

ORIGINAL

IN THE SUPREME COURT OF OHIO

SHAUN ARMSTRONG, : Case No. 2012-0244  
: :  
Plaintiff-Appellant, : :  
: :  
v. : (On Appeal from the  
: Clark County Court of Appeals  
JOHN R. JURGENSON, et al. : Second Appellate District  
: Case No. 2011-CA-6)  
: :  
Defendants-Appellees :

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REQUEST FOR RECONSIDERATION, SHAUN ARMSTRONG

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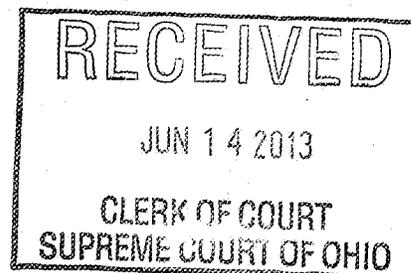
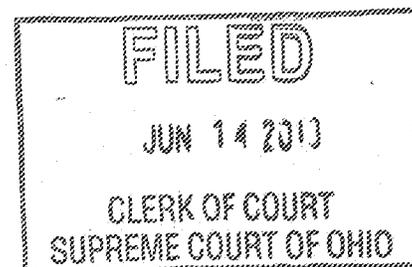


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## REQUEST FOR RECONSIDERATION

**I. Proposition of Law: The Court Erred By Failing to Recognize that the Legislature Used Two Different Words – “Injury” and “Condition” – to Mean Two Different Things. This Failure Resulted in Defining “Injury” the Same as the Narrower Term “Condition” Which Led the Court to an Error in Judgment in This Case.**

Plaintiff-Appellant herein, asks this Court to reconsider its decision in *Armstrong v. John R. Jurgensen Co.* 2013-Ohio-2237. This request for reconsideration is based on the Court’s failure to differentiate between the legislature’s use of two separate terms in R.C. 4123.01(C)(1). While the legislature distinctly uses the terms “injury” and “condition” in that statute, the opinion in *Armstrong* treats it as if those terms have exactly the same meaning. Clearly, if the legislature intended the terms to have the same meaning, it would have either specifically stated as much, or it would have only used one of those terms. As the following will demonstrate, the legislature’s clear intent was to have the term “injury” represent the entire incidence of an injurious event and to have the word “condition” represent the specific diagnoses arising from that event. Based on that distinction, it is clear that the Court’s analysis of this case was incorrect, as the psychological condition in question in this case (post-traumatic stress disorder) would unquestionably arise from the “injury” (the event of being injured in a motor vehicle accident). As such, Plaintiff-Appellant prays that this Court reconsider its initial opinion and issue a new opinion which analyzes this case in a manner consistent with the legislature’s intent to define “injury” and “condition” separately.

**A. The Court’s Decision in *Armstrong v. John R. Jurgensen Co.*, 2013-Ohio-2237, Changed the an Established Principle of Workers’ Compensation Through Judicial Activism**

In *Armstrong v. John R. Jurgensen Co.*, 2013-Ohio-2237, this Court issued a decision that shocked the workers’ compensation bar in the State of Ohio. For decades, it has been well understood by the workers’ compensation community that a psychological condition is

compensable in the workers' compensation system so long as it arises from an injury that also causes physical conditions. Thousands of cases, many involving post-traumatic stress disorder have been recognized based on this principal. No one expected that the Court would, in one fell swoop, state that these conditions were no longer compensable in this system. Under *Armstrong*, the Court did change the rule regarding psychological conditions, however, and if the decision is not reconsidered the change will have a severe effect on injured persons who this system aims to cover. Whether they realize this or not – and I suppose that the act was not intentional – the members of the Ohio Supreme Court issued a decision ringing with judicial activism by changing the understanding of the R.C. 4123.01(C)(1) from requiring that a psychological condition arise from an injury, to requiring that a psychological condition must arise from a physical condition which is the result of a work related injury.

**B. The Court Failed to Recognize that the Statute Clearly Differentiates an “Injury” from a “Condition.” The Court then Substituted the Definition of a “Condition” in Place of the Broader Term “Injury” Which Includes the Condition and the Action Leading to the Condition.**

The fundamental problem in the Court's analysis is its failure to distinguish a workers' compensation “injury,” from the specific physical “conditions” caused by an injurious event. This distinction is supremely important as the legislature uses both the term “injury” and the term “condition” in R.C. 4123.01 without giving any indication that the terms are meant to be interchangeable. R.C. 4123.01. An “injury” for workers' compensation purposes, necessarily contemplates the act of being injured. As is explained by Larson, “injury” embraces the episode or accident from start to finish, and, as such, a compensable psychological condition can arise from the experience of the injury or incident without the need for direct physical causation. *See* Larson, *Workmen's Compensation Law* § 42.1(a). In the workers' compensation system, the “injury” suffered then results in a recognition of the “conditions” which arose from the injury

occurring. Those “conditions” might include back sprains, herniated discs, torn rotator cuffs, or any of a large variety of diagnoses which might be determined to be the result of the injurious event. In a case where a physical condition arises, a psychological condition may also be compensable.

The differentiation between the broad term “injury” and the narrower term “condition” is unambiguously demonstrated in the statute itself. When defining when psychological conditions are compensable in a claim, the code excludes “psychiatric **conditions** except where the claimant’s psychiatric **conditions** have arisen from an **injury** or occupational disease sustained by that claimant . . .” R.C. 4123.01(C)(1) (*emphasis added*). It is essential to note that the code does not state that “psychological **injuries**” must be caused by “physical **injuries**,” nor does it state that “psychological **conditions**” must be “caused by “physical **conditions**.” The code specifically notes that “psychological **conditions**” must have arisen from an “**injury**,” thereby clearly demonstrating the legislature’s intent to demonstrate that the terms “condition” and “injury” represent different things under the code. According to the strict adherence to the language of the code the Court claims is necessary in this case, the Court cannot ignore the use of different terms by the legislature, as it must be assumed that the legislature used two different words for a reason. If the legislature really wanted to dictate that psychological “conditions” must be caused by physical “conditions” rather than a more general injury, the legislature would have used the term “physical condition” instead of the word “injury.” The legislature clearly did not write the code as such as it desired that psychiatric conditions be compensable so long as they arise from the general injury; the legislature did not desire that conditions be denied if they did not derive directly from the physical conditions.

The dynamic of “injury” versus “condition” is evident throughout the workers’ compensation system, but is probably best exemplified by a thought experiment regarding how any individual approaches a discussion of his/her work related incident. If an individual asks someone to discuss his or her “injury,” what will be described is the incident in question not the condition allowed in the claim. An injured person is most likely to answer “I fell at work” or “I was in a car crash.” The person may alternatively state “I injured my back” or “I strained my back,” but as one can recognize, the verb focuses on the injury and the diagnosis/condition is a detail to specify what the injury impacted. One will almost never hear an individual answer a question about his/her work related injury with “I have a back strain” or “I have a torn rotator cuff” as those are descriptions of the conditions arising from the incident which eliminate the injury which actually occurred. Conversely, if an individual is asked to describe the conditions they suffer from, that individual will respond by recounting the list of diagnoses he/she has been given by his/her doctor.

In this light, it is clear that the Supreme Court’s decision in this case misinterprets the word “injury” by substituting the definition of “condition” for the definition of “injury.” Again, this distinction is made clear from the language of R.C.4123.01(C)(1). When discussing psychological issues, the statute does not use the words “psychological injury” it uses the terms “psychological conditions.” This language makes it quite clear that the actual diagnosis is the “condition.” This is important as the statute does not state that a psychological condition must arise from a “physical condition” it merely states that the condition must arise from an “injury.” R.C. 4123.01(C)(1). This of course, is the basis for a contemporaneous injury standard: when physical and psychological conditions derive simultaneously from the same injurious event all of those conditions have the same injury as their cause. As such, all of those conditions are

compensable under R.C. 4123.01(C)(1). Shawn Armstrong's case is simply an example of where that logic is appropriate, as it is without question that a single injurious event – the motor vehicle accident – contributed to the development of both his physical and psychological conditions. It should be noted that even the Defense witness, Dr. Howard, indicated that during the course of this event, Mr. Armstrong's fear that the injuries he was suffering may be life threatening contributed to the development of the post-traumatic stress disorder. Deposition of Lee Howard pp. 20-21. Moreover, Dr. Howard himself used the term injury correctly in his testimony, specifically stating that the cause of the post traumatic stress disorder came from the "experience of the injury" as opposed to the "actual physical trauma," indicating that even the physician upon whom this Court is relying to deny the claim understands that "injury" includes more than just the physical conditions alone, and therefore, should be considered as supportive of the Plaintiff-Appellant's position. *Id.*

**C. The Failure of the Court to Differentiate Between the Legislature's Use of the Words "Injury" and "Condition" Created an Error in the Court's Analysis of Legislative Intent**

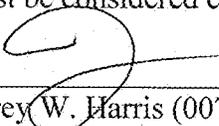
Overall, the opinion issued by the Supreme Court is not the interpretation of legislative intent that it claims to be. The clear intent of the legislature was not to bar psychological conditions which arise from the same causal nexus as physical conditions. The different usage of the terms "condition" and "injury" shows that the psychological conditions merely need to derive from an injurious event that causes physical conditions as well. What the legislature was unquestionably trying to prevent was the allowance of psychological conditions where no physical injury exists, thus making it difficult to link the psychological condition to work. The legislature intended to permit where psychological conditions arose from an injury which results in physical harm as well.

As such, the *Armstrong* decision ignores that clear intent of the legislature and replaces it with judicial activism that completely changes the workers' compensation's system's approach to psychological conditions. The decision is not based on any substantive analysis of the law itself, but merely on a selective interpretation of citations from Webster's dictionary which show nothing of the actual legislative intent of the cited provisions. Moreover, the decision in question ignores a long history of cases which specifically emphasize that the provisions of R.C. 4123.01(C)(1) are solely designed to keep out mental-mental claims based on the aforementioned difficulty of tying psychological conditions to work without accompanying physical conditions. See e.g. *McCrone*, 107 Ohio St.3d 272, *Bunger v. Lawson Co.* (1998), 82 Ohio St.3d 463, *Rambaldo v. Accurate Die Casting* (1992), 65 Ohio St.3d 281, *State ex rel. Clark v. Indus. Comm.* (2001), 92 Ohio St.3d 455, 459.

Consequently, the response of the workers' compensation legal community to the *Armstrong* opinion was shock from both sides of the aisle. While employers may be thankful for a decision that limits an injured worker's ability to pursue conditions which clearly arise from work related incidents, they in no way expected such a decision from the court, as this decision changes the way workers' compensation system has approached this conditions for as long as any practitioner can remember.

The Court is now opening the door for the denial of conditions that no party would ever deny arose from the sustaining of an injury in the course of employment. As the workers' compensation system is in place to cover conditions which arose from an injury so long as that injury gives rise to a physical condition, it should be clear to the justices that their initial analysis of *Armstrong* was wrong and must be revisited. The Court must revisit its decision in order to reconcile the fact that the legislature uses the terms "injury" and "condition" to mean different

things, a nuance which the current decision in *Armstrong* overlooks. As such, Plaintiff-Appellant prays that this Court reevaluate its decision and render a more appropriate decision recognizing that when an **injury** leads to the development of both physical and psychological **conditions** that the psychological **conditions** must be considered compensable.



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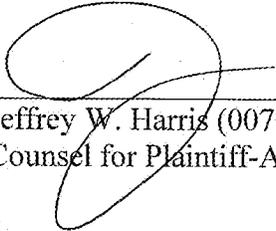
Certificate of Service

I hereby certify that a copy of the foregoing was served via ordinary U.S. mail, postage prepaid, this 13 day of June, 2013 upon the following:

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