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

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. A.R.S. § 23-1043.01(B) IS CONSTITUTIONAL BECAUSE IT IS RATIONALLY RELATED TO THE LEGITIMATE PURPOSE OF OBJECTIVELY IDENTIFYING ACCIDENTS THAT ARISE FROM EMPLOYMENT IN PURELY MENTAL INJURIES.

Article 18 §8 of the Arizona Constitution directs the legislature to "[E]nact a Workman's Compensation Law applicable to workmen…as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or necessary risk or danger inherent in the nature thereof…."

The Article divides legal causation into three elements. First, the employee must have been acting in the course of employment. Second, the employee must have suffered an injury by accident arising out of employment. Third, the injury must have been caused in whole or in part or contributed to by a necessary risk of the employee's employment, or a necessary risk or danger inherent in the nature of that employment or the employer's lack of due care.

Ariz. Const. art. 18 §8 does not define "accident arising out of . . . employment." A.R.S. §23-1043.01(B) is consistent with the constitutional

language because it is intended to help determine whether an alleged mental injury is caused by an alleged injury-producing mental event ("mental-mental injury"). The test of "unexpected, unusual or extraordinary" found in the statute gives an objective standard intended to identify an accident that arises out of employment.

The Supreme Court of Arizona created the test that was later codified in A.R.S §23-1043.01(B), which Petitioner now seeks to have declared unconstitutional. 121 Arizona 10 (1978). In *Sloss v. Indus. Comm'n* the Arizona Supreme Court stated that the claimant in that matter was "exposed to nothing other than the usual, ordinary and expected incidents of his job as a highway patrol man." 121 Arizona 10, 12 (1978). Therefore, it was found that the facts did not constitute an injury by accident. Id. Two years later the Arizona legislature codified the requirement of unexpected, unusual or extraordinary stressors obviously based on the guidance given by the Arizona Supreme Court. Petitioner has not indicated what has changed since 1978 when the Arizona Supreme Court set forth this standard change the standard from being constitutional to unconstitutional.

The objective test is necessary because of significant differences between mental-mental injuries and other injuries. *See, Findley v. Industrial Comm'n*, 135 Ariz. 273, 276 (Ariz. Ct. App. 1983) ("We further find that the classification is reasonable, based upon the nature of these cases, that is, the difficulty in showing a

definite causal connection between work related stress and mental illnesses or injuries.") Because of the unique nature of mental-mental injuries, setting an objective standard prevents workers' compensation law from becoming a general insurer. *See, Fireman's Fund Ins. Co. v. Industrial Com'n*, 119 Ariz. 51, 55 (Ariz. 1978) ("Although the Workmen's Compensation Act should be liberally construed to meet its intended purpose, we must not lose sight of the fact that the Act was not intended to be a general health and accident insurance substitute.")

II. A.R.S. § 23-1043.01(B) IS NOT WRITTEN FOR THE PURPOSE OF DENYING CLAIMS THAT WOULD BE COMPENSABLE UNDER THE ARIZONA CONSTITUTION.

In Support of his position, Petitioner points to *Grammatico v. Indus. Comm'n*, in which the court declared statutes unconstitutional that injected fault into the no-fault workers' compensation system, and that directly contradicted Ariz. Const. art. 18 §8 by denying compensability of certain injuries that were at least contributed to by a necessary risk or danger of employment. 211 Ariz. 67 (Ariz. 2005).

"Under Article 18, §8, an employee demonstrates legal causation by showing that a necessary risk or danger of employment caused or contributed to the industrial accident 'in whole or *in part.*' (Emphasis added.) Section 23-1021(D), however, denies compensation to an injured worker unless the worker proves that a necessary risk or danger of employment *wholly* caused the accident."

Grammatico v. Industrial Comm'n, 211 Ariz. 67, 72 (Ariz. 2005). The same problems do not exist in A.R.S. §23-1043.01(B). The intent and effective result of A.R.S. §23-1021(D) was to declare injuries that occurred in part because of employment non-compensable. The intent and the result of A.R.S. §23-1043.01(B), is to determine whether a specific condition that is part of a very unique class of injuries occurred by an accident arising from employment.

The Arizona courts first recognized workers' compensation claims for stress-related mental injuries in 1971. In *Brock v. Indus. Comm'n.*, the court addressed "whether a disability which is caused by or aggravated by emotional stress can render an employee 'injured by accident.'" 15 Ariz. App. 95 (1971). Soon thereafter, *Shope v. Indus. Comm'n*, held that an "accident" in a mental-mental injury claim is an "unexpected injury-causing event." 17 Ariz. App. 23, 25 (1972). The court in *Fireman's Fund Ins. Co. v. Indus. Comm'n*, found a mental-mental claim compensable for a mental injury from "additional responsibility and mounting pressure." 119 Ariz. 51, 52 (1978). In *Sloss v. Indus. Comm'n*, the Arizona Supreme Court clarified the language in *Fireman's Fund* and set forth the standard that a purely mental injury is an "accident" and thus may be compensable if the job-related stress is unexpected, unusual, or extraordinary:

> *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*. [Emphasis added.]

Sloss v. Industrial Commission, 121 Ariz. 10, 11 (Ariz. 1979). In 1980, the standard set forth in *Sloss* was codified in A.R.S. §23-1043.01(B). By doing so, the Arizona Legislature acted within the powers granted by Ariz. Const. art. 18 §8, setting forth the standard by which a mental-mental injury claim can be determined to have occurred by accident arising from employment.

Citing the dissent at the court of appeals, Petitioner argues that claims for mental-mental injury have existed for decades before A.R.S. §23-1043.01(B). *Matthews v. Indus. Comm'n of Ariz.*, 495 P.3d 333, 343 ¶27 (Ariz. Ct. App. 2021). However, *Brock v. Industrial Commission,* is the only case cited by the dissent that involved a mental-mental injury that would have been governed by A.R.S. §23-1043.01(B). And *Brock* found that the term "accident" included an Applicant who ran over and killed a woman while operating a water-truck. 5 Ariz. App. 95 (1971).

The other cases, *Rutledge v. Indus. Comm'n*, 9 Ariz. App. 316, 318-19 (1969) and *Thiel v. Indus. Comm'n*, 1 Ariz. App. 445 (1965), addressed heart-related injuries, to which A.R.S. §23-1043.01(B) would not have applied had it existed at the time.

III. THE STANDARD HAS BEEN APPLIED OBJECTIVELY TO DETERMINE WHETHER THERE IS AN ACCIDENT AND AN WHETHER AN INJURY ARISES FROM EMPLOYMENT.

A.R.S. §23-1043.01(B) permits objective analysis in mental-mental claims. And the courts have applied its standard objectively. The court in *Barnes v. Indus. Comm'n* declined to reduce the statutory standard to the subjective reaction of the person to the work events. "The finding that 'stress' – i.e.: a stressful event – is 'unexpected, unusual or extraordinary' is a legal conclusion, not a medical one." 156 Ariz. 179, 182. (1988). "There simply must be a hypothetical 'reasonable person' working alongside claimant by whom we can judge the stressfulness of work-related events and the reasonableness of the employee's reaction thereto, so as to assure the work-related nature of the injury as compared to non-work related stress." *Id. at* 183.

Petitioner states that there is no dispute that Matthews suffered a personal injury by accident. This is not correct. There is a dispute about whether there was accident arising out of employment. It is the difference between an unexpected, unusual, or extraordinary event, and an unexpected, unusual, or extraordinary reaction to an event. *Barnes v. Industrial Com'n of Arizona*, 156 Ariz. 179, 183 (Ariz. Ct. App. 1988) ("*Fireman* preceded the amendment embraced in A.R.S. §23-1043.01 which specifically requires the stress not only be 'unexpected, unusual or extraordinary,' but also that it be 'related to the employment.' There

is nothing in this amendment to indicate that the stress be anything other than objective.") Petitioner skips the issue of whether there was an accident and quotes *Goodyear Aircraft Corp. v. Industrial Comm'n*, in which the court's focus was on whether a claimant's injury from an exploding soda bottle arose out of employment. 158 P.2d 511 (1945). In that case a bottle exploded cutting the worker's eye and face. The accident was clear. The injury was obvious. And the lack of other possible causes was undisputed. The only issue was whether the explosion of the worker's lunchtime soda arose from employment. The significant difference in the nature of the resulting medical condition, the physical manifestation of injury, and in the ability to identify the actual cause of the condition, all make the *Goodyear* analysis different than that needed in mental-mental cases.

This Court in *France v. Industrial Comm'n*, stated that "when a work-related event is (like the Shooting Incident here) objectively unexpected, unusual, or extraordinary, it is more likely to produce objectively unexpected, unusual, or extraordinary stress, and therefore, gives rise to a compensable injury." 250 Ariz. 487, 492 (2021).

The *France* standard protects the worker and employer in all types of jobs including high-stress occupations. It recognizes the need for objective analysis of whether there was an accident arising from employment.

IV. THE NATURE OF MENTAL-MENTAL INJURIES MAKES OBJECTIVE ANALYSIS PARTICULARLY IMPORTANT.

It is hard to imagine that a worker exists who enters employment each day as a blank slate, unaffected by life experiences or ongoing stressors outside of work. The typical worker brings with them their life experiences, personal problems, and concerns, which may cause unexpected and extreme reactions to otherwise standard-issue situations. A worker's personal stressors and psychological conditions often go undetected, potentially preventing fact finders from considering whether a condition arises from an event at work or from issues brought to work by the worker. And the manifestation of a psychological diagnosis may look the same to medical experts, regardless of whether the cause is personal or work related.

Mental-mental injuries are very different from physical ones where vectors of force can be determined, objective signs of injury can be perceived, and preexisting conditions or outside causes can often be objectively identified and considered.

> Where a workman loses a finger because of an errant piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional stress may have multiple causes, some work-related, others not so related. We can suffer as much and probably more mental distress 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. Industrial Comm'n[1], 127 Ariz. 199, 203 (Ariz. Ct. App. 1980). *See, Findley v. Industrial Comm'n of Arizona*, 135 Ariz. 273, 276 (Ariz. Ct. 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.)"

A California appellate court commented, "For years commentators have written critically about problems unique to the disposition of psychiatric claims, notably vagueness in defining the injury and problems of establishing industrial causation and apportionment." *Sakotas v. W.C.A.B.*, 80 Cal. App.4th 262, 272, 95 Cal. Rptr.2d 153, 160 (App. 2000). The Vermont Supreme Court noted, "[M]edical authorities often disagree on 'the precise etiology of most mental disorders,' that many sources outside of the employment setting—including culture, heredity, social environment, and family relationships—may cause or contribute to psychological injuries, and that medical opinions relating to the cause of such

[1] *Archer* was overruled by *Bush v. Indus. Comm'n of Arizona*, 136 Ariz. 525 (App. 1983), because both *Archer* and *Bush* involved mental-physical claims of heart attacks caused by mental stress. Such claims are not governed by A.R.S. § 23-1043.01(B). *Barnes* did rely on *Archer's* description of the objective test, as it accurately states how the heightened standard applies in mental-mental cases. 156 Ariz. at 182 (quoting *Archer*).

injuries are often based on the claimant's subjective viewpoint." *Crosby v. City of Burlington*, 176 Vt. 239, 244, 844 A.2d 722, 725-26 (2003).

A.R.S. §23-1043.01(B) furthers the purposes of Ariz. Const. art. 18 §8 by creating the objective measure of unexpected, unusual, or extraordinary, which applies to all members of the class of persons with stress-related mental injuries or illnesses to determine whether there is an injury by accident that arises from employment.

V. ELIMINATION OF THE STATUTORY REQUIREMENTS FOR MENTAL-MENTAL INJURIES CREATES A NEARLY ENTIRELY SUBJECTIVE APPROACH TO DETERMINATION OF COMPENSABILITY.

The elimination of the requirement to prove an unexpected, unusual, or extraordinary stressor effectively transforms a standard created to provide some objectivity and balance in mental-mental claims into a relaxed standard that makes self-perceived stressors accidents arising from employment. If the extreme subjective reaction of the worker to the expected, usual and ordinary work events becomes an accident that arises from employment, the floodgates will be opened to mental-mental claims. Whenever an employee alleges an experience of stress that they perceive or characterize as significant to them, regardless of whether a reasonable person would agree, legal causation would be met. The relationship between employment and stressor would become the exclusive domain of the employee. The employee alone would determine what events in and out of work

are to be disclosed to, or recognized by, medical providers and the workers' compensation system as factors of causation. And for those in the chosen jobs that are relieved from the requirements of A.R.S. §23-1043.01(B), even the relatively normal events could be found to be perceived subjectively by the worker alone to be injurious. As stated by Justice Gordon, this turns the Arizona Workers' Compensation Act into "a general health and accident insurance substitute," and "paves the way" for abuses of the system. *Fireman's Fund,* 119 Ariz. at 55 (Gordon, J., dissenting). It will also disproportionately benefit employees chosen to be recognized as working in high-stress occupations, potentially in violation of the U.S. and Arizona Equal Protection Clauses. And because mental-mental claims can result in "unscheduled permanent impairments," they are subject to lifetime loss of earning capacity benefits. This will drastically increase the cost of providing workers' compensation for private employers, for the State of Arizona, for municipalities and for Arizona taxpayers.

VI. THE STATUTE HAS SURVIVED PRIOR CONSTITUTIONAL ATTACKS.

When the statute was challenged on state and federal constitutional equal protection grounds, the court in *Findley v. Indus. Comm'n* recognized that the Legislature acted reasonably in classifying all individuals with stress-related mental injuries or illnesses as one group and treating all members of that group equally given the difficulty in proving causation. 135 Ariz. 273, 276, 660 P.2d 874,

877 (App. 1983). In answer to a second equal protection challenge, the court in *Toto v. Indus. Comm'n* noted a strong presumption supporting the constitutionality of a legislative enactment and the claimant's burden in overcoming that presumption. 144 Ariz. 508, 510-11, 698 P.2d 753, 756-57 (1985). It then affirmed the holding in *Findley* that all mental illnesses arising from the workplace constitute a class properly subject to special treatment due to the difficulty in determining causation for mental injuries. *Id*. The court also applied a rational basis test to a separate challenge that the statute granted special exclusive privileges, immunities, or franchises. *Id*. It found that the classifications contained within the statute were rationally related to a legitimate legislative purpose citing the Supreme Court decision in *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053. The appellate court specifically determined that the statute did not favor any class, which would violate the Arizona Constitution's prohibition of special law.

VII. ANY CHANGES IN THE STANDARD SHOULD BE MADE BY THE LEGISLATURE.

The Petitioner argues that this Court should act on a broad, undefined scale where the Legislature has refused to create new law. He also does not define which occupations should be defined as "high-stress," nor does he point to any prior case law or legislative action which attempts to define the term.

The legislature has had the opportunity to revisit these issues. Since 2015, the Arizona Legislature has rejected proposed changes to the standard of causation for the specific mental diagnosis of post-traumatic stress disorder. *See* SB1443, 52nd Legislature, 1st Regular Session (2015); *See also* HB2350, 52nd Legislature, 2nd Regular Session (2016). It also rejected the creation of a carve-out exception for post-traumatic stress disorder experienced by first responders. *See* HB2501, 53rd Legislature, 2nd Regular Session (2018); *See also* HB2460, 54th Legislature, 1st Regular Session (2019). Instead of creating these carve-outs, the Legislature enacted separate laws to provide therapy and counseling employment benefits to individuals employed in public safety, policing, or firefighting occupations codified as A.R.S. § 38-672 and 673.

CONCLUSION

This Court should affirm the court of appeals' opinion and deny the constitutional challenge to A.R.S. §23-1043.01(B).

RESPECTFULLY SUBMITTED: this 28th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 23(k)(3) of the Arizona Rules of Civil Appellate Procedure, Respondent certifies:

1. That Respondents' have been permitted to file a supplemental brief

2. That the line spacing is double spaced;

3. That the Brief uses a proportionately spaced roman font typeface of 14 points or more; and,

4. Contains a 2,952 word count, excluding the Coversheet, Table of Contents, Table of Citations, Signature Block, Certificate of Compliance and Certificate of Service.

DATED: this 28th day of February, 2022

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CERTIFICATE OF SERVICE

ORIGINAL of the foregoing delivered/
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By /s/ Mariah Tierney