SUPREME COURT OF ARIZONA

TIMOTHY MATTHEWS, Petitioner Employee, vs. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CITY OF TUCSON, Respondent Employer, TRISTAR RISK MANAGEMENT, Respondent Carrier.	Arizona Supreme Court No. CV-21-0192-PR Court of Appeals Division Two Case No.: 2 CA-IC 20-0001 ICA Claim No.: 20182-540202 Carrier Claim No.: 18736339

RESPONSE TO PETITION OF REVIEW

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INTRODUCTION

The legal causation standard of unusual, unexpected, or extraordinary for work-related purely mental ("mental-mental") injuries has withstood constitutional challenges since A.R.S. § 23-1043.01(B) was first enacted in 1980. The arguments raised by Petitioner are not issues of first impression. Petitioner's argument that A.R.S. § 23-1043.01 permits an assumption of the risk defense, and is thus unconstitutional, is eliminated by *France v. Industrial Comm'n*, 250 Ariz. 487, 481 P.3d 1162 (2021). The decision in *France* is consistent with the legislative and judicial treatment of mental injury claims in Arizona. Respondents request that the Petition for Review of the Court of Appeals opinion be denied.

ISSUES DECIDED BY THE COURT OF APPEALS

1. Whether the Administrative Law Judge properly considered the entire record.
2. Whether the requirement in A.R.S. § 23-1041.01(B) that a work-related stressor be unexpected, unusual or extraordinary is constitutional.
3. Whether A.R.S. § 23-1041.01(B) allows or creates an assumption of the risk defense that causes the statute to be unconstitutional.

MATERIAL FACTS

Petitioner was diagnosed with post-traumatic stress disorder years before the date of his alleged industrial injury. For that condition, he continued to receive treatment and counselling up to the June 17, 2018, injury date.

Petitioner is a trained and experienced detective. He was assigned to the domestic violence unit. On June 17, 2018, along with dozens of police personnel, he responded to a domestic violence scene where a suspect had barricaded himself in the garage of a house. While other police personnel dealt win the barricaded suspect, Petitioner interviewed witnesses and applied to a judge for a no-knock warrant. He watched the events unfold on a video screen from a safe distance. The events included the unseen suspect sustaining a self-inflicted gunshot wound and then exiting the house into view where he could be seen on video feed. Petitioner later claimed a mental-mental injury arising from that event.

The Industrial Commission Administrative Law Judge reviewed the hearing testimony and evidence as well as post-hearing memoranda. The judge relied, in part, on the testimony of Petitioner's witness, Sergeant Daniel Spencer, who characterized of the June 17, 2018, situation as "standard issue." He additionally noted, "[Respondent expert Benny Click] saw nothing in this fact pattern that subjected the applicant to greater or different stress than the other police officers and personnel." The Administrative Law Judge acknowledged Petitioner's pre-

existing mental health disorders and the gravity of the event on June 17, 2018, but found, relying on the testimony from Petitioner's expert, that Petitioner was not subjected to an unexpected, unusual, or extraordinary stress situation. That decision was later affirmed on December 30, 2019, after Petitioner challenged the constitutionality of A.R.S. § 23-1043.01(B) in his Request for Review.

SUMMARY OF COURT OF APPEALS OPINION

The Court of Appeals found that the Administrative Law Judge properly applied A.R.S. § 23-1043.01(B) and that Petitioner had not met the high burden of establishing its unconstitutionality. The opinion laid a legal framework for its decision based largely on *France*, 250 Ariz. 487. It stated that the Petitioner must establish that his work-related stress was a substantial contributing cause of his mental injury and that the specific event causing injury was objectively unexpected, unusual, or extraordinary. It further stated that the stressful event must be considered from the viewpoint of a reasonable employee with the same or similar job duties and training rather than Petitioner's subjective view of his experience. The Court of Appeals then determined that the Decision included "detailed" findings of fact and conclusions of law that were "carefully considered" and supported by the evidence.

The Court of Appeals acknowledged that there is a strong presumption that the legislature acts constitutionally and that it is incumbent on courts to construe a

legislative enactment as having a constitutional construction. The Court of Appeals distinguished *Grammatico v. Indus. Comm'n*, the case emphasized in Petitioner's Petition for Review before this Court, as well as the statutes it declared unconstitutional because they did not relate to mental injury, the fact pattern in Petitioner's claim, or the Petitioner's statutory burden of proof. 211 Ariz. 67, 117 P.3d 786 (2005). It additionally found that Respondents had not raised an assumption of the risk defense. *Matthews v. Indus. Comm'n*, No. 2 CA-IC 2020-001, 2021 WL 2885804, at *1, *5 (Ariz. App. July 9, 2021).

Finally, the Court of Appeals also addressed Petitioner's oral argument that A.R.S § 23-1043.01(B) unconstitutionally curtailed compensable injuries because the framers of the Arizona Constitution and Original Workers' Compensation Amendment contemplated mental injuries. The Court did not find any authority brought by Petitioner or from its own research upon which to justify this premise. Instead, it recognized the Legislature's authority to expand the application of workers' compensation laws.

REASONS THE PETITION FOR REVIEW SHOULD BE DENIED

The Petition for Review does not present a matter of first impression.

Arizona courts first recognized stress-related injury claims in 1971. *Brock v. Indus. Comm'n*, 15 Ariz. 95, 486 P.2d 207 (App. 1971). They soon limited compensability to claims involving an "unexpected injury-causing event." *Shope v.*

Indus. Comm'n, 17 Ariz. 23, 25, 495 P.2d 148, 150 (App. 1972). Then in *Sloss v. Indus. Comm'n*, this court adopted what later became the standard found in the statute: a purely mental injury is not compensable unless the job-related stress is "unexpected," "unusual" or "extraordinary." 121 Ariz. 10, 11-12, 588 P.2d 303, 304-305 (1978). In 1980, the Arizona Legislature passed A.R.S. § 23-1043.01, which precluded compensation for mental injuries "unless some unexpected, unusual, or extraordinary stress related to the employment [. . .] was a substantial contributing cause of the mental injury, illness or condition."

Petitioners claim that the issue of assumption of the risk in mental-mental cases is an issue of first impression. However, the Defendants did not raise assumption of the risk as a defense. The Administrative Law Judge did not rely on reasoning consistent with assumption of the risk in the Decision Upon Hearing. Most importantly, *France* prevents application of any defense that might evenly be broadly construed as assumption of the risk. 250 Ariz. 487, 481 P.3d 1162.

Both Petitioner and the dissenting opinion by the Court of Appeals mischaracterize Respondents' defense to be that an unusual, unexpected, or extraordinary stressor cannot occur if the event causing that stressor was contemplated in Petitioner's assigned job description or duties. Based on this mischaracterization, Petitioner then argues that Respondents have argued all mental injuries sustained within all contemplated job duties are non-compensable

in reliance on A.R.S. § 23-1043.01(B). Petitioner concludes that the statute is therefore unconstitutional because it "expressly preclude[s]" compensation for mental injuries sustained during events which an employee is aware could happen as part of their employment.

France protects workers from the concerns raised by Petitioner. While the *France* decision did not eliminate the importance of understanding the contours of a worker's job, it reasserted the need to view work-related stress from the objective viewpoint of a reasonable co-worker with the same or similar job duties rather than the subjective viewpoint of the claimant themselves. 250 Ariz. at 488, 481 P.3d at 1163. It rejected the argument that the unusual, unexpected, or extraordinary legal causation standard set by A.R.S. § 23-1043.01(B) can only be met by proving that an injury was sustained during an event that is outside of the contemplated employment. *France* eliminated any alleged danger that A.R.S. § 23-1043.01(B) unconstitutionally allows the injection of an assumption of the risk defense into the workers' compensation system.

The Court of Appeals in this case correctly understood Respondents' motivation for producing evidence of Petitioner's training and experience to provide the objective lens necessary to determine the compensability of a mental injury.

> We agree that establishing the contours of Matthews's position and its anticipated burdens through his training and experience, as well as the perspectives and opinions of the experts in his field, served to provide an objective lens through which the ALJ could view Matthews's employment and mental injury. The City's submission of such evidence therefore did not constitute an assumption-of-risk defense, and the ALJ did not err in rejecting Matthews's constitutional challenge to § 23-1043.01(B) on this basis. (citations to *France* omitted)

Matthews v. Indus. Comm'n., No. 2 CA-IC 2020-001, 2021 WL 2885804, at *5 (Ariz. App. July 9, 2021).

<u>Petitioner's constitutional challenge of A.R.S. §23-1043.01(B) ignores the long-understood unique nature of mental-mental injuries.</u>

The very nature of mental-mental injuries requires a standard like that of an "unexpected, unusual, or extraordinary" stressor. Without it, there would be no objectivity to the determination of compensability of mental-mental injury claims. The result would be something more akin to general coverage for all mental conditions for all workers.

The unique nature of mental-mental claims cannot be ignored.

> Emotional stress cases [. . .] are extremely difficult. This difficulty arises because of the complexity in relating the resulting injury to an industrially responsible event. [. . .] [E]motional stress may have multiple causes, some work-related, others not so related. We can suffer as much and probably more mental stress over the wayward actions of our children as we do over the harassing actions of an overbearing supervisor at work: Likewise, the mental distress brought about by hounding creditors is medically undistinguishable from the mental distress brought about by an inefficient co-worker.

Archer v. Indus. Comm'n, 127 Ariz. 199, 203, 619 P.2d 27, 31 (App. 1980); *See also, Findley v. Indus. Comm'n*, 135 Ariz. 273, 276, 660 P.2d 874, 877 (App. 1983). ("Given the difficulty in proving the causal connection between mental illness and the workplace, the legislature could constitutionally provide a more stringent proof classification for these types of injuries. We therefore find A.R.S. § 23-1043.01(B) constitutional"). *Toto v. Indus. Comm'n*, finds the statute constitutional in part based on the "difficulty in showing the definite causal connection between work related stress and mental illnesses or injuries." 144 Ariz. 508, 511, 698 P.2d 753, 756 (1985), *quoting Findley*, 135 Ariz. at 273, 660 P.2d at 874.

Petitioner attempts to ignore the unique nature of mental-mental injury claims as well as the body of case law that recognizes and addresses that unique nature. Furthermore, citing *Paulley v. Indus. Comm'n*, 91 Ariz. 266, 270-72, 371 P.2d 888, 891-893 (1962), the dissent at the Court of Appeals characterizes an "accident" as an unexpected cause or an unexpected result. The claimant in *Paulley* suffered gangrenous diabetic complications of a blister on the bottom of his foot. The scientific ability to determine causation, to discern diagnosis, and to eliminate confounding causative factors of a blister, bears no resemblance to the same processes in mental-mental claims. *France* recognized the differences between diagnosis and evaluation of a gangrenous blister versus a mental-mental injury, and

it built upon decades of precedent. As a result, *France* requires that the work-related stressor, which is the "accident" in the claim, be unexpected, unusual, or extraordinary. This contradicts Applicant's argument, and the argument by the Court of Appeals dissent, that an accident be classified as claimant's unexpected subjective reaction to an event. In *Archer*, which recognizes the unique nature of mental-mental injury claims, the court defined "accident" differently than *Paulley* by saying that more than a severe subjective reaction to stress is necessary for a compensable claim. The "accident" is the stressor itself. It also must be unusual.

Generally, Arizona Workers' Compensation Law requires that compensable injuries be by an accident and arise out of and in the course of employment. Ariz. Const, Art. XVIII, § 8; *U.S. Fid. and Guar. Co. v. Indus. Comm'n*, 43 Ariz. 305, 30 P.2d 846 (1934). Petitioner seeks to entirely undo any rigorous examination of a claim under those compensability requirements in mental-mental claims. Because of the unique nature of mental-mental injuries, if the requirement of an unexpected, unusual, or extraordinary stress were abandoned, there would be no meaningful way to ensure that an injury arose out of and in the course of employment. The evidentiary standard for mental-mental injuries works to enforce the legal standard that an injury be by an accident arising out of and in the course of employment. The law, as it now exists, protects against the compensability of injuries with vague, subjective, multifactorial causes.

In *Toto*, the Court of Appeals upheld A.R.S. § 23-1043.01(B) under an equal protection analysis:

> [T]he classifications contained in A.R.S. § 23–1043.01(B) are reasonable. The statute treats all members within the class equally. The statute does not favor any class by granting it a special or exclusive immunity, privilege or franchise. Therefore, this statute does not constitute an improper special law.

144 Ariz. 508, 512, 698 P.2d 753, 575 (1985). Petitioner's continual argument that individuals with "high stress occupations" claiming mental health injury should receive an unequal privilege over all other Arizona workers claiming mental injury ignores this precedent and the equal protection that the legislature provided. Such a class would necessitate further legislative intervention as the term "high stress occupations" is not defined.

Petitioner's argument that his claim for compensation of a mental-mental injury would have been compensable prior to the passage of A.R.S. § 23-1043.01(B) is not supported, nor does it speak to constitutionality. That argument is the same, at its core, as the argument made in *Lapare v. Indus. Comm'n*, 154 Ariz. 318, 321, 742 P.2d 819, 822 (1987). There, the claimant felt that the statute had "diminished" the amount of compensation he would have otherwise received and claimed economic hardship. The Court of Appeals found that claimant's mental claim was not compensable under either case law prior to 1980 or the statute and concluded, "[A.R.S. § 23-1043.01(B)] affects neither the percentage

nor the amount of compensation." Here, the Petitioner changes facts slightly to say that his claimed mental injury would have been compensable prior to the passage of A.R.S. § 23-1043.01(B) under the Arizona State Constitution rather than case law. However, the same analysis used in *Lapare* could be applied now. 154 Ariz. 318, 742 P.2d at 819.

THE COURT OF APPEALS CORRECTLY UPHELD A.R.S. §23-1043.01(B) AS CONSTITUTIONAL

A legislative enactment must be construed as constitutional whenever possible. *Aitken v. Indus. Comm'n*, 183 Ariz. 387, 389, 904 P.2d 456, 457 (1995). The constitutionality of the statute has been repeatedly affirmed. This Court has most recently addressed the statute in *France*, and interpreted A.R.S. § 23-1043.01(B) to still require an objective test. It is that objective test of stress that Petitioner attacks in this matter.

The framers of Arizona Constitution Art. XVIII § 8 did not contemplate mental injuries.

The Petitioner claims that when the legislature enacted the statute in 1980 it could not have believed it was extending compensation for a type of injury not previously contemplated. However, Supreme Court Justice Gordon stated in a dissent just two years prior to the enactment of A.R.S. §23-1043.01(B), "Without question, the majority announces a logical extension of the workmen's compensation case law represented by Paulley v. Industrial Commission and Brock

v. Industrial Commission." *Fireman's Fund Ins. Co. v. Indus. Comm'n*, 119 Ariz. 51, 579 P.2d 555 (1978). He encouraged the action taken by the Arizona Legislature in 1980 to avoid "further judicial modification of the terms 'injured by accident arising out of and in the course of employment.'" 119 Ariz. at 55, 579 P.2d at 559. In enacting A.R.S. § 23-1043.01(B), the Arizona legislature acknowledged the need for expansion of workers' compensation law to include legal causation for purely mental injuries as well as the steps the judiciary had already taken. The legislature's ability to extend, rather than restrict, the reach of the Arizona Constitution was already well established. *See Goodyear Aircraft Corp. v. Indus. Comm'n*, 62 Ariz. 398, 408-09, 158 P.2d 511, 515-516 (1945). *See also Lou Grubb Chevrolet v. Indus. Comm'n*, 171 Ariz. 183, 188-90, 829 P.2d 1229, 1234-36 (App. 1991).

Petitioner also argues that a textual interpretation of Article XVIII § 8 should override forty years of case law upholding A.R.S. § 23-1043.01(B) because he assumes work-related mental health injuries were contemplated when the Arizona Constitution was ratified in 1912. However, that date of ratification is fifty years prior to the first cases recognizing a "mental-mental" category of workers' compensation injury decided in New Jersey and Florida. Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 56.04, at 56-16 (2003). Moreover, the Court of Appeals in this case conducted its own research and could not find

support for the notion that the framers contemplated mental injuries as eligible for compensation.

Contrary to Petitioner's assertions, Arizona followed the patterns of workers' compensation law in other states such as Alaska, West Virginia, and Oregon, which amended their workers' compensation laws in the 1980s "in the face of state court decisions establishing liberal standards for stress claims." *Larsons* 56.06(1)(b), 56-47 (2003); *See e.g., Korter v. EBI Cos.* 46 Or. 43, 610 P.2d 312 (App. 1980). The Court of Appeals cited *Aguiar v. Indus. Comm'n* as one of the few outlines of legislative intent during the enaction of A.R.S. 23-1043.01.

> In 1980, the Arizona Legislature enacted a statute relating to the compensability of "heart-related and mental cases." […] These companion provisions are almost identical, and they share the requirement that circumstances related to employment constitute a substantial contributing cause. They differ, however, in one significant respect. The subsection concerning mental cases requires that the contributing cause be "unexpected, unusual or extraordinary"; the subsection concerning heart-related cases does not. We believe that this disparity was a *deliberate response to a contemporaneous development* in Arizona's workers' compensation case law. [Emphasis added].

165 Ariz. 172, 174, 797 P.2d 711, 713 (App. 1990). The Court of Appeals properly concluded that mental injury emerged as a new category of industrial injury decades after the Arizona Constitution and the Workers' Compensation Act. Thus, Petitioner's desire for Respondents to provide evidence that mental injury was purposefully excluded by the framers in 1912 is both impossible and disregards his

own burden of proof to overcome the presumption of constitutionality as the challenging party.

The Court of Appeals properly distinguished the decision in Grammatico v. Industrial Commission.

Contrary to Petitioner's argument, the Court of Appeals did not "simply ignore" the 2005 decision in *Grammatico*, 211 Ariz. 67, 117 P.3d 786. Instead, it explained why it found the fact pattern and analysis in that case distinguishable. Overturned Arizona Statutes §23-1021(C) and (D) did not impact mental injury claims for workers' compensation. Furthermore, these statutes overtly blocked injuries from eligibility for compensation if an employee later tested positive for the unlawful use of a controlled substance unless that employee could prove that his actions in taking drugs did not contributorily cause the injury. As the Court of Appeals pointed out, "These subsections differ greatly from § 23-1043.01(B) because they restrict compensation based upon the claimant's own actions rather than placing a particular legal burden of proof on a class of claimants due to the uniquely difficult nature of proving causation of mental injuries." *Matthews*, No. 2 CA-IC 2020-001, 2021 WL 2885804, at *5 (Ariz. App. July 9, 2021).

The Petitioner's failure to meet the legal causation standard imposed upon purely mental injuries does not lead to the conclusion that all mental-mental injury claims are denied under A.R.S. § 23-1043.01(B). Petitioner presents no statistical proof of this assertion. Petitioner's claims, rooted in *Grammatico*, reveal his

underlying argument that purely mental injury claims should be accepted upon proof of medical causation alone. This concept was denied in *Sloss v. Indus. Comm'n.* as a misinterpretation of the contemporaneous majority opinion in *Fireman's Fund*. *Sloss*, 121 Ariz. 10, 588 P.2d 303 (1978).

> Fireman's Fund does not mean that every emotional condition even though work-related is compensable. This court declined to accept the view expressed in *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960), which would allow the ordinary stresses of employment to which all workers are subjected to provide a basis for workmen's compensation for a work-related disabling nervous condition. Fireman's Fund requires more than ordinary and usual job-related stress. To qualify as an injury by accident, the condition must have been produced by the unexpected, the unusual, or the extraordinary stress.

Sloss, 121 Ariz. at 11, 588 P.2d at 304. If Petitioner were successful in having A.R.S. § 23-1043.01(B) declared to be unconstitutional, Arizona courts would have no recourse but to further judicially modify the terms "injured by accident arising out of" and "in the course of employment." Perversely, this is the very outcome Petitioner claims he is seeking to avoid pursuant to *Kilpatrick v. Super. Ct. In and For Maricopa Cty*, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970).

CONCLUSION

For the above-stated reasons, this Court should deny the Petition for Review and uphold the Court of Appeals' Opinion affirming the Decision Upon Hearing as well as the constitutionality of A.R.S. § 23-1043.01(B).

RESPECTFULLY SUBMITTED: this 29th day of September, 2021.

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