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SUPREME COURT OF ARIZONA

TIMOTHY MATTHEWS)	Arizona Supreme Court
Petitioner,)	No. CV-21-0192-PR
v.)	
)	Court of Appeals
INDUSTRIAL COMMISSION)	Division Two
OF ARIZONA)	No. 2 CA-IC 2020-0001
Respondent,)	
)	ICA Claim
CITY OF TUCSON)	No. 20182-540202
Respondent Employer,)	
)	Carrier Claim
TRISTAR)	No. 18736339
Respondent Carrier.)	
________________________________)	

PETITIONER'S REPONSE TO AMICI CURIAE BRIEF OF THE ARIZONA MUNICIPAL RISK RETENTION POOL AND ARIZONA COUNTIES INSURANCE POOL

The Amici Curiae Brief of the Arizona Municipal Risk Retention Pool and Arizona Counties Insurance Pool (hereafter referred to collectively as "Amicus") is neither persuasive nor a trusted guide on the issues at bar. It offers an incomplete standard for reviewing whether a statute is constitutional. It relies on commentators unrecognized by this Court as authoritative. It demonstrates a misunderstanding of the purpose of the Arizona Workers' Compensation Act ("WCA") and art. XVIII, § 8 of the Arizona Constitution.

RESPONSE

Purpose of WCA is economic trade-off

The Petitioner acknowledges the insurance carriers' interest in the case at bar, however, Amicus fails to acknowledge the "Grand Bargain" between labor and employers made over 100 years ago -- a bargain the cities and towns benefited from because it relieved them of the burden of supporting injured workers and their families.

One of the primary objectives of the WCA "is to prevent [claimants] and [their] dependents from becoming public charges during the period of disability." *Safeway Stores Inc. v. Indus. Comm'n*, 152 Ariz. 42, 47 (1986), citing *Prigosin v. Indus. Comm'n*, 133 Ariz. 87, 89 (1976). Before passage of workers' compensation statutes, maimed workers and their families often became "public charges". See *Ford v. Revlon*, 153 Ariz. 38, 46 n. 1 (1987) (Feldman, J. concurring). Support of

the injured or killed worker and his family typically fell upon industrial towns and communities. *Id*. The intent of the framers of constitution was "that industry be made to compensate for the human cost of producing" goods and services. *Ford v. Indus. Comm'n, 145 Ariz. 509, 517* (1985) (internal citation omitted).

Injured workers gave up the right to sue their employer in exchange for medical benefits and a *portion* of the lost wages from their injury during their disability. "Under the Arizona Constitution, therefore, absent an employee's express rejection of workers' compensation, a no-fault system has replaced the prior fault-based tort system." *Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 71 (2005), *citing Stoecker v. Brush Wellman, Inc.,* 194 Ariz. 448, 451, ¶ 11 (1999) ("The underlying principle of the compensation system is a trade of tort rights for an expeditious, no-fault method by which an employee can receive compensation for accidental injuries sustained in work-related accidents.").

Employers are shielded from common-law actions. "Workers are provided a specified recovery for work-related injuries, while employers … are granted immunity from common-law suits by the compensated worker if they [employers] fulfill their mandate." *See* Ray J. Davis et al., *Arizona Workers' Compensation Handbook*, § 12.1 (1992 & Supp. 2019). Employers complying with the statutory mandate to have workers' compensation insurance "shall not be liable for damages at common law or by statute … for injury or death of an employee …" A.R.S. §

23-906 (A). Municipalities benefitted from the bargain because maimed or killed workers and their families would not become "public charges" of the community.

Arizona voters declared their public policy preference in passing the 1925 amendment to art. XVIII, § 8 of the constitution. It is not a court's duty to override that preference in response to fears of increased insurance costs. Whatever slight increase to consumers of municipal services from mental injury claims reflects what the constitution envisioned. The Arizona Constitution mandated a "just and humane compensation law … for the relief and protection of such workmen" and their dependents in art. XVIII, § 8. It promised compensation "shall be … paid" for "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 …" *Id*. This is a reasonable price to pay for law enforcement officers like Matthews, who took an oath to protect his community, that they too, can seek treatment and file claims for work-related mental injuries. Art. XVIII, § 8 is the public's promise to protect officers like Matthews when he suffers an on-the-job injury.

<u>Correcting the Standard of Review</u>

Amicus's brief states an incomplete standard of review. It ignores that this case involves a fundamental right protected by art. XVIII, § 8. First, Amicus

claims support for the pending opinion by stating that this Court places "substantial weight in favor" in favor of upholding the constitutionality of a statute, citing *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 9 (2014)[1]. However, this Court in *Gallardo* expressly disapproved of the "beyond a reasonable doubt" standard for making constitutionality determinations. *Id*. at 87 ¶ 8. And, here is the critical piece missing from Amicus's reference to *Gallardo*: "We do, however, presume that 'the legislature acts constitutionally. But *if a law burdens fundamental rights*, such as free speech or freedom of religion, *any presumption in its favor falls away*." *Id*. at 87 ¶ 9 (emphasis added).

Unlike the statute in *Gallardo*, which "touche[d] only peripherally" on a fundamental right (voting), here, A.R.S. § 23-1043.01 (B), the mental injury statute, directly violates the Petitioner's fundamental right to workers' compensation benefits guaranteed in art. XVIII, § 8.

The proper standard of review for constitutional questions in workers' compensation is found in *Grammatico v Indus. Comm'n*, 208 Ariz. 10, 11 ¶ 6 (Ct. App. 2004) and *Kilpatrick v. Superior Ct. In & For Maricopa Cty*., 105 Ariz. 413, 415-16 (1970). The court analyzes "the constitutionality of a statute de novo,

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[1] At issue in *Gallardo* was whether a statute was a "special law" that violated Ariz. Const. art. IV, Pt. 2 § 19.

beginning with a strong presumption that the statue is constitutional." *Grammatico*, 208 Ariz. 10, 11. The party challenging the constitutionality bears the burden of overcoming the presumption. *Grammatico*, 208 Ariz. at 11. However, the legislature "may not define legal causation in way the conflicts with Article 18, Section 8 because the legislature 'cannot enact laws which will supersede constitutional provisions adopted by the people.'" *Grammatico*, 211 Ariz. 67, 72 (2005), citing *Kilpatrick* at 415-16. "Words are to be given their usual and commonly understood meaning unless it is plain or clear that a different meaning was intended." *Kilpatrick* at 421.

A. "Injury by accident"

Fifty years ago, Arizona's first published decision of a "mental-mental" work injury came in *Brock v. Indus. Comm'n*, 15 Ariz. App. 95 (Ct. App. 1971), where a city water truck driver ran over and killed a woman. Brock was unaware that he ran over the woman, and the ensuing police investigation and scorn from his neighbors aggravated his pre-existing mental conditions. *Brock* at 95-96. In setting aside the Commission's award denying the claim, the appellate court held "the presence of physical or exertion was not a necessary element" to determine whether Brock had been "injured by accident". *Brock* at 96.

The "amount" of stress Brock endured was of no concern either to the Commission or the appellate court. Instead, the existence of "*an easily discernible*

event" was the basis "for determining whether the injury there involved was 'arising out of and in the course of employment.'" *Brock* at 96 (emphasis added).

The appellate court's rationale in *Brock* was in concert with a long line of Arizona case law dating decades prior to *Brock* – that an injury by accident arises from the employment when it is "fairly traceable" to the employment from a necessary risk of the employment. *Ocean Accident & Guarantee Corp. v. Indus. Comm'n*, 32 Ariz. 265, 270-71 (1927).

Six years after *Ocean Accident*, this Court in *Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 446 (1933) held compensable injuries had to be the result of "an undesigned, sudden and unexpected event", thus denying a claim where the employment aggravated an underlying heart condition that led to an acute attack, causing death. But just 12 years later, this Court rejected its narrow definition of "accident" in *Pierce* because the "phrasing of the constitutional mandate" was not considered. *In re Mitchell*, 61 Ariz. 436, 451 (1944). The constitutional mandate that "compensation shall be paid … 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 a necessary risk or danger inherent in the nature thereof" is "broader and more comprehensive than the

legislative enactment …" *In re Mitchell* at 451. "A construction of the latter must be governed by the constitutional provision." *In re Mitchell* at 451.

The principle and holding from *In re Mitchell* was endorsed in *Phelps Dodge Corp. v Cabarga*, 79 Ariz. 148 (1955), *Jones v. Indus. Comm'n*, 81 Ariz. 352 (1957), and *Paulley v. Indus. Comm'n*, 91 Ariz. 266, 271-272 (1962). In *Paulley*, this Court put to rest any debate about the term "accident":

> "For this reason we again announce that Arizona follows the English and now majority American view that an injury is caused 'by accident' when either the external cause or the resulting injury itself is unexpected or accidental. This construction of the phrase 'injury by accident' is most likely to effectuate '* * * the evident purpose of the law that those covered by the act who are injured while engaged in industrial work are to be compensated.'"

Paulley at 272. See also, *Ford v. Indus. Comm'n*, 145 Ariz. at 517.

1. <u>The constitutional infirmity in *Sloss v. Indus. Comm'n*</u>

After *Brock* and before *Sloss v. Indus. Comm'n,* 121 Ariz. 10 (1978), published decisions for mental injury claims could be characterized as "gradual" injuries. *See*, *Shope v. Indus. Comm'n*, (1972) (claimant's "angry reaction from a "buildup of emotional stress for a period of years")[2]; *Ayer v. Indus. Comm'n*, 23

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[2] *Fireman's Fund Ins. Co. v. Indus. Comm'n*, 119 Ariz. 51, 54 (1978) expressly disapproved of the appellate court's holding in *Shope* that "excessive psychoneurotic anxiety reaction without physical force or exertion" was noncompensable.

Ariz. App. 163 (Ct. App. 1975) (claimant's chronic mental injury gradual over several years and ALJ resolved conflict in favor of no medical causations); *Muse v. Indus. Comm'n*, 27 Ariz. App. 312 (Ct. App. 1976) (claimant's gradual injury developed over four to five years); *Fireman's Fund Ins. Co. v. Indus. Comm'n*, 119 Ariz. 51 (1978) (claimant suffered compensable "mental breakdown" after six months of dramatically increased workload and responsibilities).

Shortly after *Fireman's Fund*, this Court delivered its decision in *Sloss v. Indus. Comm'n*. The scant factual record in the *Sloss* decision stated Sloss was a highway patrol officer who was diagnosed with "chronic anxiety" resulting in gastritis. *Sloss* at 11. The chronic nature of Sloss's anxiety indicates another gradual injury claim. *Id*. The *Sloss* decision stated little else other than it agreed with the hearing officer's findings because *Fireman's Fund* requires "more than ordinary and usual job-related stress" and that the "condition" must produced by "unexpected, unusual, or extraordinary stress." *Sloss* at 11.

The problem, however, is that the *Sloss* opinion did not address the *constitutional coverage mandate* of art. XVIII, § 8 when it articulated the "unexpected, unusual, or extraordinary" ("UUE") stress standard in Sloss's gradual mental injury claim. Herein lies the mental injury statute's constitutional infirmity in borrowing language from an opinion that gives no indication that it considered whether Sloss's injury had its origin in a necessary risk or danger connected with

his employment. This is a similar fatal flaw this Court *In re Mitchell* found in *Pierce*. The constitutional mandate that "compensation shall be paid" for any personal injury "by 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 a necessary risk or danger inherent in the nature thereof" is "broader and more comprehensive than the legislative enactment …" *In re Mitchell* at 451. "A construction of the latter must be governed by the constitutional provision." *Id*.

When the Legislature in 1980 seized upon the UUE language from *Sloss* and passed A.R.S. 23-1043.01(B), it imported its constitutional infirmity as well because under *Grammatico*, the legislature "may not define legal causation in way the conflicts with Article 18, Section 8 because the legislature 'cannot enact laws which will supersede constitutional provisions adopted by the people.'" *Grammatico* 211 Ariz. at 72.

B. So-called "complexities" of mental injury claims

There is no "evidentiary complexity" in the case at bar. There was no dispute that Matthews suffered a personal injury by accident – disabling PTSD. There was no dispute that Matthews was performing duties of a domestic violence ("DV") detective on June 17, 2018, when he watched a man die from a shotgun blast to the chest and then "processed" the body for evidence. There was no

medical causation dispute either, as the city's own examining psychiatrist opined that Matthews's PTSD was "related almost exclusively to his employment." The parties agreed Matthews had met his burden for medical causation for the injury.

Additionally, we are 40 years removed from the *Archer v. Indus. Comm'n* decision's complaints of evidentiary complexities in "stress" cases. *Archer v. Indus. Comm'n*, 127 Ariz. 199, 203 (Ct. App. 1980). Science and medicine have advanced, and so too have our diagnostic tools. The 2013 DSM-V stripped out the "subjective" criteria used in prior editions for diagnosing PTSD. *See* Petitioner's Supplemental brief, p. 5-6.

Instead of Amicus's commentators, Arizona courts have consistently turned to Arthur Larson's authoritative treatise "The Law of Workers' Compensation" for commentary. *See Wiley v. Indus. Comm'n*, 174 Ariz. 94, 102 (1993) (describing Larson as "the authoritative commentator in the field" of workers' compensation); *Fry's Food Stores v. Indus. Comm'n*, 177 Ariz. 264, 268 (1994) (describing Larson as a "leading authority on workers' compensation").

With respect to "mental stimulus causing nervous injury", Larson commented:

> Perhaps, in earlier years, when much less was known about mental and nervous injuries and their relation to "physical" symptoms and behavior, there was an excuse, on ground of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and workers' compensation. But the excuse no longer exists. And

> therefore a state that would the benefits of workers' compensation from a worker who, before an obvious industrial mishap, was a competent, respected iron-worker, and after the mishap was totally incapacitated to do the only job he or she was trained for, would nowadays be doing unjustifiable violence to the intent of the workers' compensation act, for reasons that are without support in either legal or medical theory.

4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* [hereinafter "Larson"] § 56.04 (1) (2020).

Amicus relies on a law review article written in 2011, before the DSM-V was published in 2013. Amicus brief, p. 10. The law review article refers to concerns that the "A criterion" of the DSM-III, which was published in 1980. But in 2013, the DSM-V removed the "subjective" criteria and reclassified PTSD into a new category within the DSM-V[3].

Amicus brief also raises the specter of biased or sympathetic medical experts who may "assume" that the claimant has lasting symptoms or accept the "claimant's emphasis on work stress" to conclude the PTSD was related to work

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[3] Modifications in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) included objectively defining trauma exposure, eliminating the subjective component of the definition of trauma, and relocating PTSD from the anxiety disorders category into a new category, "Trauma and Stressor-Related Disorders". A. Pai, A. Suris, and C. North, Review. "Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations." Behav. Sci. v. 7 (1) (March 2017). (Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5371751/ , last visited Feb. 27, 2022).

stress. Amicus brief, p. 10-11. But in the case at bar, medical causation was undisputed because *the city's own medical expert* concluded Matthews's disabling PTSD was "almost exclusively related to his employment".

C. "UUE" is an additional burden to legal causation

The mental injury statute *does change* legal causation and places an additional hurdle to clear for mental injury claimants. Amicus refers the recent decision in *France v Indus. Comm'n*, 250 Ariz. 487, 488 (2021), where sheriff's deputy France encountered a mentally unstable person wielding a shotgun during a welfare check. The *France* case shows how the UUE stress requirement allows defendant insurance carriers and employers to deny otherwise valid claims. Despite the "startling event" nature of France's encounter that day (most similar to *Brock v Indus. Comm'n*), despite the extreme rarity of the type of encounter, and even though Sgt. France was performing a necessary risk of his employment when he suffered his injury-by-accident, the claim was denied by the carrier. *France* at 491-92, ¶ 21. Sgt. France was forced to litigate a claim for his fundamental workers' compensation rights all the way to this Court.

In the case at bar, Detective Matthews's injury by accident also occurred at an articulable work event on June 17, 2018 – he witnessed a human being's unnatural death from a shotgun blast to the chest and then performed an up-close inspection of the body. Matthews was carrying out the necessary duties of a DV

detective and subjecting himself to risks of being a law enforcement officer. Medical causation regarding Matthews's PTSD was not disputed. And yet, what would otherwise be a valid claim under our constitution – an injury-by-accident occurring in the course employment and arising from a necessary risk or danger inherent thereof the employment – is denied under the mental injury statute.

France's PTSD claim and Matthews's PTSD claim were not gradual mental injury claims, but the ALJs' and lower court's application the UUE stress requirement to *all types* of mental injury claims – even when France's and Matthews's claims arose from startling and articulable work events – operated to deny their claims, which would otherwise be accepted under our constitution.

Under the holding in *France*, Matthews's claim is compensable. "We emphasize today that our holding today is limited to mental injuries from a specific work-related incident and does not encompass gradual injuries resulting from ordinary stresses and strains of the work regimen." *France* at 492, ¶ 23. Matthews also satisfied medical causation and established that his work-related stress was a substantial contributing cause of his mental injury. *France* at 492, ¶ 24.

Finally, Amicus Brief's characterization of *Atkinson, Kier Bros., Spicer Co. v. Indus. Comm'n*, 35 Ariz. 48 (1929) is misleading and demonstrates that it cannot be a trusted guide to understanding the jurisprudence of the Arizona WCA and art. XVIII, § 8 of the Arizona Constitution. The Amicus's assertion that the

constitutional coverage protection is limited "workmen engaged in manual or mechanical labor" under *Atkinson* is opposite of what *Atkinson* actually concluded: Once the legislature adds a group, the group is protected by the constitutional guarantees. *Atkinson* at 58-59. *See also*, *Lou Grubb Chevrolet v. Indus. Comm'n*, 171 Ariz. 183, 190 (Ct. App. 1991); *Kilpatrick* at 417.

D. The mental injury statute impermissibly restricts legal causation

Grammatico demonstrated how Arizona courts should analyze whether a statute imposes a legal causation burden beyond what is allowed in the constitution. "Under Art. 18, Sect. 8, an employee demonstrates legal causation by showing that a necessary risk or danger of employment caused or contributed to the industrial injury in whole or in part." *Grammatico* at 72, ¶ 23. As this Court explained in *Grammatico*, while the legislature "has some latitude to establish the requisite medical causation", it cannot "define legal causation in a statute in a way that conflicts with Article 18, Section 8 because the legislature 'cannot enact laws which will supersede constitutional provisions adopted by the people'". *Grammatico* at 72, ¶ 21, citing *Kilpatrick* at 415-16.

"The test to be applied in accidents mentioned in the constitutional mandate to determine whether they arise out of the employment is, were they caused in whole or in part, or contributed to by a *necessary* risk or danger of the

employment, or *inherent* in its nature". *Goodyear Aircraft Corp. v. Indus. Comm'n*, 62 Ariz. 398, 409 (1945).

The statute, A.R.S. 23-1043.01 (B), impermissibly redefines legal causation for mental injuries, restricts compensation for mental injuries to only those caused by something more (unusual stress) than necessary risk or danger of employment, and therefore, contradicts the scope of coverage mandated and envisioned by art. XVIII, § 8.

In *DeSchaaf v. Indus. Comm'n*, 141 Ariz. 318, 321 (Ct. App. 1984), the court stated, "Legal causation concerns whether the injury arose out of and in the course of the employment. On the other hand, medical causation ordinarily requires expert medical testimony to establish the industrial accident cause the injury."

"Unexpected, unusual or extraordinary stress" is a "legal causation" standard. *Barnes v. Indus. Comm'n*, 156 Ariz. 179, 182 (Ct. App. 1988). This is not a mixed "medical-legal" question as Amicus asserts. Amicus brief, p. 14. It has never been analyzed as a mixed "medical-legal" question, and Amicus offers no support for this departure.

The unique and complicated history of occupational disease claims in Arizona distinguishes *Ford v. Indus. Comm'n*, 145 Ariz. 509 (1995) from the case at bar. *See generally*, *Ford*, 512-14.

Additionally, Amicus's assertion that *Paulley* is inapplicable because it involved a physical injury is another false distinction because *Brock* (a mental injury) cites to *Paulley*: "… [T]he concept of what is an 'accident' has been the subject of frequent consideration by our courts, and it is now commonly viewed to include any unexpected injury-causing event, so long as it is work-connected." *Brock v. Indus. Comm'n*, 15 Ariz. App. 95, 96 (1971). As the Brock court explained:

> We cannot perceive any logical basis for viewing the pedestrian's injury stemming from this unexpected event as an accidental injury to the pedestrian, and viewing as different the mental injury sustained by the petitioner when causally related to the same event. In this connection, the Commission found, or at least assumed, the necessary causal relationship, but denied petitioner's claim on the basis that a disability arising from severe emotional reaction to an unexpected event unaccompanied by physical force or exertion is somehow different.

Brock, at 96.

Lastly, Amicus refers to "layers of benefits to fairly compensate police officers" for their service, but only the Workers Compensation Act is a constitutionally protected "layer of benefit". The other "layers" can be bargained away, amended or repealed, reduced due to economic downturns, or eliminated because of changing priorities or politics.

The limited recovery provided under the WCA is a reasonable price to pay for the undisputed mental injury Matthews sustained from the necessary risks of his employment, and it is one envisioned and enshrined by the Constitution.

CONCLUSION

If a "law burdens fundamental rights, such as free speech or freedom of religion, any presumption in its favor falls away." *Gallardo*. at 87 ¶ 9. A.R.S. § 23-1043.01 (B), directly violates the Petitioner's fundamental right to workers' compensation benefits guaranteed in art. XVIII, § 8. For the reasons stated herein and stated in the Petitioner's Petition for Review and Supplemental Brief, the mental injury statute is unconstitutional. Nothing revealed or offered by the Amicus Brief changes that conclusion.

RESPECTFULLY SUBMITTED this 5th day of April 2022.

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