

**BEFORE THE SENATE
INSURANCE AND FINANCIAL INSTITUTIONS COMMITTEE**

Testimony of Robert A. Minor on Sub. H.B. 80

June 19, 2019

Chairman Hackett, Vice-Chairman Hottinger, members of the Committee. Good morning. I am Robert Minor. I am a member of the Workers' Compensation Committee of the Ohio Chamber of Commerce and I was asked by the Chamber to provide background on the significant change that Substitute H.B. 80 would bring to the Ohio workers' compensation law, changing the criteria for compensating a particular form of a psychological condition, post-traumatic stress disorder or PTSD. By way of a very brief background, I began practicing law in Ohio in the fall of 1975 and the focus of my practice became occupational safety and health including workers' compensation, OSHA and disability management. I retired January 1, 2019, but have remained active with the Ohio Chamber. I am also the Executive Secretary of the Ohio Self-Insurers Association and the past President of the National Council of Self-Insurers, an organization of national businesses and state self-insurers' associations. I serve on its Executive Committee.

I have done a fair amount of teaching and presenting on workers' compensation matters and I often tell folks who are new to the field that workers' compensation is not difficult in concept. When you think about it, there are two basic questions in workers' compensation. The first question is who gets into the system and the second question is how are they going to be treated once they are in the system. Both of those questions are what the General Assembly answers when it refines or fine-tunes our

workers' compensation system. Today we are discussing the first question - "who gets into the system?" Stated another way, under what circumstances may someone who has PTSD enter the system?

Currently, in order for a psychological condition to be recognized under the Ohio workers' compensation law, it must arise from a physical injury. It is commonly called the "mental-mental" exclusion. Here is the background to that rule. For years in Ohio there was a requirement of physical harm prior to compensating any psychological condition. This was whether in workers' compensation or in negligence cases. In the early 1980's, Ohio had an activist Supreme Court that did not hesitate to change the law in accordance with its political philosophy. Among other things, that Court created an intentional tort exception to the exclusivity of the workers' compensation remedy and for the first time permitted gradually developing conditions to be treated as "injuries" under the law.

In 1983, that Court did away with the requirement of there being a physical injury prior to permitting a negligence case alleging psychological harm to go forward. In other words, a person who experienced stress and developed a psychological condition because of someone's negligent conduct could bring a lawsuit for her psychological condition even if she were not physically harmed. Workers' compensation principles have always followed negligence concepts. Workers' compensation was, after all, a replacement for the common-law system for addressing workplace injuries.

The concern in the early 1980's was that permitting recovery for a psychological condition in the no-fault workers' compensation law would profoundly change the system. Again, the requirement of there being a physical injury prior to there being a

compensable event has always been a part of the Ohio workers' compensation law. It was originally judge-made law. In an act that became effective on January 1, 1986, the General Assembly reacted to several of the Supreme Court's decisions. As I recollect, Senator Richard Finan and Representative Clifford Skeen hammered out a bill with bipartisan support. In addition to addressing the problem of intentional tort, that bill provided that in order for a psychological condition to be compensated under the Ohio workers' compensation law, the condition must arise out of a physical injury. The requirement that a condition arise out of a physical injury is often referred to as a gatekeeper. Legislatures routinely create gatekeepers to better ensure that a condition that is to be compensated is the result of some work-related incident and not something extraneous to work. A common gate-keeper seen in almost all systems is that in order for hearing loss to be compensated, there must be a total loss. There are simply too many other factors that can contribute to hearing loss and that is the gatekeeper that legislatures use. In 2006, the General Assembly had occasion to revisit the issue. A case arose from a situation where an employee ran over a co-worker with a forklift and killed him. The Supreme Court allowed the driver's workers' compensation claim to be allowed for a psychological condition resulting from the event. The Court reasoned that the condition arose from an injury; it was an injury that someone else sustained. In Amended Substitute Senate Bill No. 7, the General Assembly clarified that in order for a psychological condition to be compensated under the Ohio workers' compensation law, it must arise from an injury sustained by the person alleging the psychological condition.

PTSD has been and is regularly compensated under Ohio law. There have been some who have asserted that a Supreme Court decision, the Armstrong case,

precluded PTSD from being compensated. That is not true. In Armstrong, a dump truck driver was stopped at the entrance to a highway in a construction area. He looked into his side-view mirror and saw a van rapidly approaching. The van slammed into the back of the dump truck, the driver of the dump truck injured his back, he exited the vehicle and saw the van driver either dead or dying. He developed post-traumatic stress disorder and asked that his workers' compensation claim for his back injury be amended to include PTSD. The issue was taken to court and tried to a judge. The testimony of two doctors was presented. The doctor who supported the truck driver's claim testified that the combination of the physical injury to the driver's back and the apprehension of death that gave rise to his PTSD. The doctor for the defense testified that while the truck driver had PTSD, it did not arise from the physical injury but from the perceived life-threatening situation. The judge chose to believe the testimony of the defense doctor and, once he made the factual finding that the PTSD did not arise out of the physical injury, the judge applied the statute that mandates that a psychological condition arise from a physical injury. The condition was denied and the Supreme Court affirmed. I have appended to my testimony three decisions of the Industrial Commission that were issued after the Armstrong case became law. In each of those decisions the Industrial Commission allowed the workers' compensation claim for PTSD, finding that where the condition is caused by a combination of physical injury and stress, PTSD can become a part of a recognized claim.

The Bureau budget bill would alter a principle that has been a part of the workers' compensation law since its beginning over a hundred years ago. The workers' compensation law was premised on compensating physical injuries and any conditions

that arise out of those physical injuries. In helping the Chamber prepare for testimony before the House Finance Committee last month, I took a look at how other states have addressed the issue of compensating mental conditions that arise from circumstances other than a physical harm. I found little consistency or uniformity. Some states only compensate mental injuries when they arise directly from a physical harm. Other states allow the so-called "mental-mental" injuries but with gatekeepers or safeguards to ensure that the impairment that is being compensated is work-related. Mr. Shimp's testimony described those gatekeepers. In addition to changing a fundamental principle of the Ohio workers' compensation law, the Bureau budget bill will also impose a tax on Ohioans. That is, this change in the law will be felt mostly, if not exclusively, by our counties and cities and villages and townships. Those governmental bodies do not create wealth. They provide services using taxpayer money. If there is an increase in the workers' compensation costs brought by the Bureau budget bill, then taxes will increase, services will decrease, or both. In 2015 there was a similar provision introduced in the Ohio Senate. Then Administrator Buehrer testified as to the amount that the BWC's Chief Actuary estimated the impact of permitting PTSD to be compensated without physical harm. The estimate was considerable - \$182,000,000. I did not see where the House committee received any such testimony on the impact that the bill would have on taxpayers. Years ago a Justice of the U.S. Supreme Court described the states as laboratories of social democracy. Workers' compensation is a great example of what he meant. There are common social problems that the states have and address; work-related disabilities are among those problems. By having 50 "laboratories" trying different ways to address these problems, a state legislature can

look to see what worked and did not work in other states. In considering abandoning the requirement that there must be a physical injury for a psychological condition to be compensated, the General Assembly can look to the experience of other states. If the experience of other states suggests that the General Assembly should do away with that gatekeeper, it might examine what other gatekeepers might be put in place. I do not know that any of that has been done here.

That concludes my remarks on the background of the so-called "mental-mental" exclusion. I would add that the Ohio Self-Insurers Association joins in the concerns expressed by the Ohio Chamber of Commerce. Mr. Chairman, I would be happy to answer any questions about the history of the "mental-mental" exclusion in Ohio and, to the extent that I can, how other states have addressed the issue. Thank you.

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 05-314690

Date of Injury: 2/17/2005

This claim has been previously allowed for: CONTUSION AND ABRASION OF FACE AND NOSE; ABRASION RIGHT FOREARM; ABRASION NECK; CERVICAL STRAIN; DISALLOWED; POST-TRAUMATIC STRESS DISORDER.

This matter was heard on 12/19/2013 before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511 and 4123.52 on the following:

RECON Request For Reconsideration filed by Injured Worker on 10/25/2013.
Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
2) Additional Allowance - POST TRAUMATIC STRESS DISORDER

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not fewer than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Copp, Mr.
APPEARANCE FOR THE EMPLOYER: Mr. Patterson
APPEARANCE FOR THE ADMINISTRATOR: No appearance

HEARD BY: Mr. Bainbridge, Ms. Taylor, Mrs. Gillmor

12/19/2013 - It is the decision of the Industrial Commission the Injured Worker's request for reconsideration, filed 10/25/2013, is taken under advisement for further review and discussion and an order be issued without further hearing.

01/31/2014 - After further review and discussion, it is the finding of the Industrial Commission the Injured Worker has met his burden of proving the Staff Hearing Officer order, issued 09/20/2013, contains a clear mistake of law of such character that remedial action would clearly follow. More specifically, the Staff Hearing Officer misapplied the Ohio Supreme Court decision in Armstrong v. John R. Jurgensen Co., 136 Ohio St.3d 58, 2013-Ohio-2237, in denying the Injured Worker's motion seeking additional allowance. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

The Injured Worker's request for reconsideration, filed 10/25/2013, is granted. The Injured Worker's appeal, filed 10/03/2013, from the Staff Hearing Officer order, issued 09/20/2013, is granted to the extent of this order. It is further ordered the Staff Hearing Officer order, issued 10/09/2013, is vacated.

It is the order of the Commission the Injured Worker's C-86 Motion, filed 03/28/2012, is granted. Accordingly, the claim is ADDITIONALLY ALLOWED for POST-TRAUMATIC STRESS DISORDER. In reaching this decision, the Commission relies upon the 07/25/2013 narrative of Michael Murphy, Ph.D., which reads in pertinent part: "In my opinion, this injury directly caused the alleged Post Traumatic Stress Disorder. The injured worker was assaulted, hit multiple times in the face, exposed to an inmate's blood, and required two AIDS medical tests."

The Commission also relies upon the case of Jones v. Catholic Healthcare Partners, Inc., 7th Dist. No. 11 MA 23, 2013-Ohio-3990, in reaching this decision. In Jones, the Seventh District Court of Appeals held physical trauma

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 05-314690

need not be the sole proximate cause of an injured worker's post-traumatic stress disorder in order to qualify as an allowed condition. Instead, an injured worker is only "required to demonstrate a causal connection between [the] covered physical injury and [the] psychological trauma." *Id.* at ¶3. Therefore, as long as an injured worker can prove the allowed physical injury is a proximate cause of the post-traumatic stress disorder, they have met their burden under R.C. 4123.01(C)(1). Such is the case *sub judice*, where the Injured Worker's post-traumatic stress disorder was caused by both physical and emotional trauma arising from the industrial injury, as explained by Dr. Murphy.

All file evidence was reviewed and considered in reaching this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN SIXTY (60) DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed By: jds
Date Typed: 02/12/2014

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor and voted on as follows:

Thomas H. Bainbridge Chairman	YES	Jodie M. Taylor Commissioner	YES
Electronically signed by Thomas H. Bainbridge		Electronically signed by Jodie M. Taylor	

DISSENTING OPINION BY COMMISSIONER GILLMOR:

I respectfully dissent from the majority decision. I would find no jurisdiction for the reason the Staff Hearing Officer did not misapply the Ohio Supreme Court decision in *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, in denying the additional allowance of Post Traumatic Stress Disorder.

Karen L. Gillmor, Ph.D. NO
Commissioner

**Electronically signed by
Karen L. Gillmor, Ph.D.**

ATTESTED TO BY:

Executive Director

Findings Mailed: 03/25/2014

**Electronically signed by
Thomas S. Connor**

OFFICIAL REDACTED VERSION

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 05-314690

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 11-862746

Date of Injury: 10/21/2011

This claim has been previously allowed for: RIGHT KNEE PATELLOFEMORAL SYNDROME; EFFUSION OF RIGHT KNEE; CHONDROMALACIA OF THE RIGHT PATELLOFEMORAL JOINT; LATERAL TIBIAL CONDYLE WITH BONE EDEMA/MICROFRACTURE OF THE MEDIAL FEMORAL CONDYLE ADJACENT TO THE TROCHLEA. This claim has been previously disallowed for: POST TRAUMATIC STRESS DISORDER; SUBSTANTIAL AGGRAVATION OF PRE-EXISTING MAJOR DEPRESSION, RECURRENT.

This matter was heard on 09/16/2014, before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511, and 4123.52 on the following:

RECON Request For Reconsideration filed by Injured Worker on 12/11/2013.

Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
2) Additional Allowance - POST TRAUMATIC STRESS DISORDER
3) Temporary Total Disability
4) Authorization Of Treatment/Appropriate Medication
5) SUBSTANTIAL AGGRAVATION OF PRE-EXISTING CONDITION - MAJOR DEPRESSION RECURRENT

Notices were mailed to the Injured Worker, the Employer, their respective representatives, and the Administrator of the Bureau of Workers' Compensation not fewer than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Goodburn
APPEARANCE FOR THE EMPLOYER: Mr. Albert
APPEARANCE FOR THE ADMINISTRATOR: No appearance

HEARD BY: Mr. Bainbridge, Ms. Taylor, Mrs. Gillmor

09/16/2014 - It is the decision of the Industrial Commission the Injured Worker's Request for Reconsideration, filed 12/11/2013, is taken under advisement for further review and discussion and an order be issued without further hearing.

09/16/2014 - After further review and discussion, it is the finding of the Industrial Commission the Injured Worker has met her burden of proving the Staff Hearing Officer order, issued 11/19/2013, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer erred by misapplying the Ohio Supreme Court's decision under the case of Armstrong v. John R. Jurgensen Co. et al, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Goblich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

The Injured Worker's Request for Reconsideration, filed 12/11/2013, is granted. The Injured Worker's Appeal, filed 11/26/2013, from the Staff Hearing Officer order, issued 11/19/2013, is granted to the extent of this order. It is further ordered the Staff Hearing Officer order, issued 12/11/2013, is vacated.

With respect to the issue of continuing jurisdiction, the action is based on the motion made by Mr. Bainbridge, seconded by Ms. Taylor, and voted on as follows:

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 11-862746

Thomas H. Bainbridge
Chairman

YES

Jodie M. Taylor
Commissioner

YES

Electronically signed by
Thomas H. Bainbridge

Electronically signed by
Jodie M. Taylor

Karen L. Gillmor, Ph.D.
Commissioner

YES

Electronically signed by
Karen L. Gillmor, Ph.D.

It is the order of the Commission that the Injured Worker's C-86 Motion, filed 05/13/2013, seeking additional allowance of post-traumatic stress disorder and substantial aggravation of pre-existing major depression is granted in part, dismissed in part, and denied in part, and the Injured Worker's C-9 request dated 05/06/2013 seeking authorization of an initial psychological evaluation and individual psychotherapy is also granted.

The Injured Worker's C-86 Motion, filed 05/13/2013, is denied to the extent it requests additional allowance of substantial aggravation of major depression recurrent because there is no evidence in file of pre-existing depression. The Commission further notes the Injured Worker's counsel conceded this fact at hearing today. Accordingly, the claim is specifically **DISALLOWED** for **SUBSTANTIAL AGGRAVATION OF PRE-EXISTING MAJOR DEPRESSION, RECURRENT**. The Commission disallows the condition by way of substantial aggravation only, as the Injured Worker's motion did not request allowance by way of any other causal theory.

However, the Injured Worker's motion is granted to the extent that the claim is **ADDITIONALLY ALLOWED** for **POST-TRAUMATIC STRESS DISORDER**. The Commission relies upon the 11/06/2013 narrative of Jerry Flexman, Ph.D., in reaching this portion of the decision. Dr. Flexman opined, "As a result of the accident in which she was involved and the resulting physical injury and pain to her right leg and knee, she developed the condition of Post-Traumatic Stress Disorder."

The parties at hearing also agreed temporary total disability compensation is not at issue, as the Injured Worker is currently receiving temporary total disability compensation secondary to physical conditions recognized under this claim. Therefore, the Injured Worker's C-86 Motion is dismissed to the extent that it requests temporary total disability compensation.

Finally, the Commission also grants the 05/06/2013 C-9 treatment request from Dr. Flexman for an initial psychological evaluation and individual psychotherapy at the rate of one time per week for a six month period. The Commission relies upon the C-9 report itself as well as the 03/22/2013 narrative from Dr. Flexman to grant this request.

All file evidence was reviewed and considered in reaching this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN SIXTY (60) DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 11-862746

Typed By: jds
Date Typed: 09/17/2014

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor and voted on as follows:

Thomas H. Bainbridge Yes
Chairman

**Electronically signed by
Thomas H. Bainbridge**

Jodie M. Taylor Yes
Commissioner

**Electronically signed by
Jodie M. Taylor**

Karen L. Gillmor, Ph.D. No
Commissioner

**Electronically signed by
Karen L. Gillmor, Ph.D.**

ATTESTED TO BY:

Executive Director

**Electronically signed by
Tim Adams**

Findings Mailed: 10/23/2014

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

Date of Injury: 8/06/2014

This claim has been previously allowed for: LEFT SHOULDER SPRAIN; LUMBOSACRAL STRAIN.

This claim has been previously disallowed for: SUBSTANTIAL AGGRAVATION OF PRE-EXISTING POST TRAUMATIC STRESS DISORDER.

This matter was heard on 08/13/2015, before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511, and 4123.52 on the following:

RECON Request For Reconsideration filed by Injured Worker on 06/12/2015.
Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
2) Injury Or Occupational Disease Allowance

Notices were mailed to the Injured Worker, the Employer, their respective representatives, and the Administrator of the Bureau of Workers' Compensation not fewer than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Ms. [REDACTED], Mr. K. Larrimer
APPEARANCE FOR THE EMPLOYER: Mr. King, Ms. Yates
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

HEARD BY: Mr. Bainbridge, Ms. Taylor

08/13/2015 - It is the decision of the Industrial Commission the Injured Worker's Request for Reconsideration, filed 06/12/2015, is taken under advisement for further review and discussion and an order be issued without further hearing.

08/13/2015 - After further review and discussion, it is the finding of the Industrial Commission the Injured Worker has met her burden of proving the Staff Hearing Officer order, issued 05/15/2015, contains a clear mistake of fact of such character that reconsideration is sought and a clear mistake of law of such character that remedial action would clearly follow. Specifically, in disallowing the claim for a psychological condition, the Staff Hearing Officer both misapplied the holding in Armstrong v. John R. Jurgensen Co., 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, and mistakenly relied upon the 10/23/2014 report from Mark Querry, Ph.D., which actually supports recognition of the psychological condition at issue. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm., 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), State ex rel. Foster v. Indus. Comm., 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct these errors.

The Injured Worker's Request for Reconsideration, filed 06/12/2015, is granted. The Injured Worker's Appeal, filed 06/01/2015, from the Staff Hearing Officer order, issued 05/15/2015, is granted to the extent of this order. It is further ordered that the Staff Hearing Officer order, issued 05/15/2015, is vacated.

It is the decision of the Commission to grant the Injured Worker's Claim Information Report, filed 09/04/2014, as follows.

The Commission finds the Injured Worker sustained an injury on 08/06/2014 in the course of and arising out of her employment as a child care provider who works with developmentally and behaviorally challenged youths. After witnessing an

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

altercation between two male youths, she helped separate the youths and was escorting one of the youths, 16 years of age, out of the building. As the Injured Worker and the youth turned a corner outside the building, the youth physically attacked her, first putting his hand down her pants and then grabbing her belt, then proceeding to drag her toward the back of the building. The Injured Worker began to fight off the youth and then fell to the ground, striking her left shoulder.

The Commission ALLOWS the claim for LEFT SHOULDER STRAIN; LUMBOSACRAL STRAIN; SUBSTANTIAL AGGRAVATION OF PRE-EXISTING POST-TRAUMATIC STRESS DISORDER.

In finding the specified conditions compensable, the Commission relies upon the 08/11/2014 and 08/19/2014 progress notes from Paul Eby, M.D., the 09/11/2014 narrative from Stephen Cox, M.D., particularly with regard to its recitation of the history of the Injured Worker's physical injury and her psychological response thereto, his 09/29/2014 narrative, and his 05/08/2015 questionnaire report. In addition, the Commission relies upon the 10/23/2014 report from Dr. Query.

The Commission awards temporary total disability compensation first for the closed period from 08/11/2014 through 02/01/2015, relying upon the MEDCO-14s, Physician's Reports of Work Ability from Dr. Eby, dated 08/11/2014 and 08/26/2014, along with his Employee Work Status Report, dated 08/11/2014, and narrative report, dated 01/30/2015. In addition, the Commission relies upon the MEDCO-14s from Dr. Cox dated, 09/29/2014 and 11/10/2014. The Commission finds the cited evidence persuasively demonstrates the Injured Worker was temporarily and totally disabled during the specified period due to the allowed conditions of the claim. The Commission further awards temporary total disability compensation for the period from 05/06/2015 through 08/05/2015, relying upon the MEDCO-14 from Dr. Cox, dated 05/08/2015, certifying total disability due to the allowed psychological condition. The Commission further finds temporary total disability compensation may continue after 08/05/2015 upon submission of appropriate medical evidence certifying ongoing disability resulting from the allowed conditions. The Commission finds no persuasive medical certification of disability currently on file for the omitted period from 02/02/2015 through 05/05/2015.

The Commission rejects the Employer's contention R.C. 4123.01(C)(1) precludes recognition of a psychological condition on a substantial aggravation basis. R.C. 4123.01(C) provides in relevant part:

. . . "Injury" does not include:

(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant

* * *

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury

The Employer contended at hearing because the Injured Worker had been diagnosed with post-traumatic stress disorder prior to the assault she suffered on 08/06/2014, her psychiatric condition could not have "arisen" from the assault, pursuant to the provisions of Paragraph (C)(1) of the quoted statute. The Commission finds the Employer's argument in this regard ignores the language included in Paragraph (C)(4) and fails to consider the provisions of Paragraph (C)(1) and (C)(4) in conjunction.

As indicated above, R.C. 4123.01(C)(4) provides the term "injury" does not include a condition pre-existing the injury unless the injury causes a substantial aggravation of the condition. The Commission finds by its express terms, Paragraph (C)(4) references pre-existing conditions without limitation,

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

i.e., the language does not indicate only pre-existing "physical" conditions substantially aggravated can be deemed an injury. The Commission finds the Employer's argument impermissibly rewrites the provisions of (C)(4) in effect to state only a pre-existing physical condition may be deemed an injury if substantially aggravated. In addition, considering the provisions of (C)(1) and (C)(4) as a whole, the Commission further finds the statute does allow for recognition of psychiatric diagnoses on a substantial aggravation basis, because as is the case with this Injured Worker, the substantial aggravation of her pre-existing diagnosis is her "condition," with the result being the condition arose from the industrial injury. The Commission finds such an interpretation of the statutory provisions reasonable, and to construe R.C. 4123.01(C)(1) and (C)(4) otherwise would contradict the long-standing principle an employer takes its injured workers as it finds them, Hamilton v. Keller, 11 Ohio App.2d 121, 229 N.E.2d 63 (3rd Dist.1967), and preclude a finding of compensability of a condition simply because an injured worker had previously been diagnosed with the condition, a result clearly contradictory to the provisions of (C)(4).

The Commission also rejects the Employer's contention that recognition of post-traumatic stress disorder in this claim is precluded by the holding in Armstrong. The Commission finds the factual situation involved in the Armstrong case is distinguishable from the factual situation involved in the instant claim.

In Armstrong, the Court held an injured worker's mental condition is only compensable if a compensable physical injury the injured worker sustained caused the mental condition. The Court affirmed a finding that the injured worker's post-traumatic stress disorder was not compensable because medical evidence upon which the lower courts had relied demonstrated the disorder did not arise from his physical injuries, but rather from the fact that the injured worker had witnessed the fatal injury to another individual who was also involved in the motor vehicle accident in which the injured worker himself had been injured.

In the instant claim, the Commission finds the Injured Worker's pre-existing post-traumatic stress disorder was substantially aggravated by the Injured Worker's compensable physical injuries. The Commission finds Dr. Query, in his 10/23/2014 report, opined the Injured Worker meets the diagnostic criteria for the diagnosis of post-traumatic stress disorder; Dr. Query further opined while the diagnosis pre-existed the industrial injury, it was substantially aggravated by it, with the rationale being the condition "had remitted until the industrial injury of 08/06/2014." Significantly, in the "Discussion" section of his report, Dr. Query also opined "[t]he catalyst to aggravating [the Injured Worker's] PTSD symptoms was actually the assault from the industrial incident on 08/06/2014." The Commission interprets Dr. Query's opinion in this regard to place emphasis on the physical injuries the Injured Worker sustained in the assault and the resulting substantial aggravation of pre-existing post-traumatic stress disorder, as opposed to the entire scope of the "incident" occurring on 08/06/2014 being the cause of the substantial aggravation.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN SIXTY (60) DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed By: wb
Date Typed: 08/19/2015

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor and voted on as follows:

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

Thomas H. Bainbridge Chairman	Yes	Jodie M. Taylor Commissioner	Yes
Electronically signed by Thomas H. Bainbridge		Electronically signed by Jodie M. Taylor	

DISSENTING OPINION BY COMMISSIONER GILLMOR:

On 09/30/2015, I discussed this matter with Staff Hearing Officer William L. Brill, who was present at the 08/13/2015 hearing. Mr. Brill summarized the testimony, evidence, and arguments presented at hearing. After this discussion and a review of all the evidence contained within the claim file, I vote to find no jurisdiction.

I find no clear mistake of law or clear mistake of fact in the Staff Hearing Officer's application of Armstrong v. John R. Jurgensen Co., 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, to deny allowance of substantial aggravation of pre-existing post-traumatic stress disorder. The Staff Hearing Officer found the Court in Armstrong held that psychiatric conditions must have been caused by the compensable physical injuries. In Armstrong, the question presented to the Supreme Court was whether R.C. 4123.01(C)(1) limits workers' compensation coverage for psychiatric conditions to those caused by the claimant's compensable physical injury. The Supreme Court held Armstrong's physical injuries did not cause his psychiatric condition and that his psychiatric condition was, therefore, not a compensable injury under R.C. 4123.01(C)(1). The Supreme Court explained at ¶¶ 14-17, 29:

{¶ 14} Pursuant to the plain language of R.C. 4123.01(C)(1), a claimant must sustain physical injury or occupational disease as a prerequisite to recovering workers' compensation benefits for a mental condition. A psychiatric condition is not a workers' compensation injury except when the condition has 'arisen from an injury or occupational disease sustained by that claimant.' ***

{¶ 15} Armstrong and OAJ urge this court to adopt a reading of the term 'injury' that embraces the entire episode or accident giving rise to a claimant's physical injuries. We decline to do so. ***

{¶ 16} While the cause and underlying circumstances are relevant to the question of compensability, once the prerequisites to coverage are met, it is the resultant harm that constitutes the 'injury' received or sustained by the claimant, and it is from that harm that the claimant's psychiatric condition must arise.

{¶ 17} Beyond requiring physical injury or occupational disease, R.C. 4123.01(C)(1) also defines the required nexus between the physical injury or occupational disease and a corresponding mental condition. As relevant here, to be compensable, the mental condition must have 'arisen from an injury ... sustained by th[e] claimant.' (Emphasis added.) ... 'Arisen from,' as used in R.C. 4123.01(C)(1), contemplates a causal connection between the mental condition and the claimant's compensable physical injury. ... Based on the language of R.C. 4123.01(C)(1), the court of appeals held that '[t]o be compensable, a psychiatric condition must have been started by and therefore result from a physical injury or occupational disease the claimant suffered.' ... We agree, reading these terms together in context, that the statute requires a causal connection between a claimant's physical injury and the claimant's mental condition.

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

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{¶ 29} Armstrong undisputedly suffered compensable physical injuries as a result of the accident, and his PTSD undisputedly arose contemporaneously as a result of the accident. For Armstrong's PTSD to qualify as a compensable injury under R.C. 4123.01(C)(1), however, more is required; he must establish that his PTSD was causally related to his compensable physical injuries and not simply to his involvement in the accident.

I, therefore, find the Staff Hearing Officer did not err in his application of Armstrong.

To support a finding that the substantial aggravation of pre-existing post-traumatic stress disorder was causally related to the compensable physical injuries, as required by Armstrong, the majority relies upon the 10/23/2014 report of Mark Querry, Ph.D. The majority interprets the opinion of Dr. Querry to place emphasis on the physical injuries the Injured Worker sustained in the assault and the resulting substantial aggravation of pre-existing post-traumatic stress disorder, as opposed to the entire scope of the "incident" occurring on 08/06/2014, being the cause of the substantial aggravation.

I do not interpret the report of Dr. Querry as does the majority. Nowhere within Dr. Querry's report does he discuss the physical injuries sustained by the Injured Worker during the assault nor does the Injured Worker discuss the physical conditions allowed by the majority during her interview with Dr. Querry. Instead, relative to the industrial incident, the Injured Worker reported distressing memories of the assault, distressing dreams of the assault, flashbacks of the assault, as well as psychological and physical distress when reminded of the assault. Dr. Querry opined the catalyst to aggravating the Injured Worker's post-traumatic stress disorder symptoms was the assault from the 08/06/2014 industrial incident. Dr. Querry also opined the Injured Worker met the DSM-IV diagnostic criteria for post-traumatic stress disorder as characterized by being assaulted that led to a threat of her physical integrity and well-being and feelings of significant fear, with the subsequent symptoms reported by the Injured Worker noted above. Dr. Querry concluded the Injured Worker's pre-existing post-traumatic stress disorder was substantially aggravated by the industrial incident. Dr. Querry did not explain how, or opine that, the Injured Worker's pre-existing post-traumatic stress disorder was substantially aggravated by the allowed left shoulder strain and lumbosacral strain. To the contrary, the basis of Dr. Querry's opinion relates to the incident, the threat to her well-being, and the Injured Worker's memories, dreams, and flashbacks of the incident.

The statute requires a causal connection between a claimant's physical injury and the claimant's mental condition. For the majority to apply such a broad, vague standard creating a causal connection between the claimant's psychiatric condition and the industrial incident is not within the holding of the Armstrong Court.

I, therefore, further find no error in the Staff Hearing Officer's reliance upon the 10/23/2014 report from Mark Querry, Ph.D., to find insufficient evidence the substantial aggravation of pre-existing post-traumatic stress disorder was caused by the allowed physical injuries versus the underlying cause being her involvement in the incident.

For the reasons noted above, I must respectfully dissent from the majority decision, I would not exercise continuing jurisdiction and would disallow the claim for substantial aggravation of pre-existing post-traumatic stress disorder.

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 14-840093

Karen L. Gillmor, Ph.D. No
Commissioner

**Electronically signed by
Karen L. Gillmor, Ph.D.**

ATTESTED TO BY:

Executive Director

Findings Mailed: 03/02/2016

**Electronically signed by
Tim Adams**