2011-Ohio-6708 at ¶ 34-38.

2. Appellant's theory is not supported by the case law upon which he relies.

Appellant's proposition that "[i]f a psychological condition arises contemporaneous to a physical injury, it is compensable" is not supported by the case law upon which he relies. (Appellant's Brief p. 4). He maintains that Ohio's courts have "long indicated" that psychiatric conditions arising contemporaneous to physical injuries are compensable, and relies upon this Court's decisions in *McCrone*, *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 1998-Ohio-407, 96 N.E.2d 1029, *Rambaldo v. Accurate Die Casting*, 65 Ohio St.3d 281, 603 N.E.2d 975 (1992),

and *State ex rel. Clark v. Indus. Comm.*, 92 Ohio St.3d 455, 459, 2001-Ohio-1265, in addition to the appellate decisions rendered in *Andolsek v. Kirtland*, 99 Ohio App.3d 333, 650 N.E.2d 911 (11th Dist. 1994), *Connors v. Sterling Milk Co.*, 98 Ohio App.3d 711, 649 N.E.2d 856 (3rd Dist. 1993), and *Grant v. Ohio Dept. of Liquor Control*, 86 Ohio App.3d 76, 619 N.E.2d 1165 (1st Dist. 1993). However, none of those cases hold that, to be compensable, a mental injury simply need arise contemporaneously with a compensable physical injury. As explained below, none of those cases have even addressed, much less upheld, the allowance of a psychiatric injury that simply arose contemporaneous to a physical injury.

McCrone involved a bank teller's claim for workers' compensation benefits based upon a purely psychiatric condition. There were no physical injuries involved. In that case, a bank employee brought a workers' compensation action against the employer to recover for post-traumatic stress disorder stemming from a bank robbery. The holding in that case does not refer to "contemporaneous" injuries, but rather states:

> psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of "injury."

McCrone, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at paragraph 1 of the syllabus. In fact, the only time the word "contemporaneous" appears in the *McCrone* decision is when this Court sets forth the certified question:

> [w]hether R.C. 4123.01(C)(1) violates the Equal Protection Clauses of the United States and Ohio Constitutions, where it excludes from Workers' Compensation coverage psychological or psychiatric conditions occurring in the course of and arising out of the claimant's employment, but [which] do not arise from or occur contemporaneously with a compensable physical injury.

McCrone at ¶5. Nowhere in the majority opinion does this Court assert that a mental disorder need only arise contemporaneously with a physical injury in order to be compensable.

Similarly, in *Bunger* and *Rambaldo*, this Court addressed claims involving pure psychiatric injuries. In *Bunger* the court determined that:

> R.C. 4123.01(C) and 4123.74 do not foreclose an employee who has suffered purely psychological injuries from pursuing a common-law remedy against his or her employer.

Bunger, 82 Ohio St.3d 463, 696 N.E.2d 1029, at syllabus. The *Bunger* Court further explained that, for purposes of R.C. 4123.01(C), "psychiatric conditions that do not result from a physical injury do not constitute an 'injury.'" *Bunger* at 464.. The *Rambaldo* Court addressed employees seeking workers' compensation benefits for mental illnesses caused solely by job stress. In denying benefits, the *Rambaldo* Court held that mental disorders occasioned solely by job-related stress were not compensable as occupational diseases. The Court explained that the mental condition must be "the result of a compensable work-related physical injury." (Emphasis removed) *Rambaldo*, 65 Ohio St.3d at 284, 603 N.E.2d 975. The term "contemporaneous" is not found within either the *Bunger* or *Rambaldo* decisions.

In *Clark*, the Court addressed the receipt of both hostage leave pay, under the injured worker's collective bargaining agreement ("CBA"), and temporary total disability benefits ("TTD"). The *Clark* court determined that Ohio statutory law did not require a setoff of TTD benefits despite the receipt of hostage leave pay. Clark's claim had already been allowed for PTSD, and was not at issue. In addressing the differences between hostage leave pay under a CBA and the receipt of TTD benefits, the Court noted that pursuant to the CBA at issue, hostage leave was payable with or without any contemporaneous physical injury, whereas a "psychological injury without a corresponding physical injury is not compensable under the workers' compensation system." *Clark*, 92 Ohio St.3d at 459, 751 N.E.2d 967. Although the *Clark* Court further noted that one who suffers a psychological injury without a

contemporaneous physical injury is without a remedy under Ohio's workers' compensation system, it did not state, much less suggest, that to be compensable a psychological injury simply had to arise contemporaneously to a work related physical injury. *Clark* at 459-60.

Similarly, the *Andolsek*, *Connors*, and *Grant* appellate decisions do not state, much less suggest, that to be compensable a psychiatric injury simply had to arise contemporaneously to a work related physical injury. Neither *Andolsek* nor *Connors* involved employees who suffered both psychiatric and physical injuries. The decisions addressed the application of the federal and state equal protection clauses to the workers' compensation exclusion of purely mental injuries. The appellate courts determined that the exclusion did not pose any equal protection violations. In *Andolsek*, the court further explained that the General Assembly did not exceed its scope of authority in defining "injury" to "exclude compensation for psychiatric injuries not *resulting from* a compensable work-related physical injury." (Emphasis added) *Andolsek*, 99 Ohio App.3d at 336-37, 650 N.E.2d 911.

Grant v. Ohio Dept. of Liquor Control, appears to be the only case cited by Appellant wherein the employee asserted both psychiatric and physical injuries. The plaintiff in *Grant* was a clerk in a state liquor store and was the victim of an armed robbery. The plaintiff alleged to have suffered anxiety, depression and PTSD as a result of the robbery, in addition to possible finger, shoulder and arm injuries. The psychiatric conditions were denied administratively because the plaintiff did not assert any physical injury until the matter had been appealed to the court of common pleas. She then moved to file an amended complaint alleging that she also sustained a contemporaneous arm injury during the robbery and subsequently developed an ulcer because of her psychiatric condition. The trial court denied the motion to amend and granted summary judgment in favor of the Industrial Commission.

On appeal, the court determined that the trial court abused its discretion in denying the plaintiff's motion to amend to add physical-mental and mental-physical claims in light of the *de novo* nature of an appeal pursuant to former R.C. 4123.519. The court briefly discussed the plaintiff's evidence when reviewing whether the trial court erred in granting summary judgment. The appellate court then spoke in terms of cause and effect as opposed to simply coinciding in time: "her posttraumatic stress syndrome was *occasioned* by the injury sustained in the second robbery" and the plaintiff alleged that "the condition [PTSD] was *caused by* a contemporaneous physical injury[.]" (Emphasis added) *Grant*, 86 Ohio App.3d at 84, 619 N.E.2d 1165.

Even a cursory review of the aforementioned decisions readily undercuts Appellant's proposition. Furthermore, Appellant ignores case authority that has long recognized that, per R.C. 4123.01, a compensable psychiatric injury must "arise from" the allowed physical injuries.

3. Ohio courts have long recognized that a compensable psychiatric injury must arise from the allowed physical injuries.

Consistent with the 2006 amendment, Ohio courts have regularly prohibited compensability for psychiatric conditions unless the conditions are found to have "arisen from" a physical injury. In *Dunn v. Mayfield*, 66 Ohio App.3d 336, 584 N.E.2d 37, the plaintiff sought compensation for PTSD in connection with injuries he sustained from an assault by inmates while working at the Southern Ohio Correctional facility. In discussing the compensability of psychiatric conditions, the appellate court acknowledged the decision in *Ryan*, 28 Ohio St.3d 406, 503 N.E.2d 1379, which addressed physical injuries caused solely by emotional stimuli, and explained:

> *Ryan* does not change established Ohio law that an emotional injury is not compensable, despite a contemporaneous physical injury, unless that physical injury causes the emotional injury. *** Accordingly to state a claim upon which relief can be granted for an emotional disability, an employee must allege either that a physical injury proximately caused the emotional disability or that the emotional stress proximately caused a physical injury. (citations omitted).

Dunn, 66 Ohio App.3d at 341, 584 N.E.2d 37, citing R.C. 4123.01(C)(1) and *Lengel v. Griswold*, 8th Dist. No. 53054, 1987 WL 20459 (Nov. 25, 1987). *See also*, *Neil v. Mayfield*, 2nd Dist. No. 10881, 1988 WL 76179 (July 22, 1988) ("an emotional injury is not compensable, despite a contemporaneous physical injury, unless the physical injury causes the emotional problems"); *Martin v. Conrad*, 7th Dist. No. 275, 2001-Ohio-3288 ("in order to be compensable, a psychological injury must arise from a contemporaneous physical injury") and *Jones v. Medical Mutual of Ohio*, 8th Dist. No. 82924, 2004-Ohio-746 (upholding the trial court's denial of the plaintiff's claim for dysthymia because the medical experts were unable to establish a causal link between the plaintiff's psychiatric condition and her back injury). While reversing the trial court order granting the employer's motion for summary judgment, the appellate court acknowledged that the plaintiff alleged a cause of action for a psychiatric condition that was supported by a compensable physical injury. However, the court noted it would be difficult to prevail in light of:

> [the appellant's] unenviable task of establishing that his post-traumatic stress disorder was proximately caused by his cut fingers, burning eyes and lungs and not the emotional stress he describes as being the causative factor in his psychiatric examination[.]"

Dunn, 66 Ohio App.3d at 342, 584 N.E.2d 37.

Following this principle, in *Cox v. Yellow Freight System*, Franklin C.P, No. 92 CVD08-6353 (October 1, 1993), the trial court granted the employer's motion for summary judgment because the evidence was insufficient to support the compensability of a claim for mental injury under R.C. 4123.01(C)(1). Specifically, the evidence indicated that the plaintiff's physical injuries did not cause his PTSD. Instead, as in the present matter, the plaintiff's witnessing of

dead bodies and feelings of responsibility for causing the deaths precipitated the PTSD. Judge Evelyn J. Stratton, writing for the court, explained:

> Plaintiff's attempt to distinguish Cox's job-related stress condition (for that is truly what the cause is) as either being "sudden and traumatic" and therefore somehow in a more recognizable category as an "injury," or somehow "arising out of" an injury (the shoulder and/or the accident) although, as both sides agree the shoulder condition did not cause the post-traumatic stress disorder.
>
> However as the Court in Rini pointed out, one must not be swayed by semantics, but by the intent of the legislature. Whether the job-related stress was long, slow, and repetitive such as suffered by a firefighter in Rini, or sudden, traumatic, and catastrophic, such as suffered by a truck driver like Cox exposed to a higher risk of witnessing accidents because of constantly being on the road, it is still job-related stress. Cox's injuries did not cause his post-traumatic stress disorder, the witnessing of the accident and deaths did.
>
> ***
>
> [T]he mere addition of a physical injury such as a "broken fingernail" as referenced by defense that bears no relation to the psychic injury other than occurring simultaneously, is insufficient to give rise to a compensable Workers' Compensation Claim under current legislative intent.

Cox, Franklin C.P, No. 92 CVD08-6353 at 3-4, 5.

Thus, the aforementioned cases refute Appellant's hope that, to be compensable, a mental injury simply needs to arise contemporaneously with a physical injury. Rather, for compensation purposes, Ohio courts have consistently interpreted and applied the "arisen from" language in R.C. 4123.01(C)(1) as requiring that the compensable physical injuries cause the psychiatric condition.

4. Appellant is attempting to convert a psychiatric condition that is purely stress related into a compensable injury by distorting R.C. 4123.01(C)(1)'s "arisen from" requirement.

Despite the plain wording of the statute, Appellant urges this court to overlook the "arising from" requirement and replace it with a more lenient "contemporaneous to" or "along with" prerequisite thereby, creating a standard under which "psychological conditions with

contemporaneous physical injuries are compensable, while those without contemporaneous physical injury are not." (Armstrong Brief p. 5).

In its amicus brief, the Ohio Association for Justice ("OAJ") takes a somewhat different angle and maintains that "the statutory language of R.C. 4123.01(C)(1) shows that a physical injury does not need to cause a psychiatric condition as the phrase 'arise from' does not require active physical causation." (OAJ Brief p. 8). Citing the Ryan decision, OAJ then suggests that the requirement of a physical injury is "for proof purposes," and not a causal requirement that the physical injury cause the psychiatric condition; a physical injury simply need be present "because the cause of the physical injury is more readily discernible than the cause of a stress-related injury[.]" (OAJ Brief pp. 8-9).

Both Appellant and the OAJ then raise their concern that applying the statute as written would "create an impossible burden on the injured worker" and would prevent compensation for trauma-related psychiatric conditions. That contention, however, ignores the General Assembly's intent to limit eligibility only for psychiatric injuries that have arisen from compensable physical injuries on a flow through basis.

A "flow through" injury is one that subsequently develops in a body party not included in the original claim filed by the claimant. *Dent v. AT&T Technologies, Inc.*, 38 Ohio St.3d 187, 527 N.E.2d 821 (1988). In order to receive benefits for flow through injuries, an injured worker must establish that the allowed physical injuries proximately caused the new injury. See *Fox v. Indus. Comm.*, 162 Ohio St. 569, 125 N.E.2d 1 (1955), paragraph one of the syllabus. The dual causation theory may also come into play, specifically in instances where PTSD is involved. It is a well-established principle in tort law that an injury may have more than one proximate cause. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 587, 575 N.E.2d 828 (1991). If an

injured worker presents sufficient evidence that there was more than one proximate cause of a condition, an instruction on dual causation is required. For example, an injured worker who suffers severe physical injuries (crushing injury, amputation, etc.) as a result of being pulled into a press machine may develop PTSD. If the injured worker presents sufficient evidence permitting reasonable minds to conclude that the PTSD was proximately caused by both the severe physical injuries and the event itself (the experience of being pulled into a working machine) an instruction on dual causation would be required, and the PTSD may be deemed compensable. Consequently, applying the statute as written would not automatically foreclose compensation for trauma-related psychiatric conditions.3

Perhaps more importantly, however, Appellant and the OAJ's distortion of the "arisen from" requirement is an attempt to divert this Court's attention away from the previously discussed decisions reflecting a straightforward application of the unambiguous statutory language. Instead, they propose an interpretation of compensable psychiatric injuries that requires this Court to legislate a new definition of "injury." However, that proposed definition

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[3] It is also important to note that Ohio's workers' compensation system is not meant to fully reimburse the employee for the entire loss sustained. The workers' compensation system involves a trade-off between employers and employees, which the General Assembly has deemed beneficial to all parties involved. It is a loss-distribution system under which injured works obtain statutorily determined benefits without proof of fault and employers received immunity from tort suits. Under the workers' compensation system, the employer has an obligation to contribute to a common fund to provide compensation for such work-related injuries, and in return, receives immunity from the full liability exposure of a tort action. The employee, on the other hand, loses the right to recover damages to the full extent of all injuries sustained, but in return obtains, through a stream-lined and inexpensive procedure, specified compensation and medical benefits for every work-related injury, regardless of fault. *See* Philip J. Fulton, *Ohio Workers' Compensation Law*, Sec. 1.2, 4-5 (4th Ed. 2011). The "scheme is specifically designed to provide injured workers with less than full compensation." *Id.* at 4.

Thus, although an employee may be denied coverage under Ohio's Worker's Compensation system for his psychiatric condition, he is not left without a remedy. The *Bunger* court noted that may disputes between employees and employers remain outside the workers' compensation system, but may still be remedied in court. Employees may seek recovery for stress-related psychiatric injuries through a civil action in tort against the tort-feasor and recover damages for all provable losses proximately resulting from the injury, including pain and suffering and loss of consortium, in addition to punitive damages. That is precisely what occurred in the present matter. Appellant has opted to pursue a personal injury action in connection with the motor vehicle accident and is entitled to recover damages for all provable losses that were proximately caused by the accident.

contravenes the General Assembly's intent to exclude mental conditions caused solely by trauma-related stress.

This Court has previously sanctioned the treatment of psychiatric injuries differently than physical injuries because mental conditions raise different issues of proof including not only the establishment and extent of the injury, but also the cause of the psychiatric condition itself. By requiring that, to be compensable, a psychiatric condition must "arise from" a physical injury enables the State to distribute the limited resources of the Insurance Fund to employees with psychological conditions that may flow through or result from the allowed physical conditions. Thus, an employee who suffers a severely debilitating work-related physical injury and/or occupational disease is entitled to recovery for the flow-through psychiatric injuries arising directly from the allowed physical conditions and/or occupational disease. This is the line drawn by the General Assembly for purposes of compensating psychiatric conditions, thereby ensuring that the psychiatric conditions are in fact work-related and not personal in nature.

Along these lines, Appellant is attempting to characterize his stress condition as a more recognizable injury--one that arose suddenly and traumatically out of events related to an automobile accident in which physical injuries were sustained. However, the automobile accident resulted in only minor physical injuries to Appellant and those physical injuries did not cause his PTSD. Armstrong, 2nd Dist. No. 2011-CA-6, 2011-Ohio-6708 at ¶39. Rather, the evidence established that Appellant's psychiatric condition is purely stress-related and was caused by his witnessing of the automobile accident and the death of another individual. Id. Consequently, it does not fit within the parameters of the statute. To require that a condition must have arisen from an injury is far different than simply requiring that a psychological injury

arise contemporaneous, but without causal connection, to some physical injury, no matter how minor.

The General Assembly drafted the definition of injury to include only those psychiatric conditions that arise from work-related physical injuries or occupational diseases. Accordingly, the statute must be interpreted and applied in a manner that effectuates the intended purposes. Although tough policy decisions are at stake when determining whether a particular injury should be eligible for compensation, the General Assembly has been elected and entrusted to serve that purpose. This is exemplified by Justice Lundberg Stratton's concurring opinion in McCrone, where she suggests:

> [I]t is the role of the General Assembly to determine whether a psychological or psychiatric condition resulting from workplace trauma should be a compensable injury or occupational disease for purposes of workers' compensation. In making that determination, I believe several issues should be subject to public debate: criteria for diagnosis, the types of conditions to be included, and how to distinguish the effects of personal trauma from workplace trauma.
>
> The General Assembly should examine competing views on the topic, including expert testimony, and set goals, priorities, and standards before a purely psychological or psychiatric condition is defined as an "injury" for purposes of workers' compensation.

McCrone, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at ¶40-41.

Thus, any alteration to the unambiguous statutory language to encompass not only psychiatric injuries that have "arisen from" a physical injury or occupational disease, but also those that "arise contemporaneous to" a physical injury or occupational disease, must be effectuated by the General Assembly and not crafted by this Court.

<u>Appellant's Proposition of Law No. 2:</u> The addition of the words "sustained by that claimant" to R.C. 4123.01(C) should not force the Court to abandon its long standing policy that psychological conditions sustained contemporaneous to physical injuries are compensable. That language merely intends to bar psychological conditions sustained contemporaneous to injuries suffered by individuals other than the claimant in question

A. The purpose of the 2006 amendment to the statutory definition of "injury" was to further limit the scope of compensable psychiatric injuries.

In response to the *Bailey* holding, characterized as "atypical," the General Assembly amended the definition of "injury" in 2006 to limit the scope of coverage for psychiatric injuries. Whereas *Bailey* provided for the inclusion of "psychiatric conditions that arise from a third party's compensable injury or occupational disease," the 2006 amendment expressly limits the compensation of psychiatric conditions to those that "have arisen from an injury or occupational disease sustained by that claimant." *Bailey*, 91 Ohio St.3d at 38, 2001-Ohio-236, 741 N.E.2d 121 and R.C. 4123.01(C)(1). Appellant correctly points out that "[t]he change did not change the previously discussed causation standard at all" and that the only substantive change in the code is the specification that the injury or occupational disease must be sustained "by the claimant." (Armstrong Brief p. 8). Thus, the "arising from" requirement — that a psychiatric injury must arise directly out of physical injury or occupational disease — has not been altered. Now, however, the physical injury or occupational disease must have been sustained by the claimant, as opposed to, another individual. Consequently, the aforementioned line of case law supporting the appellate court's interpretation and application of the "arisen from" language in R.C. 4123.01(C)(1) still applies.

Contrary to Appellant's assertions, the appellate court did not rely on the amendment to "wipe out" what Appellant characterizes as a "longstanding line of case law" interpreting the statute as "including the suffering of contemporaneous physical and psychological injuries[.]" (Armstrong Brief p. 8). Rather, in the past, Ohio courts have consistently held that, in order to

be compensable, a physical condition or occupational disease must cause the psychiatric condition. *McCrone*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 at ¶16 ("[c]onditions suffered by the claimant could be mental disorders, provided that they arose from a physical injury) *referencing Clark*, 92 Ohio St.3d 455, 751 N.E.2d 967. *See also*, *Bunger*, 82 Ohio St.3d 463, 696 N.E.2d 1029 (psychiatric conditions that do not result from a physical injury do not constitute an 'injury') and *Wood,* 156 Ohio App.3d 725, 2004-Ohio-1765, 808 N.E.2d 887 at ¶39 ("the General Assembly chose to define the terms "injury" and "occupational disease" in such a way as to exclude psychological conditions not arising from compensable physical injury").

In essence, to accept Appellant's novel interpretation of R.C. 4123.01(C)(1), this Court must delete the "arisen from" language and replace it with the words "occur contemporaneous with." As such, if this Court were to adopt Appellant's "contemporaneous" theory, it would result in the expansion the definition of injury to include, for the first time, purely stress related conditions that are not the product of a physical injury or occupational disease. Certainly, such an expansion of the statutory definition of injury must be undertaken by the General Assembly and not this Court.

B. The evidence supports both the Appellate Court and Trial Court's conclusion that Appellant's PTSD did not arise from his compensable physical injuries.

The Appellate Court correctly concluded that the trial court's judgment was not against the manifest weight of the evidence. As the sole adjudicator of fact, the Trial Court considered ample evidence to support its finding that Appellant's PTSD did not "arise from" his compensable physical injuries. Here, Appellant described experiencing nightmares, revivification in the form of flashbacks of the fatal automobile accident; sleep disruption; bouts of sadness and crying spells; a phobia of driving; and panic attacks and he attributed his psychiatric symptoms to the life threatening nature of the accident and his observations

associated with the other driver's death. (Tr. pp. 19-20 and 22-23). Conversely, Appellant offered little testimony attributing any emotional reaction to his industrial injury or medical treatment associated with those physical conditions. Under any reasonable interpretation, Appellant's testimony clearly supports both the Appellate Court and Trial Court's findings.

Beyond that, the testimony of Dr. Howard provides ample support upon which to conclude that Appellant's PTSD lacked any causal relationship to his physical injuries. Specifically, Dr. Howard opined that Appellant developed PTSD solely in response to the fatal auto accident and independent of Appellant's contemporaneous physical injuries:

> Well, my opinion is that it was not actually caused by the physical conditions, the cervicothoracic lumbar problems. It was actually caused by being a visual witness of the incident. The trauma that caused the posttraumatic stress disorder would not be a strain injury or physical injury. It would be the mental observation of the severity of the injury. The fatality, the fact that it could have been life-threatening to him at some point, that sort of thing.
>
> ***
>
> [E]ven if he didn't have any injury, physical injury, I think he still would have a posttraumatic stress disorder because of, you know, the life-threatening nature of the incident, the fact that someone else died during the accident. It's all this – the experience of the injury of the incident, not the actual physical trauma.

Armstrong, 2nd Dist. No. 2011-CA-6, 2011-Ohio-6708 at ¶20 and 22 citing Howard Tr., pp. 20-21.

Based on the above-cited evidence, the Appellate Court explained:

> The trial court correctly construed the exclusion from coverage for psychiatric conditions in R.C. 4123.01(C). Further, there was competent, credible evidence from which the court could find that Armstrong's psychiatric condition did not arise from the physical injuries he suffered, but was instead the result of the horrific injuries that caused the death of the other driver when their vehicles collided. Dr. Howard testified that Armstrong's PTSD was not caused by his physical injuries from the accident but instead was "caused by being a visual witness of the" accident. He reviewed the available medical evidence and provided a sound basis for his conclusion. The court was free to reject the testimony of Dr. Stoeckel, which tended to support Armstrong's

> "contemporaneous event" theory. Therefore, the trial court's judgment is not against the manifest weight of the evidence.

Armstrong at ¶39.

Accordingly, because the decisions of both the Appellate and Trial Court are clearly supported by: 1) the courts' application of the R.C. 4123.01(C), and 2) competent and credible evidence going to the essential element of this case, Appellant's unsupported assertion that the court must follow some common law "contemporaneous event" theory are insufficient to warrant reversal of this fact-specific, evidentiary decision rendered under established Ohio law.

IV. CONCLUSION

Appellant urges this Court to ignore existing statutory law and apply an unsupported "contemporaneous event" theory in order to find a compensable psychological injury. Beyond that, his sole purpose is to reverse adverse, fact-specific evidentiary decisions rendered by the lower courts in a routine workers' compensation appeal. Appellant's argument finds no support in any controlling authorities, and instead requests this Court to improperly assume the power of the General Assembly and legislate a new, more expansive definition of "injury" to now include purely stress-related psychiatric injuries and/or diseases. Given that both the historic definition of injury and a plain reading of the current statute reveals the General Assembly's intent to limit claims for psychiatric conditions to situations where the conditions arise directly from a work-related physical injury or occupational disease, Appellant's appeal must fail. Consequently, this Court should affirm the appellate court decision denying Appellant's receipt of workers' compensation benefits for the psychiatric condition PTSD.

Respectfully submitted,

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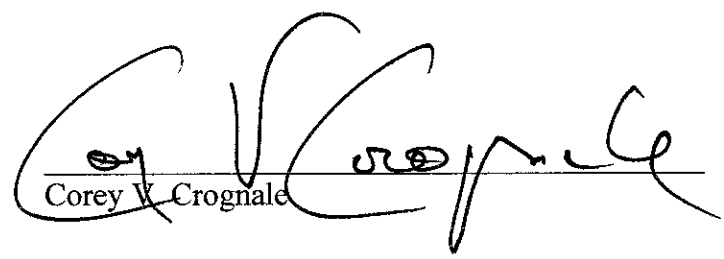

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