

Rescuing the Rescuer: Reforming How Florida's Workers' Compensation Law Treats Mental Injury of First Responders

Travis J. Foels

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Rescuing the Rescuer: Reforming How Florida's Workers' Compensation Law Treats Mental Injury of First Responders

Erratum

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RESCUING THE RESCUER: REFORMING HOW FLORIDA'S WORKERS' COMPENSATION LAW TREATS MENTAL INJURY OF FIRST RESPONDERS

*Travis J. Foels** **

Abstract

The 2016 Pulse nightclub shooting in Orlando, Florida was the deadliest terrorist attack in the United States since the September 11 attacks in 2001. With a final death toll of forty-nine people, and fifty-three others wounded, the attack sent shockwaves throughout the city, state, and nation. People sent condolences to the families of those affected, prayers for those taken, and praise to first responders and health care professionals for their hard work and service. What many fail to consider, however, is the lasting effect such a horrific and traumatic event can have on the first responders whose job it is to pick up the pieces after attackers rip the world apart.

This Note begins by discussing the struggle of Gerry Realin, one of the police officers tasked with removing the bodies of the slain after the shooting. Officer Realin was deeply affected by the experience, and is currently in a fight with the state of Florida to have his PTSD covered by workers' compensation. Under current Florida law, first responders who experience psychological trauma on the job are not entitled to paid days off or to have their medical bills reimbursed by their employer, absent an accompanying physical injury. This Note argues that the current Florida workers' compensation statutory scheme results in unfairness to first responders, a class of people who put their lives on the line and frequently risk exposure to dangerous and highly stressful events. In addition, this Note addresses the constitutional arguments against such laws and proposes legislative changes necessary to remedy this injustice. Unfortunately, horrific events such as the Pulse shooting are seemingly

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** J.D., University of Florida 2018; B.S., University of Florida 2015. Thank you to my friends at the *Florida Law Review* for all of their dedication and hard work. To my mom, a brilliant workers' compensation attorney and even better mother, thank you for supporting me in everything I do, and for your knowledge and expertise in workers' compensation law. To my dad, thank you for setting an unreachable standard for what a man, father, and legal professional should be. To my amazing sisters, thank you for continuing to inspire me with your determination and drive toward success. Lastly, endless thanks to my fiancé for her patience, encouragement, and brilliance; you've always pushed me to be the best person I can be, and I would not be where I am without you. Every aspiration I've undertaken in life has been met with nothing but guidance, love, and unwavering support from my family and friends, so this Note is dedicated to them. I would also like to extend a special thank you to all the first responders who put their lives on the line every day to keep our society safe. It is my hope that this Note calls attention to the continued need for legislative reform, enabling injured heroes to finally receive the support they both require and deserve.

becoming more frequent, and legislators need to reevaluate the effect these laws have on the men and women tasked with keeping our society safe.

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INTRODUCTION

On June 12, 2016, Orlando Police Department Officer Gerry Realin received a phone call at 8:30 a.m. informing him that he and his seven-

man hazmat team were to report for duty.¹ At first, Officer Realin thought the call would be routine: assisting the FBI with collecting evidence, conducting a meth-lab raid, or cleaning up a drug bust—common duties assigned to hazmat team officers.² Instead, Officer Realin and his team were tasked with collecting the forty-nine bodies of deceased victims of a shooting that had occurred in a local nightclub just a few hours prior.³ This shooting would be the nation's deadliest mass shooting in history, and worst terror attack since September 11, 2001.⁴ Officer Realin and his team worked nearly around the clock,⁵ carrying out their inconceivable task with dignity. They refused to let any other officers assist them with removing the bodies so that fewer people had to witness the horrific scene that lay behind the club doors.⁶

Other Orlando first responders recounted the horrific sight as a lone gunman opened fire on the unsuspecting club-goers. Julio Salgado, an EMT who arrived on scene shortly after the attack began, described “rows of wounded bodies” and “[p]atrons . . . running out of the building with open wounds, trying to escape.”⁷ As responding police officers entered the club, they were met with “chaos and darkness,” the only light in the building emanating eerily from a lone disco ball, revealing a dance floor

1. Mike Holfeld, *Pulse First Responder Still Having Nightmares, Flashbacks*, WKMG CLICKORLANDO (Aug. 23, 2016, 4:35 PM), <http://www.clickorlando.com/news/pulse-orlando-shooting/opd-first-responder-i-can-still-see-all-the-blood>.

2. Christopher Brennan, *Orlando First Responder Cannot Claim PTSD on Workers' Comp*, N.Y. DAILY NEWS (Aug. 23, 2016, 7:32 PM), <http://www.nydailynews.com/news/national/orlando-responder-claim-ptsd-workers-comp-article-1.2762932>; Holfeld, *supra* note 1; see also *HAZMAT Team*, SAFEOPEDIA, <https://www.safeopedia.com/definition/1114/hazmat-team> (last visited Feb. 9, 2017) (defining a hazmat team as “an organized group of professionals . . . specially trained to handle hazardous materials or dangerous goods”).

3. Brennan, *supra* note 2.

4. Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>; see also Wm. Robert Johnston, *Worst Terrorist Strikes in the United States*, JOHNSTON'S ARCHIVE (Jan. 2, 2017), <http://www.johnstonsarchive.net/terrorism/wrjp255us.html> (listing the Pulse nightclub shooting as the fifth deadliest domestic terror attack of any kind in the past century). This Note was written prior to the horrific shooting in Las Vegas, Nevada on October 1, 2017 in which fifty-eight people were killed and at least 500 more were injured. Holly Yan et al., *Las Vegas Shooting: Bodycam Footage Shows First Response*, CNN (Oct. 7, 2017, 2:36 AM), <http://www.cnn.com/2017/10/03/us/las-vegas-shooting-investigation/index.html>.

5. Field Sutton, *Orlando Police Officer Has PTSD; Could Lose Everything Because of State Loophole*, WFTV (Aug. 19, 2016, 6:29 PM), <http://www.wftv.com/news/local/orlando-police-officer-has-ptsd-could-lose-everything-because-of-state-loophole/426684791>.

6. Abe Aboraya, *The Politics of PTSD After Pulse First Responder Goes Public with Diagnosis*, WMFE (Sept. 14, 2016), <http://www.wmfe.org/the-politics-of-ptsd-after-pulse-first-responder-goes-public-with-diagnosis/64137>.

7. Morgan Winsor et al., *After Orlando Shooting, First Responders Grapple with Psychological Toll*, ABC NEWS (June 21, 2016, 7:00 AM), <http://abcnews.go.com/Health/orlando-shooting-responders-grapple-psychological-toll/story?id=39992495>.

covered in blood and bullet casings.⁸ One of the most haunting descriptions from a first responder involved “a symphony of familiar ringtones . . . each ring [signifying the] families of the dead . . . desperately trying to reach their loved ones after learning of the mass shooting.”⁹ The brave men and women who worked tirelessly that night will forever be haunted by what they experienced.

Officer Realin and several other Orlando first responders who answered the call that night have since been diagnosed with PTSD.¹⁰ Officer Realin suffers from hypertension, nightmares, loss of sleep, and flashbacks to the event.¹¹ He is currently under the care of a psychologist, psychiatrist, and cardiologist, and has been hospitalized for hypertension since the incident.¹² He returned to work two weeks after the shooting, but after passing out on the job he began calling in sick, using his department-given sick days to recover.¹³ Due to his symptoms, Officer Realin’s psychiatrist placed him on “no work” status and told him that he should not return to work due to his debilitating flashbacks and nightmares.¹⁴ Before long, Officer Realin depleted all of his vacation time and sick days, and the department placed him on paid leave.¹⁵ Although he is currently receiving paid leave from the Orlando Police Department, Officer Realin and his family are worried that the financial assistance may stop at any time.¹⁶ This worry stems from the fact that, while

8. *Id.*; see also Jim Ash, *Lawmakers Searching for a Workers’ Comp Cure*, WUSF NEWS (Dec. 5, 2016), <http://wusfnews.wusf.usf.edu/post/lawmakers-searching-workers-comp-cure#stream/0> (“Relin [sic] stood for hours in pools of human blood to remove bodies from the Pulse nightclub.”).

9. Caitlin Doornbos, *First Responders ‘Resilient,’ Coping After Pulse Shooting*, ORLANDO SENTINEL (June 25, 2016), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-shooting-first-responder-cope-20160624-story.html>.

10. Frances Robles, *Orlando Officers Grapple with Trauma and Red Tape After Massacre*, N.Y. TIMES (Oct. 27, 2016), <http://www.nytimes.com/2016/10/28/us/orlando-shooting-police.html> (offering officer accounts of struggling to return to work in the aftermath of the Pulse shooting).

11. Bob Kealing, *Local Lawmaker: Time to Re-draft First Responder Workers’ Compensation Laws*, WESH 2 NEWS (Sept. 26, 2016, 7:19 PM), <http://www.wesh.com/news/local-lawmaker-time-to-redraft-first-responder-workers-compensation-laws/41839516>.

12. Joe Startz on behalf of Gerry Realin, *Officer Realin Support Fund*, GOFUNDME (Aug. 17, 2016), <https://www.gofundme.com/officergerryrealin>.

13. Cody Gohl, *Pulse First Responder Is in Danger of Losing His Job*, NEWNOWNEXT (Aug. 24, 2016), <http://www.newnownext.com/pulse-nightclub-first-responder-ptsd/08/2016/?device=1#openuserprofile=4ccfd80303d8cf4c000103d8cf4c>.

14. Brennan, *supra* note 2; Holfeld, *supra* note 1.

15. Nico Lang, *Florida Denies Pulse First Responder Workers’ Comp for PTSD*, ADVOCATE (Aug. 23, 2016, 11:55 AM), <http://www.advocate.com/politics/2016/8/23/florida-denies-pulse-first-responder-workmans-comp-ptsd>.

16. Christopher Brennan, *Orlando First Responder with PTSD Pushes for Mental Health Care*, N.Y. DAILY NEWS (Sept. 21, 2016, 8:22 PM), <http://www.nydailynews.com/news/national/bill-push-post-orlando-responder-ptsd-coverage-article-1.2801332>. Since the spring of

physical injuries and mental injury that results from physical injury are fully covered by workers' compensation laws in Florida, purely mental injuries are not.¹⁷

Current Florida workers' compensation statutes differentiate between mental injuries accompanied by a compensable physical injury and injuries that are purely mental in nature that are unaccompanied by a physical injury.¹⁸ For purely mental injury, also known as mental-mental injury,¹⁹ current statutes do not provide a right for first responders to receive indemnification,²⁰ such as recouped vacation and sick leave, reimbursement for medical treatment received prior to the compensation claim, paid days off, or lost wages.²¹ Therefore, while Officer Realin is entitled to continue to have his medical treatment paid for by the police department, they are under no obligation to reimburse him for any prior medical expenses or time missed, or to continue to pay his salary.²² A spokesperson for the police department stated that Officer Realin can apply for compensation through the department's disability committee, and if he can prove that his injury inhibited his ability to work and was suffered on the job, his time could be reimbursed.²³ However, Officer Realin and his attorney argue that this process typically adheres to the protocols set forth by the state workers' compensation statutes.²⁴ Compensation through that channel is therefore far from certain, and is often subject to lengthy bureaucratic struggles.²⁵ Faced with the

2017 when this Note was completed, the Orlando Police Department stopped paying Officer Realin, but he was ultimately approved for early retirement benefits by the police pension board. Christal Hayes, *Orlando Police Stops Paying Cop with PTSD After Pulse: 'Where Is Orlando United Now?'*, ORLANDO SENTINEL (June 30, 2017, 11:15 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-gerry-realin-pulse-orlando-police-20170630-story.html>; David Harris, *Pension Board Approves Early Retirement for Orlando Police Officer with PTSD After Pulse*, ORLANDO SENTINEL (July 13, 2017 (July 13, 2017, 4:40 PM), <http://www.orlandosentinel.com/news/breaking-news/os-gerry-realin-pension-20170713-story.html>.

17. FLA. STAT. § 112.1815 (2017); *id.* § 440.093.

18. § 112.1815.

19. Adam Tucker, *How Denying Mental-Mental Claims Frustrates the Central Purposes of Workers' Compensation Law*, 31 J. LEGAL MED. 467, 470 (2010).

20. § 112.1815(2)(a)(3).

21. Lang, *supra* note 15; *Workers' Compensation*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/Workers'+Compensation> (last visited June 21, 2016) (describing generally what falls under the category of "indemnity benefits" in the realm of workers' compensation law).

22. Holfeld, *supra* note 1.

23. Gohl, *supra* note 13.

24. *Id.* For example, section 112.1815, as previously discussed, flatly denies indemnification for first responder mental injury that is unaccompanied by physical injury. It follows then, that if a committee looked to this statute for guidance in determining compensability of an injury, it would ultimately deny coverage.

25. Robles, *supra* note 10 (citing how two officers described "weekslong [sic] bureaucratic struggles" to obtain financial support as their employer attempted to "patch together resources").

uncertainty of whether he will continue to receive financial support, Officer Realin has resorted to creating a GoFundMe account in an effort to elicit donations.²⁶ Unsurprisingly, the added stress of not knowing whether he will be able to continue supporting his family financially has only augmented the stress and anguish caused by the shooting.²⁷

It is estimated that more than 100,000 officers across the country suffer from PTSD, many of whom find themselves in a similar situation to Officer Realin.²⁸ Currently, eighteen states, including Florida, refuse to recognize purely psychological trauma unaccompanied by a physical injury as a compensable injury eligible for full workers' compensation benefits.²⁹ Officer Realin and his attorney are actively advocating for a change in the current Florida workers' compensation law that would provide long-term disability payments if he is unable to return to his job for an indefinite period of time.³⁰ The brave men and women who serve as first responders dedicate their lives to protecting others. As part of that dedication, they risk finding themselves in traumatic circumstances that may leave a lasting impact on them psychologically. Unfortunately, the pain of witnessing highly traumatic events stays with these men and women long after the last rescue has been made or the last body has been removed.³¹ Recently, tragic attacks such as the Pulse shooting are occurring with more and more frequency,³² providing more opportunities

26. *Id.*; Joe Startz, *supra* note 12.

27. Brennan, *supra* note 16; Robles, *supra* note 10 (“‘Not knowing if my kids are going to have health insurance or [if] we’re going to get a paycheck to pay the bills, just not knowing the financial future is a real stress,’ Officer Realin said. ‘I don’t know what’s going to happen. Nothing is resolved.’”).

28. See Lang, *supra* note 15; see also Pamela Kulbarsh, *2015 Police Suicide Statistics*, OFFICER.COM (Jan. 13, 2016), <http://www.officer.com/article/12156622/2015-police-suicide-statistics> (estimating that roughly 15–18% of police officers, about 150,000 nationally, suffer from post-traumatic stress). It is also believed that this figure might be less than the actual number of law enforcement officers struggling with PTSD, due to underreporting and unwillingness to seek help. Kulbarsh, *supra*.

29. Ashley R. Bailey, *Stress Is [Not] Part of the Job: Finding the Appropriate Balance Between Fairness and Efficiency to Compensate Posttraumatic Stress Disorder Under Workers’ Compensation Statutes*, 2015 WIS. L. REV. 507, 518. Those states are: Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Kansas, Kentucky, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. *Id.* at 518 n.82.

30. Kealing, *supra* note 11.

31. Kulbarsh, *supra* note 28 (citing research that indicates that as many as 1/3 of active and retired law enforcement officers suffer from PTSD, some of whom do not even realize they suffer from the disorder).

32. See Michael S. Schmidt, *F.B.I. Confirms a Sharp Rise in Mass Shootings Since 2000*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/25/us/25shooters.html?_r=0 (“‘There were, on average, 16.4 such shootings a year from 2007 to 2013, compared with an average of 6.4 shootings annually from 2000 to 2006. In the past 13 years, 486 people have been killed in such shootings, with 366 of the deaths in the past seven years.’”); see also Tanya Basu,

for first responder exposure to circumstances that may cause a lasting, negative effect on their psychological well-being. The Pulse tragedy has called attention to the increased need for Florida legislators to amend current law and allow first responders to receive full compensation for legitimate, purely mental injuries. Doing so honors the service of dedicated first responders and provides them with the compensation and financial assurance they both require and deserve.

Part I of this Note will address PTSD generally, as well as the give-and-take bargain that the workers' compensation system embodies. Part II describes the current posture of Florida's workers' compensation law, referencing both statutes and illustrative case law to better explain how Florida treats mental injuries. Part III demonstrates how such a categorical denial of indemnification for first responders' purely mental injuries is unconstitutional, and argues that evidentiary and floodgate concerns do not outweigh the need to compensate legitimate injury. Lastly, Part IV proposes a model statute to be adopted by the Florida legislature, and offers a methodology for mental injury claim evaluation to ease whatever burden courts may feel after allowing such claims into the courtroom.

I. BACKGROUND: PTSD GENERALLY & THE WORKERS' COMPENSATION QUID PRO QUO

To fully comprehend the gravity of Officer Realin's mental injury, and to understand why Florida's legislature has been hesitant to compensate purely mental injuries, it is helpful to have a general understanding of post-traumatic stress disorder, commonly known as PTSD. Additionally, it is important to note that workers' compensation law is entirely state specific. Each state legislature weighs pros and cons in deciding what laws to enact and what injuries to compensate to best serve the overarching workers' compensation goal. A basic understanding of this overall goal will assist with fully understanding why that goal is frustrated by current Florida statutes.

A. PTSD Generally

While PTSD is far from new, it was officially recognized by the American Psychiatric Association in 1980 after people took note of Vietnam War veterans' struggles to cope with their experiences from battle after returning home.³³ When faced with extreme sensory overload

This Chart Shows How Mass Public Shootings in the U.S. Have Risen, TIME (Aug. 4, 2015), <http://time.com/3983557/mass-shootings-america-increasing/> (depicting graphically how the average rate of mass public shootings has risen from a 1.1 incidence rate in the 1970s to about 4.5 incidences per year between 2010 and 2013).

33. Nicholas B. Haynes, *Indecisiveness in Compensating Post Traumatic Stress Disorder: Where Does Illinois Leave First Responders?*, 34 S. ILL. U. L.J. 151, 154 (2009).

and stress, like the stressful combat situations faced by the soldiers in Vietnam, the human brain responds by generating what is known as the “fight or flight” response.³⁴ Adrenaline, cortisol, and norepinephrine flood your brain and your heart rate increases.³⁵ This, in turn, increases the amount of blood pumped to extremities and muscles, elevates your blood pressure, and provides a surge of energy that focuses your attention, allowing you to deal with the emergency situation.³⁶ But what happens after the body returns to its normal state? As hormones level off and bodily functions return to normal, you are left to process the events you have just experienced. Most people recover from the initial symptoms of the fight-or-flight response naturally,³⁷ but for others returning to a state of normalcy is not that simple. For some, exposure to trauma such as combat, domestic violence, rape, sexual abuse, burns, disasters, violent crime, terrorist attacks, or other significant, stressful events can result in PTSD.³⁸

PTSD is “a psychological reaction that occurs after experiencing a highly stressing event . . . outside the range of normal human experience . . . that is usually characterized by depression, anxiety, flashbacks, recurrent nightmares, and avoidance of reminders of the event.”³⁹ The Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (DSM-V) lists the criteria considered when making a PTSD diagnosis.⁴⁰ According to the DSM-V, the “essential feature of posttraumatic stress disorder (PTSD) is the development of characteristic symptoms following exposure to one or more traumatic events.”⁴¹ PTSD can result from “[e]xposure to actual or threatened death, . . . [d]irectly

34. *Stress Effects on the Body*, AM. PSYCHOLOGICAL ASS’N (2016), <http://www.apa.org/helpcenter/stress-body.aspx>.

35. Sarah Klein, *Adrenaline, Cortisol, Norepinephrine: The Three Major Stress Hormones, Explained*, HUFFINGTON POST (Apr. 19, 2013, 8:42 AM), http://www.huffingtonpost.com/2013/04/19/adrenaline-cortisol-stress-hormones_n_3112800.html (explaining what each of these stress hormones are, where they are produced from, and what effect each of them has on the human body).

36. *Id.*; AM. PSYCHOLOGICAL ASS’N, *supra* note 34.

37. *Post-Traumatic Stress Disorder*, NAT’L INST. OF MENTAL HEALTH (Feb. 2016), <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml>.

38. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 10 (2001); *see also* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271–80 (5th ed. 2013) [hereinafter *DSM-V*], <https://psicovalero.files.wordpress.com/2014/06/dsm-v-manual-diagn3b3stico-y-estadc3adstico-de-los-trastornos-mentales.pdf> (describing the diagnostic criteria used in diagnosing PTSD, the stressors known to cause PTSD, diagnostic features of the disorder, prevalence, and risks associated with the disorder).

39. *Post-Traumatic Stress Disorder*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/post-traumatic%20stress%20disorder> (last visited May 17, 2017).

40. *DSM-V*, *supra* note 38, at 271–72.

41. *Id.* at 274.

experiencing [a] traumatic event(s) . . . [or] [e]xperiencing repeated or extreme exposure to aversive details of the traumatic event(s).”⁴² The DSM-V even cites as an example of a traumatic event “first responders collecting human remains.”⁴³ Additionally, the other criteria necessary for a PTSD diagnosis include (1) the presence of one or more “intrusion symptoms” associated with the causative event;⁴⁴ (2) “[d]issociative reactions” or flashbacks; (3) “[p]ersistent avoidance of stimuli associated with the event”; (4) negative alterations in mood; (5) “alterations in arousal and reactivity” associated with the event (such as “[i]rritable behavior and angry outbursts,” “[h]ypervigilance,” or “[s]leep disturbance”); (6) the duration of the aforementioned criteria lasting longer than one month; and the requirement that (7) the symptoms cause “significant distress or impairment in social, occupational, or other important areas of functioning.”⁴⁵

Symptoms of PTSD can include re-experiencing the trauma, avoiding situations or activities reminiscent of the original trauma, hypervigilance, and health problems such as hypertension.⁴⁶ Essentially, an individual with PTSD suffers from a persistent re-experiencing of the traumatic event; “[e]very time the traumatic event is recollected, it triggers a physiological arousal and stress response, intense fear, and anxiety of the event.”⁴⁷ PTSD victims can spend their lives running from triggers that cause them to slip back into the painful memory of the traumatic event. “A color, a light, a sound, a word, almost anything can trigger a reminder of that feared incident, causing the same response every time, reliving the entire event” from memory.⁴⁸ The fear, pain, helplessness, and all of the physical reactions that accompanied the initial event, are all re-experienced.⁴⁹ Fortunately, since 1980 PTSD has become more widely recognized and understood by our society, and the number of individuals who have been successfully diagnosed and treated for PTSD continues to increase every year.⁵⁰

42. *Id.* at 271.

43. *Id.*

44. *Id.* Intrusion symptoms are further defined to include “recurrent, involuntary, and intrusive distressing memories” of the traumatic event; “recurrent distressing dreams” related to the event; flashbacks in which the individual feels or acts as though the event is recurring; and intense psychological distress when exposed to “cues” that symbolize the event. *Id.*

45. *Id.* at 271–72.

46. *Id.* at 272, 275; Garcia-Rill & Beecher-Monas, *supra* note 38, at 14, 16.

47. Garcia-Rill & Beecher-Monas, *supra* note 38, at 16–17.

48. *Id.* at 17. For Officer Realin, some of those triggers include Sharpies, face masks, and San Francisco 49ers jerseys; “Sharpies because of the markers the authorities used to put the names of the victims on a board. Masks for the one he wore that day to keep blood off his face. Forty-nine for the number of people who were killed.” Robles, *supra* note 10.

49. Garcia-Rill & Beecher-Monas, *supra* note 38, at 17.

50. Haynes, *supra* note 33, at 154 (noting that one of the reasons PTSD has become more prevalent in recent years is due to the number of soldiers returning from Iraq who suffer from

B. Workers' Compensation Purpose and the *Quid Pro Quo*

Workers' compensation law functions in a unique fashion. Since its genesis, it has been legislated with no federal involvement and is therefore the product of absolute state authority.⁵¹ States possess the right to decide the framework and standards they believe best benefit their citizens and what injuries they believe should be compensable under those standards.⁵² The driving philosophy behind workers' compensation law is "belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries."⁵³ By design, the workers' compensation system functions as a type of *quid pro quo*: it is a "no-fault"⁵⁴ system where employers are shielded from excessive liability by predetermined sums to be paid when an employee files a claim for a work-related injury.⁵⁵ In exchange for employer limited liability, the employee is guaranteed some (typically modest) compensation for waiving their right to pursue the action in civil court, and benefits from a streamlined system well accustomed to handling workers' compensation claims.⁵⁶

In Florida, the legislative intent of workers' compensation law is codified in Florida Statutes section 440.015. The statute states that the

PTSD symptoms); *PTSD Statistics*, PTSD UNITED, <http://www.ptsdunited.org/ptsd-statistics-2/> (last visited June 21, 2017) ("In the past year alone the number of diagnosed cases in the military jumped 50%."); see generally Jaimie L. Gradus, *Epidemiology of PTSD*, U.S. DEP'T OF VETERAN'S AFF., <http://www.ptsd.va.gov/professional/PTSD-overview/epidemiological-facts-ptsd.asp> (last visited May 17, 2017) (describing studies conducted to evaluate the prevalence of PTSD in men, women, adolescents, and other members of the community).

51. Logan Burke, Note, *Finding a Way Out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. VA. L. REV. 889, 890 (2015).

52. Tucker, *supra* note 19, at 468.

53. Bailey, *supra* note 29, at 513 (quoting 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.03 (Matthew Bender ed.)). German Chancellor Otto von Bismarck, who passed the first compensation law in 1884, believed a system where employees agree not to sue when they are injured and employers agree to pay medical bills and lost wages would serve could be a way to humanize the industrial revolution. Ash, *supra* note 8; Burke, *supra* note 51, at 891.

54. Workers' compensation is a no-fault system because "negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his or her rights and in the sense that the employer's complete freedom from fault does not lessen its liability." Bailey, *supra* note 29, at 513; see also LARSON, *supra* note 53, § 1.02 ("[T]he right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.").

55. Burke, *supra* note 51, at 895.

56. *Id.* at 890–91; LARSON, *supra* note 53, § 1.01 (stating that the injured employee is "automatically entitled to certain benefits whenever the employee suffers a 'personal injury by accident arising out of and in the course of employment,'" and in exchange, "give[s] up [his or her] common-law right to sue the employer for damages for any injury covered by the act").

assurance of “quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful employment” is the primary goal of workers’ compensation law.⁵⁷ Additionally, “[i]t is the specific intent of the Legislature that workers’ compensation cases shall be *decided on their merits*.”⁵⁸ Furthermore, Florida Statutes section 440.11 codifies the exclusive liability provision, stating that “[t]he liability of an employer prescribed in [the workers’ compensation statutes] shall be exclusive and in place of all other liability.”⁵⁹ In light of these statutes, it is certainly curious how a blanket denial of workers’ compensation indemnity benefits for first responders with PTSD or other purely mental injuries furthers these explicitly stated legislative intentions.

Workers’ compensation functions like a contractual agreement between employer and employee, with both sides making concessions to avoid the cost and unpredictability that inevitably accompanies civil tort claims.⁶⁰ However, for this system to work, the employee must have adequate compensation for her injury. If she does not, what benefit does she gain from the agreement? For first responders who sustain physical injury in Florida, the compromise is arguably fair. Physically injured employees benefit from the no-fault system and are typically provided with full compensation for legitimate claims.⁶¹ Employees with purely mental injuries, however, do not receive the same consideration, and are effectively left in limbo. First responders who sustain purely mental injury have essentially signed away their right to pursue full compensation for their injury in civil court. Without the provision of indemnification through the avenue of workers’ compensation reimbursement, those injured first responders are left without recourse.

II. FLORIDA’S CURRENT WORKERS’ COMPENSATION LAW

The Florida Statutes that govern the delivery of workers’ compensation benefits for a typical injured employee completely bar claims for purely mental injury.⁶² However, several years ago an exception was created for first responders, allowing firefighters,

57. FLA. STAT. § 440.015 (2017).

58. *Id.* (emphasis added).

59. *Id.* § 440.11. For a general discussion about the “Exclusiveness Rule” of workers’ compensation, see 9 LARSON, *supra* note 53, § 100.01.

60. As Logan Burke points out, the agreement stricken by employer and employee is paradoxical. Both sides make themselves more vulnerable while simultaneously better safeguarding themselves from financial injury. Employees benefit from guaranteed payments, yet give up the right to sue in tort in exchange. Employers promise to provide employees with certain benefits irrespective of employer fault, and in exchange are insulated from the possibility of excessive tort judgments. Burke, *supra* note 51, at 892.

61. § 440.093; *id.* § 112.1815.

62. § 440.093(1).

paramedics, EMTs, and law enforcement officers to bring claims for mental injury unaccompanied by any sort of physical injury.⁶³ Confoundingly, the legislature stopped short of providing full coverage. Despite recognizing that first responder mental injuries can and do exist, the legislature decided to limit recovery to only medical benefits, explicitly excluding the provision of indemnification.⁶⁴ During the 2017 legislative session, a handful of bills were proposed in both the Florida House and Senate that, if passed, would amend or replace current law and provide both medical and indemnity benefits to first responders.⁶⁵ However, the bills failed to progress through the requisite legislative subcommittees in time, and died when the 2017 session ended.⁶⁶ In analyzing the issues created by the distinction between types of mental injury and provision of some benefits but not others, a brief review of the current Florida Statutes and illustrative case law is helpful. In addition, it is important to note that although such laws distinguish between employees with different injuries and limitations, there is no direct conflict with the Americans with Disabilities Act.⁶⁷

A. Florida's Mental or Nervous Disorders and First Responder Statutes

Florida Statutes sections 440.093 and 112.1815 describe the prerequisites for claiming a compensable mental injury. Section 440.093 states that “a mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment” and “[a] physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter.”⁶⁸ Additionally, the mental or nervous injury must be

63. Harper Gerlach PL, *Florida Lawmakers Broaden Workers' Comp. Coverage for 'First Responders,'* 19 NO. 8 FLA. EMP. L. LETTER 1 (2007).

64. *Id.* (“[T]he first responder may receive medical benefits (but not indemnity benefits) . . . [and] may receive indemnity benefits [only] if a compensable physical injury accompanies the mental or nervous injury.”); see § 112.1815(3) (excluding indemnification unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury). It is unclear why the legislature chose to explicitly deny indemnity. The distinction seems arbitrarily drawn as providing first responders with medical benefits for proven, legitimate mental injury claims validates such injuries and shows they should be given credence. If medical benefits are provided, the employee has already demonstrated the manifestation of an injury by clear and convincing evidence, the standard used to verify compensable injuries. *Id.*

65. S. 516, 2017 Leg., 119th Sess. (Fla. 2017); H.R. 1019; 2017 Leg., 119th Sess. (Fla. 2017); S. 1088, 2017 Leg., 119th Sess. (Fla. 2017).

66. S. 516, 2017 Leg., 119th Sess. (Fla. 2017); H.R. 1019; 2017 Leg., 119th Sess. (Fla. 2017); S. 1088, 2017 Leg., 119th Sess. (Fla. 2017).

67. The ADA is codified in the United States Code, beginning at 42 U.S.C. § 12101 (2012); *Hensley v. Punta Gorda*, 686 So. 2d 724, 726–27 (Fla. 1st DCA 1997). See *infra* Section II.D for ADA preemption discussion.

68. § 440.093(1).

demonstrated by clear and convincing evidence and “[t]he compensable physical injury must be and remain the major contributing cause of the mental or nervous condition.”⁶⁹

In 2007, Governor Charlie Crist signed a bill that broadened the compensation coverage available to first responders,⁷⁰ now codified in Florida Statutes section 112.1815. The statute defines “first responder” as “a law enforcement officer, . . . a firefighter, . . . an emergency medical technician [EMT] or paramedic . . . employed by state or local government” and does allow for some compensation, such as medical benefits, for strictly mental injury.⁷¹ However, the statute explicitly states that “[f]or a mental or nervous injury arising out of the employment unaccompanied by a physical injury . . . *only medical benefits* . . . shall be payable,” and that “payment of indemnity . . . may not be made unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.”⁷² Indemnity benefits help compensate an employee for his loss of income and earning capacity,⁷³ and in some circumstances are crucial to an employee who is unable to return to work for a prolonged or undetermined period of time. Without such benefits, the employee may find himself with no viable source of income,⁷⁴ and like Officer Realin, may face uncertainty as to how he will continue to support his family financially.

B. *Illustrative Case Law: McKenzie v. Mental Health Care*

The Florida First District Court of Appeal discussed Section 440.093 at length in *McKenzie v. Mental Health Care, Inc.*⁷⁵ In *McKenzie*, a registered nurse working in a treatment center that housed patients with behavioral and mental disorders was struck in the throat by a violent patient, resulting in physical injury.⁷⁶ In addition, the nurse claimed she sustained psychological injury as a result of the attack, but her employer denied workers’ compensation for this claim.⁷⁷ The *McKenzie* court stated that the purpose of workers’ compensation law is to provide

69. *Id.* § 440.093(2).

70. Harper Gerlach PL, *supra* note 63, at 1.

71. § 112.1815.

72. *Id.* § 112.1815(2)(a)(3) (emphasis added).

73. *Workers’ Compensation*, THEFREECTIONARY.COM, [http://legal-dictionary.thefreedictionary.com/Workers’+Compensation](http://legal-dictionary.thefreedictionary.com/Workers'+Compensation) (last visited June 21, 2016).

74. Christopher J. Boggs, *Benefits Provided Under Workers’ Compensation Laws*, INS. J. (Mar. 23, 2015), <http://www.insurancejournal.com/blogs/academy-journal/2015/03/23/360655.htm> (describing how injured employees may be completely unable to work and garner the same pay as they could prior to their injury, resulting in either a complete loss of income or a considerably diminished lifestyle).

75. 43 So. 3d 767 (Fla. 1st DCA 2010).

76. *Id.* at 768.

77. *Id.*

defined benefits for certain injuries caused by workplace accidents.⁷⁸ The court continued to describe situations in which mental or nervous injuries might occur.⁷⁹ Notably, the court recognized that the second sentence of section 440.093(1) recognizes and makes compensable “mental or nervous injuries that accompany a separate physical injury serious enough to require medical treatment.”⁸⁰ The court believed it was particularly important to recognize that the workplace accident at issue in this case caused two separate injuries, one physical and one mental.⁸¹ Another example of such contemporaneous injuries might be if an employee was sexually assaulted or battered at work, resulting in both a compensable physical injury and an accompanying mental injury. According to the court in *McKenzie*, in such a situation the employee “simultaneously suffered *two* compensable workplace injuries.”⁸² The court contrasted this scenario with circumstances giving rise to a purely psychological injury, such as an employee being robbed at gunpoint or witnessing a horrific event in the workplace.⁸³ Although the legislature recognizes that such mental injuries can occur and do exist, they are nonetheless not compensable under the current statutory scheme.⁸⁴

C. Types of Mental Injury

As the court in *McKenzie* noted, there are several different types of mental injuries considered by the legislature. The court discussed four types of injury, two of which are compensable and two of which are not.⁸⁵ These different injury scenarios can further be broken down into the three sub-categories of (1) physical–mental injury, (2) mental–physical injury, and (3) mental–mental injury.⁸⁶

78. *Id.* at 769.

79. *Id.* at 769–70.

80. *Id.* at 769.

81. *Id.*

82. *Id.* The court in *McKenzie* appeared to be comfortable with recognizing and compensating the accompanying mental injury because the injury met the requirements of sections 440.09 and 440.093 of the Florida Statutes. FLA. STAT. § 440.09(1) (2017) (requiring that the injury arise out of work performed in the course and scope of employment; that the injury be “established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries”); *id.* § 440.093(2) (requiring that claimants demonstrate injury by clear and convincing evidence “by a licensed psychiatrist meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association”; and that the injury “remain[s] the major contributing cause of the mental or nervous condition and the compensable physical injury . . . be at least 50 percent responsible for the mental or nervous condition”).

83. *McKenzie*, 43 So. 3d at 769.

84. *Id.*

85. *Id.* at 769–70.

86. Burke, *supra* note 51, at 896.

A *physical–mental* injury occurs when an employee suffers a physical injury that causes some psychological response in the employee, resulting in an accompanying mental injury subsequent to or concurrent with the physical injury.⁸⁷ Examples of this might include an employee who suffers a painful burn or loss of limb on the job, and over time the employee becomes clinically depressed, develops PTSD, severe anxiety, or some other adverse mental response resulting from the earlier physical injury.⁸⁸ Pursuant to subsection 440.093(2) and the second sentence of subsection 440.093(1), the psychological injury that manifests is compensable as long as the underlying physical injury is proven to be the “major contributing cause” of the mental injury, or the psychological injury is deemed to have occurred simultaneously with the physical injury.⁸⁹ These types of claims are generally compensable because the employee has suffered a “distinct, objective physical and traumatic injury during the course of his employment.”⁹⁰

Mental–physical classification, on the other hand, encompasses physical injuries that result from mental or nervous injury that are unaccompanied by a clear causative physical trauma.⁹¹ As the third sentence of subsection 440.093(1) dictates, employees injured under this scenario do not receive compensation.⁹² An example of this situation might be where an employee suffers a heart attack or develops high blood pressure due to constant and prolonged workplace pressures. Because the physical injury claimed manifested as a result of mental injury, it is not compensable under Florida law. Despite the objective nature of the resulting physical injury, courts and legislators are concerned about the difficulty of proving that the injury was actually caused by the workplace stimuli.⁹³

Lastly, *mental–mental* injury claims, like the injury claimed by Officer Realin, do not have an underlying causative physical component.⁹⁴ This type of injury is addressed by the first sentence of

87. *Id.*

88. Burke offers the example of an oil rig worker who is badly burned in a rig fire. The worker’s physical injuries ultimately heal, but the worker develops a paralyzing fear that another fire will inevitably occur, further disabling his ability to perform his job. *Id.*

89. FLA. STAT. § 440.093(1)–(2) (2017); *McKenzie*, 43 So. 3d at 770.

90. Burke, *supra* note 51, at 896.

91. *Id.*; *McKenzie*, 43 So. 3d at 769–70.

92. *Id.*; § 440.093(1).

93. Burke, *supra* note 51, at 896. Despite the objective, physical response, legislators fear the burden that accompanies proving what caused injuries of this kind. Using the heart attack example, a loud, abrupt noise might induce extreme fright and cause someone to suffer a heart attack; however, certain individuals are more susceptible to suffering heart attacks than others. *Id.* at 896–97. In such a circumstance, it cannot clearly be concluded that the major contributing cause of the heart attack was the noise, and not the predisposition to heart attacks. *Id.*

94. *Id.* at 897. PTSD and other mental–mental injuries oftentimes manifest themselves in physical symptoms such as hypertension and other cardiac issues such as coronary heart disease.

section 440.093(1), which states that mental or nervous injuries “due to stress, fright, or excitement only,” are not considered a compensable injury deemed to have arisen out of the course of employment.⁹⁵ Like the robbery example provided by the court in *McKenzie*,⁹⁶ Officer Realin sustained no subsequent or contemporaneous physical injury while removing the bodies from the nightclub.⁹⁷ As such, his mental injury is not recognized as a compensable injury by Florida statutes. Legislatures justify their denial of compensation citing concerns about establishing causation, proof of injury, and degree of impairment.⁹⁸

McKenzie is helpful in understanding how Florida courts and legislators view what injuries are compensable and how they distinguish between types of mental injury. In Officer Realin’s case, because he suffered no physical injury while removing the bodies, he would have fallen under the purview of subsection 440.093(1), and absent the additional first responder statute he would not be entitled to any compensation benefits at all. This distinction between what benefits are awarded based on what type of mental injury is sustained is important, because despite the fact that Officer Realin is now entitled to ongoing medical compensation per the first responder statute, section 112.1815 still distinguishes between physical–mental and mental–mental injuries. First responders claiming purely mental injury enjoy only limited rights, while claimants who suffered an underlying physical injury are green-lighted to receive full compensation, including rights to indemnification. If Officer Realin had tripped and broken his leg while removing the bodies, he would have a stronger claim to full compensation.

D. Non-ADA Preemption

The First District has found no direct conflict between the Americans with Disabilities Act (ADA)⁹⁹ and Florida’s workers’ compensation

Steven S. Coughlin, *Post-traumatic Stress Disorder and Cardiovascular Disease*, 5 OPEN CARDIOVASCULAR MED. J. 164, 164 (2011). However, because such injuries lack an underlying physical injury that gave rise to the mental injury itself, it remains uncompensated by the Florida legislature. § 440.093(1).

95. § 440.093(1).

96. *McKenzie*, 43 So. 3d at 769 (“[A]n employee experiences mental trauma after being robbed at gunpoint but does not suffer a physical injury requiring medical treatment.”).

97. See *supra* INTRODUCTION.

98. Burke, *supra* note 51, at 897. It is thought that these evidentiary hurdles are compounded by the lack of unanimity between medicine and psychiatry, including differing methods of evaluation for mental–mental injuries. *Id. But see id.* (“[P]sychiatric injuries are better understood than ever before, an understanding that should be extended to the workers’ compensation framework within a changing workplace.”).

99. 42 U.S.C. §§ 12101–12213 (2012).

statutes that classify purely mental injuries as non-compensable.¹⁰⁰ In coming to this conclusion, the court in *Hensley v. Punta Gorda*¹⁰¹ reasoned that the Florida workers' compensation statutes were crafted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers' return to gainful reemployment at a reasonable cost to the employer."¹⁰² Conversely, the ADA is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to prevent the prejudicial treatment of disabled persons and to allow such persons to compete in the workplace."¹⁰³ The two bodies of law were therefore created with different intents and to satisfy two distinct goals. While Florida workers' compensation statutes address the needs of disabled individuals incapable of returning to their former employment, the ADA does not aim to guarantee equal rights to benefits for all disabled individuals.¹⁰⁴ Workers' compensation statutes denying compensation to individuals who suffered purely mental injuries are not preempted because the ADA does not mandate that all disabled persons must receive equal benefits, "regardless of their varying abilities to work."¹⁰⁵ As long as there are no unreasonable or unnecessary barriers to a disabled person's right to work, under the ADA an employer is under no legal duty to provide equal benefits for employees who have suffered different forms of mental injury.¹⁰⁶ The ADA therefore cannot be utilized to remedy the injustices created by the current Florida workers' compensation statutory scheme. Instead, constitutional challenges to the statutes from due process and access to the courts standpoints must be the vehicles used to effectuate change.

100. *Hensley v. Punta Gorda*, 686 So. 2d 724, 727 (Fla. 1st DCA 1997) ("Although entitlement to Florida workers' compensation benefits is subject to the anti-discrimination provisions of the ADA, it does not follow that the ADA necessarily preempts Florida workers' compensation laws.").

101. *Id.* at 724.

102. *Id.* at 727 (citing FLA. STAT. § 440.015 (Supp. 1994)).

103. *Id.*; see also Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1121–22 (2010) (describing the general accommodation requirements of employers under the ADA and characterizing the ADA as the "emancipation proclamation for people with disabilities").

104. *Hensley*, 686 So. 2d at 727. The ADA prohibits employers from "'discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to' hiring, discharge, and other terms and conditions of employment." Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 190 (2005) (quoting 42 U.S.C. § 12112(a) (2000)). The ADA only protects "qualified" individuals from discrimination by employers. *Id.* at 190–91 (defining "qualified individual" as someone who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

105. *Hensley*, 686 So. 2d at 727.

106. *Id.* at 728.

III. CONSTITUTIONAL ARGUMENTS

Both the U.S. and Florida Constitutions guarantee all natural persons certain inalienable basic rights, among which are the rights to enjoy and defend life and liberty, pursue happiness, and to acquire, possess, and protect property.¹⁰⁷ According to the Florida Constitution, if a citizen is deprived of life, liberty, or property for a sufficient reason, they are guaranteed due process of law, and shall have full access to the courts for redress of any injury.¹⁰⁸ Keeping in mind the *quid pro quo* created by the workers' compensation system, it is helpful to analyze how the Florida Supreme Court has balanced these constitutional rights with the reciprocity agreement between employer and employee.¹⁰⁹ This Part will analyze the constitutionality of Florida's first responder workers' compensation statute, both from due process and access to the courts standpoints. Ultimately, this Part argues that an indefinite, categorical denial of full coverage for all first responders who suffer mental-mental injury violates both U.S. and Florida constitutional guarantees.

A. *Due Process: The Castellanos v. Next Door Co. Standard*

To successfully bring a due process challenge, it must first be established that the claimant has a legitimate property interest the claimant desires to protect.¹¹⁰ In *Rucker v. City of Ocala*,¹¹¹ the Florida Supreme Court found that an injured employee's right to receive workers' compensation benefits qualifies as such an interest.¹¹² Florida courts have never considered a due process challenge to first responder indemnity benefits for PTSD. However, the Florida Supreme Court recently addressed a due process challenge to a different section of the current

107. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 2.

108. FLA. CONST. art. I, §§ 9, 21. While not stated expressly, as in the Florida Constitution, the right of access to courts is also implicit in the U.S. Constitution. *See* Judith Anne Bass, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U. L. REV. 871, 871 (1977) ("The right of access to the courts was such an integral part of the common law that the framers of our Federal Constitution perceived no need to guarantee this right expressly. Though not specifically provided for, the right of court access is nevertheless pervasive within the United States Constitution."). Over the years, courts have found a federal constitutional guarantee of access to courts in: the First Amendment's petition for redress of grievances clause, the Fifth and Fourteenth Amendments' due process clauses, the Sixth Amendment's right to speedy and public trial guarantee, the Fourteenth Amendment's privileges and immunities clause, and the Fourteenth Amendment's equal protection clause. *Id.* at 871-72.

109. *See supra* Section I.B.

110. *Rucker v. City of Ocala*, 684 So. 2d 836, 840 (Fla. 1st DCA 1996) ("Procedural due process rights derive from a property interest in which the individual has a legitimate claim.").

111. *Id.* at 836.

112. *Id.* at 840; *see also* *De Ayala v. Fla. Farm Bureau Cas. Ins.*, 543 So. 2d 204, 206 n.6 (Fla. 1989) ("[I]n the sense that the worker's compensation system replaced other rights formerly afforded to workers, we cannot agree . . . that worker's compensation is entirely in the nature of a privilege.").

workers' compensation code. In *Castellanos v. Next Door Co.*,¹¹³ the Florida Supreme Court was asked to evaluate the constitutionality of the mandatory fee schedule dictated by Florida Statutes section 440.34.¹¹⁴ The statute created an irrebuttable presumption that precluded any consideration or questioning of whether a fee award was reasonable to compensate a workers' compensation attorney.¹¹⁵ Despite the obvious unreasonableness of the statutorily determined rate to be paid to Castellanos's attorney,¹¹⁶ the Judge of Compensation Claims (JCC) and the First District were barred from reviewing the fee award for reasonableness.¹¹⁷ The fee schedule statute simply "presumes that the ultimate fee will always be reasonable . . . without providing any mechanism for refutation."¹¹⁸ The Florida Supreme Court found that such preclusion of any inquiry into reasonableness was unconstitutional under both the Florida and U.S. Constitutions as a violation of due process.¹¹⁹

As part of their analysis, the court set forth a three-part test used to determine the constitutionality of a statute's conclusive presumption.¹²⁰ The court must inquire into

- (1) whether the concern of the Legislature was 'reasonably aroused by the possibility of an abuse which it legitimately desired to avoid';
- (2) whether there was a 'reasonable basis for a conclusion that the statute would protect against its occurrence';
- and (3) whether 'the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.'¹²¹

For an irrebuttable presumption to pass a constitutional due process challenge, each prong of the test must be satisfied.¹²²

113. 192 So. 3d 431 (Fla. 2016).

114. FLA. STAT. § 440.34 (2016); *Castellanos*, 192 So. 3d at 432.

115. *Castellanos*, 192 So. 3d at 432.

116. Because section 440.34 uses a sliding scale to limit a claimant's ability to recover fees based on the amount of benefits obtained, regardless of the amount of time and energy actually expended, the fee awarded to Castellanos's attorney amounted to \$1.53 per hour for 107.2 hours of work. *Id.* at 433.

117. *Id.*

118. *Id.*

119. *Id.* at 432, 435 (holding that the statute violated both article I, section 9 of the Florida Constitution and Amendment XIV, Section 1 of the U.S. Constitution).

120. *Id.* at 444.

121. *Id.* (quoting *Recchi Am., Inc. v. Hall*, 692 So. 2d 153, 154 (Fla. 1997)).

122. *Id.* (noting that the challenged presumption in *Recchi* failed because the expense and other difficulties of individual determinations failed to justify the imprecision of the presumption, thus failing the test by not satisfying prong (3)).

It is instructive to focus on the court's analysis of the first and third prongs.¹²³ Applying those prongs to the situation of first responders provides a compelling argument that the first responder statute's irrebuttable presumption against indemnification for mental–mental injury should be found unconstitutional. In *Castellanos*, the court concluded that the fee schedule statute failed the first prong of the test, reasoning that while the fee schedule's conclusive presumption achieves the legislative goal of avoiding excessive attorney's fees by mandating fee standardization, "it does so in a manner that lacks any relationship to the amount of time and effort actually expended by the attorney."¹²⁴ Additionally, the court found that a concern about excessive fee awards is insufficient, as other safeguards are already in place to guard against the risk of excessive fees.¹²⁵ The court concluded that the statute would also fail the third prong of the test because judges of compensation claims are skilled in determining, awarding, and approving fees without undue expense or difficulty, and have done so since the advent of the workers' compensation system.¹²⁶ Despite the proven efficiency of the courts, the fee schedule prevents injured workers from presenting evidence to prove unreasonable inadequacy of a fee in their specific case.¹²⁷ The court found that without the ability of the judiciary to assess reasonableness on a case-by-case basis and deviate from the statutory mandate when necessary, there remains the risk that the result will be "arbitrary, unjust, and grossly inadequate."¹²⁸

B. *Access to Courts: The Westphal v. City of St. Petersburg Standard*

Another recent Florida Supreme Court case, *Westphal v. City of St. Petersburg*,¹²⁹ considered the constitutionality of a workers' compensation statute that cut off disability benefits after a predetermined

123. The second prong—"whether there was a 'reasonable basis for a conclusion that the statute would protect against'" abuse the legislature desired to avoid—has little applicability here. *Id.* Clearly an absolute bar of indemnification claims for first responder mental–mental injury could reasonably be concluded to protect against evidentiary and floodgate concerns. The focus of this analysis is on the reasonableness of those legislative concerns themselves, not on the reasonableness of the means to protect against them.

124. *Id.*

125. *Id.* (citing a rule regulating the Florida Bar, 4–1.5, as an example, which provides a number of factors to consider when determining a reasonable fee).

126. *Id.* at 446. A similar rationale was used in deciding *Recchi*, where the court held that a statute withholding from an employee the opportunity to rebut the presumption that intoxication or influence of drugs was a contributing cause of his or her workplace injury was held to violate due process. 692 So. 2d at 154. The presumption ultimately failed the third prong of the test because the relatively low expense and minor difficulties of individual determinations did not justify the inherent imprecision of the conclusive presumption. *Id.*

127. *Castellanos*, 192 So. 3d at 448.

128. *Id.*

129. 194 So. 3d 311 (Fla. 2016).

period of time for workers who are totally disabled and incapable of working, but who have not yet reached maximum medical improvement.¹³⁰ The Court found that the statute was unconstitutional under Article I, Section 21 of the Florida Constitution, the guarantee of the right of access to courts.¹³¹ In so finding, the court reasoned that the statute “deprive[d] an injured worker of disability benefits . . . for an indefinite amount of time . . . creating a system of redress that no longer function[ed] as a reasonable alternative to tort litigation.”¹³²

The court articulated that the statute frustrated the stated purpose of workers' compensation law¹³³ because it cut off the benefits provided to an injured worker at a critical time—when the employee cannot return to work but the employee's doctors believe that the employee's condition may still continue to improve.¹³⁴ The “constitutional yardstick” applied by the court to determine whether an access-to-the-courts violation has occurred, was “whether the [statutory] scheme continues to provide ‘adequate, sufficient, and . . . preferable safeguards for an employee who is injured on the job.’”¹³⁵ Additionally, the court harped on the importance of the right of access to courts, noting that the right has typically been construed liberally to guarantee accessibility to courts for injured employees to resolve disputes.¹³⁶ The court continued that:

[T]he Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, *unless the Legislature can show an overpowering public necessity for the abolishment of such a right*, and no alternative method of meeting such public necessity can be shown.¹³⁷

Although workers' compensation abolished the right to sue an employer

130. *Id.* at 313 (referencing FLA. STAT. § 440.15(2)(a) (2016)).

131. *Id.* at 327.

132. *Id.* at 313.

133. § 440.015 (articulating that the purpose of workers' compensation law is “to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer”); *Westphal*, 194 So. 3d at 314 (“[T]he workers' compensation law undoubtedly fails to provide ‘full medical care and wage-loss payments for total or partial disability regardless of fault.’”). For further general discussion of the historical driving force behind workers' compensation law, see *supra* Section I.B.

134. *Westphal*, 194 So. 3d at 314.

135. *Id.* at 315 (quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)).

136. *Id.* at 321 (citing the language of article I, section 21 of the Florida Constitution that guarantees every person access to the courts and ensures the administration of justice without denial or delay); *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (stating that “[t]he right to go to court to resolve our disputes” is a fundamental right, *receded from on other grounds*, *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996)).

137. *Westphal*, 194 So. 3d at 322 (quoting *Kluger*, 281 So. 2d at 4) (emphasis added).

in tort for job-related injuries, it “provide[s] adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.”¹³⁸

Workers’ compensation constitutes a “reasonable alternative” to suing in tort, and does not violate the constitutional guarantee of access to courts, only “so long as it provides adequate and sufficient safeguards for the injured employee.”¹³⁹ For a workers’ compensation law to be upheld as constitutional, it must continue to provide a reasonable alternative to tort litigation, keeping in mind the original intent of the workers’ compensation scheme.¹⁴⁰ The proverbial “tipping point” where a statute crosses the line into unconstitutionality is when it effectively constitutes a *denial* of benefits for a legitimately injured employee.¹⁴¹ While in *Westphal* the court considered the constitutional challenge of a statute that completely denied benefits to a disabled worker,¹⁴² the first responder statute’s denial of indemnity is no less serious, as it denies hardworking first responders the critical economic support necessary to pay their bills and survive on a day-to-day basis.

138. *Id.* at 322 (emphasis omitted). When the Florida Workers’ Compensation Act (FWCA) was first enacted, the statutory scheme was thought to be a favorable substitute for tort litigation, as it diminished the uncertainty that inevitably accompanies tort litigation, benefitting both employer and employee. Viktoryia Johnson, *Florida Workers’ Compensation Act: The Unconstitutional Erosion of the Quid Pro Quo*, 45 STETSON L. REV. 119, 143 (2015) (“Florida’s [workers’] compensation program was established . . . to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents.”). *But see id.* at 119, 144 (suggesting that, while the original workers’ compensation scheme enacted by the Florida legislature in 1935 may have served as an adequate substitute for tort, over time the statute’s modality has been significantly eroded and in its present state it is no longer sufficient to substitute for the access to courts guarantee).

139. *Westphal*, 194 So. 3d at 322; *Kluger*, 281 So. 2d at 4.

140. *Westphal*, 194 So. 3d at 322–23 (“[T]o provide ‘injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation.’”).

141. *Id.* at 323 (describing this “tipping point” as the point where the diminution of benefits effectively constitutes a denial of benefits).

142. The court contrasted the situation in *Westphal* with *Martinez v. Scanlan*, an earlier decision in which a statute that reduced the workers’ compensation benefits a claimant would receive was upheld as constitutional. *Compare* 194 So. 3d at 322–23, with 582 So. 2d 1167 (Fla. 1991). While the current first responder situation does not deal with a full denial of benefits, *Martinez* can be contrasted, as the court held that such a reduction in benefits still constitutes a reasonable alternative to tort litigation because it continues to provide injured workers with *full medical care and wage-loss payments*. *Compare* 194 So. 3d at 322–23, with 582 So. 2d at 1171–72.

C. *Dispelling Legislative Concerns*

From both *Castellanos* and *Westphal* a workable standard can be deduced and applied to the current first responder circumstance.¹⁴³ The constitutional standards used in both cases exhibit a common and controlling denominator: whether a reasonable legislative concern overcomes the public necessity for a statutory irrebuttable presumption.¹⁴⁴ To clearly and appropriately apply these standards to the first responder circumstance, one must first address and abate the legislative concerns that weigh in favor of the current conclusive presumption against fully compensating mental–mental injuries of first responders. Doing so will show that the concerns are largely overblown, and prove that such a presumption frustrates the purpose of workers' compensation law by unreasonably and unconstitutionally denying full compensation for first responders.

When state legislatures consider what injuries should be compensable under workers' compensation statutes, two concerns dominate the conversation. First, legislators are concerned about malingering,¹⁴⁵ and that allowing mental–mental claims will lead to other evidentiary difficulties in proving that the mental injuries were actually caused by workplace stimuli.¹⁴⁶ Second, legislators are concerned that allowing mental–mental claims will cause an expensive increase in the amount of workers' compensation claims; an opening of the proverbial “floodgates” that will have a negative fiscal impact on employers, administrative agencies, and society as a whole.¹⁴⁷

143. See *infra* Section III.D for the application of the *Castellanos* and *Westphal* standards to the first responder circumstance.

144. In *Castellanos*, this concern is exemplified in the first prong of the court's test: whether the concern of the Legislature was reasonably aroused by the possibility of an abuse it legitimately desired to avoid. 192 So. 3d 431, 444 (2016). In *Westphal*, that concern is reflected in the court's articulation that, unless the Legislature can show an overpowering public necessity for the abolishment of an individual's rights, the legislature is without power to abolish those rights. 194 So. 3d at 322.

145. *Malingering*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/malingering> (last visited June 21, 2017) (defining malingering as “pretend[ing] or exaggerate[ing] incapacity or illness (as to avoid duty or work)”).

146. Tucker, *supra* note 19, at 477.

147. *Id.* at 481; see also PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, FLA. SENATE COMM. ON BANKING & INS. 2, 10–13 (2007) [hereinafter PROFESSIONAL STAFF ANALYSIS], <http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s0746.bi.pdf> (discussing generally the fiscal implications of SB 746, including the additional costs expected for individual self-insurers, after section 112.1815, Florida Statutes, goes into effect).

1. Evidentiary Concerns

Because mental injuries and disorders such as PTSD develop through “‘complex interrelation’ between one’s ‘internal, subjective reality’ and [one’s] ‘external, environmental reality,’” those in favor of barring their compensability argue that the evidentiary burden of proving or disproving purely mental claims will be too immense.¹⁴⁸ Due to this complexity, legislators fear that these types of injuries will be more difficult to evaluate and may therefore be easier to falsify.¹⁴⁹ Fear of fraudulently brought claims, or malingering,¹⁵⁰ has greatly influenced legislators’ and judiciaries’ attitudes regarding whether or not these claims can and should be compensable.¹⁵¹

Fears of malingering and causation uncertainty, while once potentially legitimate concerns, have largely been quelled by scientific breakthroughs and increased understanding of mental health disorders.¹⁵² In fact, *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) provides a list of factors to use to detect malingering,¹⁵³ available to any clinician or expert. There is even an entire subfield of forensic psychology that centers around the detection of malingering.¹⁵⁴ Additionally, PTSD has been empirically tested and subjected to critique

148. Tucker, *supra* note 19, at 477.

149. Bailey, *supra* note 29, at 514; *see also* Tucker, *supra* note 19, at 477 (addressing the concerns about determining the true cause of a mental disorder, such as the challenges of determining which external, environmental factors is the primary cause of the disorder).

150. Malingering is defined as “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as . . . avoiding work [or] obtaining financial compensation.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 683 (4th ed. 2013) [hereinafter *DSM-IV*], <https://justines2010blog.files.wordpress.com/2011/03/dsm-iv.pdf>. The newest edition, DSM-V, does not specifically discuss malingering or criteria for evaluating malingering.

151. Lawrence Joseph, *The Causation Issue in Workers’ Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 273 (1983) (“The spectre of fraud has influenced judicial attitudes toward mental injuries.”). *But see* Lisa Cullen, *The Myth of Workers’ Compensation Fraud*, FRONTLINE PBS (2013), <http://www.pbs.org/wgbh/pages/frontline/shows/workplace/etc/fraud.html> (asserting that the insurance industry’s focus on malingering may be unfounded, as studies show that only 1–2% of all workers’ compensation claims are fraudulent).

152. 4 LARSON, *supra* note 53, § 56.04 (Matthew Bender ed.):

[I]t is no longer realistic to draw a line between what is ‘nervous’ and what is ‘physical’ . . . [p]erhaps, 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 grounds of evidentiary difficulties, for ruling out recoveries based on such injuries . . . in workmen’s compensation. But the excuse no longer exists.

153. *DSM-IV*, *supra* note 150, at 683.

154. Tucker, *supra* note 19, at 479.

for decades, studies of PTSD patients have been both published and peer reviewed, and “PTSD has been accepted as textbook science by the scientific community for [over] twenty years.”¹⁵⁵ PTSD testimony meets all of the *Daubert* criteria.¹⁵⁶

While allowing mental–mental injuries into the realm of workers’ compensation claims would not circumvent a battle of the experts,¹⁵⁷ this is not a battle unique to mental–mental injury claims. One of the hallmarks of the current workers’ compensation system is a highly specialized trier of fact that considers expert testimony with an eye toward the concern that the claimant may be malingering, exaggerating his or her injuries, or attempting to claim an injury unrelated to employment.¹⁵⁸ Experts are routinely admitted to testify regarding the legitimacy and causative nature of a claimant’s physical injuries or mental injuries caused by physical trauma.¹⁵⁹ Courts already depend on triers of fact to detect and weed out fraudulent or illegitimate claims.¹⁶⁰ It follows, then, that fact finders should similarly be able to consider evidence presented “to determine whether a mental or emotional injury has arisen from and in the course of employment, just as they do for physical injuries.”¹⁶¹ It would produce a far more reasonable and equitable result to allow the trier of fact to consider evidence that a claimant is malingering, rather than to assume that all mental–mental claimants are malingering.

Finally, allowing expert testimony to be considered to prove or disprove a PTSD claim would also produce a perception in the eyes of the claimant that the results are fair. Though experts will still be necessary to determine claim validity, “resources expended by the parties would be more appropriately channeled into considering the merits of the case, as

155. Garcia-Rill & Beecher-Monas, *supra* note 38, at 30.

156. *Id.* The *Daubert* standard requires a judge to “examine the proffered testimony for falsifiability, error rate and the existence of protocols, peer review and publication, and general acceptance.” *Id.* at 29.

157. Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 45 (2011) (“Evidence of PTSD is generally offered through expert witnesses . . . [such as] treating clinicians who describe their diagnostic impressions of their patients or forensic examiners retained by one of the parties to evaluate an individual and render an opinion on a specific issue tied to the civil or criminal litigation.”).

158. Tucker, *supra* note 19, at 479–80.

159. Smith, *supra* note 157, at 45 (discussing the use of experts and the role of the courts as fact finders); Tucker, *supra* note 19, at 480.

160. Tucker, *supra* note 19, at 480.

161. *Id.*; see also Smith, *supra* note 157, at 51 (“In short, with few exceptions, courts generally do not use rules of evidence as a basis to restrict PTSD-based expert testimony. Rather, reasoning that due to its inclusion in [the] DSM[,] PTSD is a ‘medically recognized disorder,’ [and] courts regard it as relevant, useful, and appropriate for fact finders to . . . rely upon the adversarial process to flesh out the limitations of such evidence.”).

opposed to peripheral issues.”¹⁶² No matter the result, claimants will feel that they did all they could, and their money spent fighting for their claim was at least channeled toward the appropriate issues. Even if the claimant is unsuccessful, at minimum she would have the dignity of having her claim heard on its merits, rather than automatically dispelled without consideration.¹⁶³

2. The Proverbial Floodgate Concern

Courts have voiced the concern that “recognizing ‘compensation for any mental diseases and disorders caused by on-the-job stressful events or conditions would . . . open a floodgate for workers who succumb to the everyday pressures of life.’”¹⁶⁴ In 2007, when the Florida Senate considered the original first responder amendment,¹⁶⁵ the Banking and Insurance Senate Committee prepared an economic impact statement discussing the potential fiscal ramifications of the bill.¹⁶⁶ Unsurprisingly, it was estimated that allowing first responders to recover medical benefits for purely mental injury would increase the overall cost of compensating the first responder class.¹⁶⁷ It also follows that loosening compensability standards will likely add claims,¹⁶⁸ though the report indicated that broadening the benefits available to first responders would only marginally increase the amount of first responder claims.¹⁶⁹ While the decision to refrain from expanding coverage to full indemnification is not discussed, the committee’s apparent controlling concern was what economic impact loosening coverage might have on local government

162. Bailey, *supra* note 29, at 527.

163. *Id.* at 528. Research has shown that “litigants are more likely to be satisfied with the outcome [of a claim] when they perceive the decision-making process is fair.” *Id.* at 527–28.

164. Tucker, *supra* note 19, at 478; *see also* 4 LARSON, *supra* note 53, § 56.04(2) (stating that in some jurisdictions, due to concerns about flooding claims over workplace stress, states have placed limitations on such claims even in the absence of legislation).

165. Referenced in Section II.A.

166. PROFESSIONAL STAFF ANALYSIS, *supra* note 147, at 2.

167. *Id.* at 2 (“The National Council on Compensation Insurers (NCCI) estimates that costs for first responder classes would increase 5.9 – 6.4 percent (\$12.2 – 13.0 million) if this proposal were enacted in its current form.”). Because individual self-insurers do not report data to the NCCI, they were not included in that estimate; however, additional costs for individual self-insurers that employ first responders, such as state and local governmental agencies, are expected as well. *Id.*

168. *Id.* at 11 (“Depending on judicial interpretation, compensability of any mental injury ‘occurring as a manifestation of an employment’ may not only allow compensation of first responders traumatized by the suffering they’ve seen in the course of their employment, but may also allow compensation as a result of the stress from routine activities, interactions and employment decisions.”).

169. *Id.* (estimating that the combined impact of the provisions of the new statute would increase the number of compensable claims for first responders by 1%).

and the tax payers that would ultimately have to foot the bill for the increase in claims.¹⁷⁰

Several bills proposed in the 2017 legislative session aimed to expand the coverage available to first responders who sustain purely mental injury.¹⁷¹ However, the bills were proposed too late, and were unable to make it through the committee review process before the end of the legislative session.¹⁷² The bill that progressed the furthest, SB 1088, was specifically targeted at authorizing indemnity payments for first responders who sustained mental or nervous injury, and loosening evidentiary standards for such claims.¹⁷³ The Banking and Insurance Senate Committee likewise prepared a report for this bill, ultimately approving the bill by unanimous vote.¹⁷⁴ The report stated that, according to the National Council on Compensation Insurance, “the impact on overall workers’ compensation costs would be expected to be small, since the data reported . . . show that first responders represent approximately 2.5 percent of statewide losses in Florida.”¹⁷⁵ However, the Committee ultimately concluded that it could not predict with certainty the fiscal impact the bill will have on the private or government sectors, though it noted that a small increase in both claims and cost is expected.¹⁷⁶

It flows logically that loosening compensability standards for first responders will likely increase the amount of first responder claims. As more injuries are brought into the compensability spectrum, injured employees such as Officer Realin will file a claim and (hopefully) receive compensation. The costs of providing full indemnification for first responders may not be as great as many people fear, however. First

170. *Id.* at 10–13 (discussing the fiscal impact of the bill on private sector and governmental sector entities).

171. S. 516, 2017 Leg., 119th Sess. (Fla. 2017); H.R. 1019; 2017 Leg., 119th Sess. (Fla. 2017); S. 1088, 2017 Leg., 119th Sess. (Fla. 2017).

172. See Julie Gargotta, *Bill Expanding Workers’ Compensation for First Responders in Jeopardy*, NEWS 13 (Apr. 3, 2017, 6:14 PM), http://www.mynews13.com/content/news/cfnews13/news/article.html/content/news/articles/cfn/2017/4/3/bill_expanding_worke.html.

173. BILL ANALYSIS AND FISCAL IMPACT STATEMENT, FLA. SENATE COMM. ON BANKING & INS. 1, 1 (Apr. 17, 2017) [hereinafter BILL ANALYSIS], <https://www.flsenate.gov/Session/Bill/2017/1088/Analyses/2017s01088.bi.PDF>.

174. Mike Holfeld, *PTSD Legislation Unanimously Passes Florida Subcommittee*, CLICKORLANDO (Apr. 17, 2017, 7:37 PM), <http://www.clickorlando.com/news/ptsd-legislation-unanimously-passes-florida-sub-committee>.

175. BILL ANALYSIS, *supra* note 173, at 9.

176. BILL ANALYSIS, *supra* note 173, at 9–10. Regarding the private sector impact, the Committee estimated that the impact on overall system costs is expected to be small—less than 1%. *Id.* at 9. In the government sector context, there is likewise a potential for a small increase in cost, though if a state employee is unable to return to work due to particularly severe injury, his claim may result in a higher cost depending on his age and salary. *Id.* at 10.

responders represent only a small portion of the general populace,¹⁷⁷ so compensating them with indemnification benefits will not deal a crippling blow to a provider's fiscal budget. Additionally, it may be more costly for governments to not fully compensate first responders, as the injured will be slower to return to work or work performance may suffer as a result of returning to work before the employee is ready.¹⁷⁸ Such hindered work performance may also result in unintended mistakes and negligence, exposing governmental agencies to increased liability in tort.¹⁷⁹ If first responders with mental injury such as PTSD are not given sufficient time or support to enable them to recover, they may not be able to earn income through employment and could end up on welfare or other governmental support anyway.¹⁸⁰ Governmental employers may be better off simply paying higher insurance premiums for increased coverage instead of dealing with the effects of undercompensation.

While it is true that indemnification for legitimate first responder mental injury claims will undoubtedly impose at least some additional cost to local governments, the question of whether such coverage should be provided comes down to a cost-benefit analysis. Such an analysis "inevitably incorporate[s] political and moral judgments about the proper distribution of resources."¹⁸¹ A society must both recalibrate its moral compass and view the situation with economic pragmatism; it must ask whether the cost of its first responders going undercompensated for legitimate mental injury outweighs the small economic benefit of withholding full compensation. While evidentiary and floodgate concerns may arguably outweigh the need to compensate every Average Joe for a stress-related mental injury suffered on the job, such concerns do not carry the same weight when applied to first responders. In light of this, applying the *Castellanos* and *Westphal* standards to first responders

177. See KRISTINA SCHAFER ET AL., U.S. DEP'T OF LABOR, CHARACTERISTICS OF INDIVIDUALS AND EMPLOYMENT AMONG FIRST RESPONDERS i (2015), <https://www.dol.gov/asp/evaluation/analytcs-reports/CharacteristicsOfIndividualsAndEmploymentAmongFirstResponders.pdf> (estimating nearly 1.2 million people work as police, firefighters, and emergency medical technicians ("EMTs")). The U.S. Census Bureau estimates that approximately 324 million people live in the United States today. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited June 21, 2017).

178. Tucker, *supra* note 19, at 480 (citing a British study published in the *British Medical Journal* that found "impaired efficiency at work associated with mental health problems" costs the United Kingdom approximately £15.1 billion, or \$22.5 billion, a year).

179. See generally RESTATEMENT (FIRST) OF AGENCY § 243 (AM. LAW INST. 1933) ("A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment.").

180. See generally Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, NPR (2013), <http://apps.npr.org/unfit-for-work/> (stating that in the past three decades, the number of Americans who are on disability has skyrocketed, and that every month 14 million Americans collect a disability check from the government).

181. Tucker, *supra* note 19, at 481.

clearly shows that categorical denial of indemnification results not only in moral impropriety, but infringes upon constitutionally guaranteed rights as well.

D. Applying *Castellanos* and *Westphal*

To make applying *Castellanos* and *Westphal* to the first responder circumstance easier to articulate and understand, a reiteration of the standards used by the Florida Supreme Court is helpful. Recall that, in *Castellanos*, the controlling questions were (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse the legislature legitimately desired to avoid; and (2) whether the expense and other difficulties of individual determinations justifies the inherent imprecision of a conclusive presumption.¹⁸² In *Westphal*, the court focused on (1) whether the legislature could show an overpowering public necessity for the abolishment of the right to pursue an action in tort; and (2) whether a viable alternative existed for meeting such a pressing public necessity could be shown.¹⁸³

The first prong of the *Castellanos* standard, whether a concern of the legislature was reasonably aroused by the possibility of an abuse the legislature legitimately desired to avoid, is not met in the first responder circumstance. The abuse to be avoided here is the possibility of fraudulent claims and malingering, and a decade or two ago such a concern might have justified limiting recovery for purely mental injury.¹⁸⁴ However, due to advancements in diagnosis and treatment, and an increase in the amount of knowledge about PTSD and mental health generally, the fear of fraud is no longer a legitimate reason for limiting first responder recovery.¹⁸⁵ In *Castellanos*, the court reasoned that a concern about excessive fee awards is insufficient to constitute a legitimate legislative concern, because safeguards are in place to defend against that risk.¹⁸⁶ Similarly, safeguards are routinely set forth in the area of workers' compensation law to protect against fraud and malingering.¹⁸⁷ Like any other compensable mental injury claim, claimants must come before an experienced, specialized fact finder; they must establish their injuries by clear and convincing medical evidence presented by a licensed psychiatrist; and they must meet all the criteria established in the most

182. *Castellanos v. Next Door Co.*, 192 So. 3d 431, 444 (Fla. 2016).

183. *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 322 (Fla. 2016).

184. See Subsection III.C.1 for a discussion of evidentiary concerns, and why concerns of malingering and fraudulent claims are largely overblown.

185. See *supra* notes 152–56 and accompanying text.

186. *Castellanos*, 192 So. 3d at 444.

187. For a discussion of how courts can protect against fraudulent claims, see Subsection III.C.1.a.

recent edition of the diagnostic and statistical manual of mental disorders, before they can receive full compensation.¹⁸⁸

The fact is, PTSD incidence is significantly higher in law enforcement officers and other first responders than the rest of the general population.¹⁸⁹ First responders are routinely exposed to stressful, traumatic events while performing their duties.¹⁹⁰ The Banking and Insurance Senate Committee acknowledged this fact in their report on SB 1088, and recognized that first responders are already part of a “special risk class” by virtue of the exceptionally demanding nature of their work.¹⁹¹ Furthermore, the report provided statistical evidence that, according to the U.S. Department of Veterans Affairs, the prevalence of PTSD in first responders is estimated to be as high as twenty to forty percent, while PTSD prevalence in the general population sits around seven to eight percent.¹⁹² There is therefore a much greater chance that a first responder claim of PTSD or other mental injury will be legitimate and stem from workplace stimuli, and a much greater chance that a blanket denial of indemnification would wrongfully deny coverage to first responders with legitimate mental injury. Similar to the court’s reasoning in *Castellanos*,¹⁹³ the first prong fails here because although the conclusive presumption achieves the goal of standardization of coverage, it does so in a manner that lacks any relationship to the actual

188. FLA. STAT. § 440.093(2) (2017).

189. Bailey, *supra* note 29, at 519; *DSM-V*, *supra* note 38, at 276 (“Rates of PTSD are higher among veterans and others whose vocation increases the risk of traumatic exposure (e.g., police, firefighters, emergency medical personnel.)”); Kulbarsh, *supra* note 28 (“Law enforcement officers are also at a much higher rate of developing a cumulative form of PTSD related to their exposure to multiple traumatic events.”); Lainie Rutkow et al., *Protecting the Mental Health of First Responders: Legal and Ethical Considerations*, 39 J. L. MED. & ETHICS 56 (“Studies have demonstrated that, after participating in disaster responses, first responders experience elevated rates of depression, stress disorders, and posttraumatic stress disorder (PTSD) for months and sometimes years.”).

190. Rutkow et al., *supra* note 189, at 56 (“[First responders] often work long hours under stressful conditions, witnessing the human harms, physical destruction, and psychological devastation that can accompany disasters.”); *DSM-V*, *supra* note 38, at 271 (listing “first responders collecting human remains” and “police officers repeatedly being exposed to details of child abuse” as examples of repeated or extreme exposure to traumatic events).

191. BILL ANALYSIS, *supra* note 173, at 5 (“[T]he Legislature recognized that certain employees must, as an essential function of their positions, perform work that is physically demanding or that requires extraordinary agility and mental acuity.”). A member of the Special Risk Class may retire at an earlier age and is eligible to receive higher disability and death benefits. *Id.*

192. BILL ANALYSIS, *supra* note 173, at 9–10.

193. *Castellanos v. Next Door Co.*, 192 So. 3d 431, 444 (Fla. 2016) (stating that while the legislative intent to standardize attorney’s fees is accomplished by the conclusive presumption of section 440.34, Florida Statutes, the presumption does so in a manner that lacks any relationship to the amount of time or effort actually expended by the attorney, and is therefore unconstitutional).

merits of the claim.¹⁹⁴ It is now understood how much greater at risk first responders are for developing PTSD, and it is possible to diagnose and treat such mental injuries and detect potential malingering. Because of these developments, the concern about abuse is no longer reasonable when applied to first responders, and it no longer outweighs the benefit of providing full compensation for proven, legitimate claims.

The second prong of the *Castellanos* standard, whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption, also fails when applied to first responders. The workers' compensation system is a highly specialized, streamlined approach geared towards providing employees coverage in a quick and efficient manner.¹⁹⁵ Workers' compensation courts are skilled in determining whether an employee's claimed injury is legitimate, and whether the injury sustained arose "out of work performed in the course and scope of employment."¹⁹⁶ Courts already evaluate testimony regarding legitimacy of mental injury claims, including testimony from expert psychiatrists and psychologists.¹⁹⁷ It follows then, that courts should be able to evaluate testimony about the legitimacy or seriousness of first responders' mental-mental injury with relatively little additional expense.

Due to the ease with which Florida courts could incorporate purely mental injury into the spectrum of compensable injuries for first responders, it cannot be said that any perceived additional expense outweighs allowing indemnification, other than the cost of indemnification itself.¹⁹⁸ Just as courts can assess reasonableness on a case-by-case basis with regard to attorney's fees, so too can they assess the reasonableness and legitimacy of mental injury. Without the ability to consider the merits of each claim individually, there remains the risk that the result will be "arbitrary, unjust, and grossly inadequate."¹⁹⁹ By compensating first responders with medical benefits, the court is already acknowledging the legitimacy of their mental injury claim. Denial of much needed indemnification seems arbitrary and unreasonable, and is violative of the constitutional right to due process.

194. An individual, case-by-case determination would far better serve the legislative intent of the law, as it would ensure coverage for legitimate claimants while keeping the burden on the claimant to ultimately prove her injury, deterring disingenuous claims.

195. See Subsection III.C.1.

196. FLA. STAT. § 440.09 (2016); Tucker, *supra* note 19, at 280.

197. See Subsection III.C.1.

198. For an explanation of why the cost of indemnification for first responders who sustain purely mental injury would be marginal, see Subsection III.C.2.

199. *Castellanos v. Next Door Co.*, 192 So. 3d 431, 448 (Fla. 2016) (using the same quoted language to describe the unconstitutional result of the section 440.015 presumption, in which the JCC was barred from assessing the reasonableness of fee awards on a case-by-case basis and deviating from that presumption when equity demanded).

No overpowering public necessity for depriving first responders the right to sue in tort to recover indemnification benefits can be shown. Therefore, the categorical denial of indemnity dictated by section 112.1815 fails the first prong of the *Westphal* standard.²⁰⁰ Evidentiary and economic concerns are largely overblown in the first responder context. While some economic impact is unavoidable, opponents to expanding coverage would be hard pressed to argue that such marginal additional expenditure is not worthwhile. In the long term, expanding coverage would not only benefit employers and society as a whole by maintaining healthier, more diligent first responder employees,²⁰¹ but would also allocate societal resources to a deserving and noble cause. In the first responder circumstance, the legislative concerns previously discussed do not outweigh the strong possibility that a first responder's meritorious claim will be categorically barred from court and will go unheard and unrecompensed.

Even if legislative concerns rose to the level of justifying a limitation of benefits for purely mental injury, it cannot be shown that a less harmful alternative does not exist as the second prong of the *Westphal* standard requires.²⁰² Other states have taken creative approaches to the issue of how to handle mental–mental injuries, incorporating various criteria and causal nexus standards that must be satisfied before an injury may be compensated.²⁰³ Therefore, even if the aforementioned concerns proved to be overpowering, procedural and evidentiary safeguards could be put in place that allowed legitimate claims to be compensated while efficiently weeding out claims without merit.

Because Florida Statutes section 440.11(1) dictates that workers' compensation is the exclusive remedy available to claimant employees,²⁰⁴ first responders who suffer PTSD or other purely mental injury are unable to pursue additional recovery outside of the workers' compensation system. This result frustrates the purpose of workers' compensation statutes as the statutes no longer “provide ‘adequate, sufficient, and . . . preferable safeguards for an employee who is injured on the job.’”²⁰⁵ For claimants who have a bona fide diagnosis of PTSD or

200. *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 322 (Fla. 2016).

201. *See supra* notes 178–80 and accompanying text.

202. *Westphal*, 194 So. 3d at 322.

203. Bailey, *supra* note 29, at 514–18 (discussing methods used by various states that include requiring mental injuries to be caused by gradual stress, or requiring that the injury-inducing stress be usual and/or sudden); *see also* Burke, *supra* note 51, at 909–13 (discussing how Pennsylvania, New Jersey, and New York approach mental–mental claim evaluation).

204. FLA. STAT. § 440.11(1) (2017).

205. *Westphal*, 194 So. 3d at 315 (quoting *Kluger v. White*, 281 So. 2d 1, 4 (1973)); *see also* 4 LARSON, *supra* note 53, § 56.04 (stating that, in light of advances in knowledge about mental injury, any state that continues to withhold the benefits of workers' compensation from a worker

other mental disorder, they are left to struggle with a serious condition that hinders not only their ability to perform employment functions, but impacts their daily lives and families as well.²⁰⁶ A categorical denial of indemnification for mental–mental injury suffered by first responders does not provide any sort of adequate or sufficient safeguards for the injured employee because it treats legitimate mental workplace injuries as if they do not exist.²⁰⁷ The workers' compensation employer–employee bargain effectively traps the employee in a state of limbo, resulting in an unconscionable imbalance of bargaining power. Florida Statutes section 112.1815 therefore does not constitute a “reasonable alternative”²⁰⁸ to tort litigation, and should be held violative of the constitutional guarantee of access to courts. While not a complete denial of all benefits, the arbitrary denial of indemnification surpasses the tipping point discussed in *Westphal*²⁰⁹ and crosses the line into unconstitutionality.

IV. PROPOSED CHANGES & METHODS FOR EVALUATION

Naturally, the primary change advocated for in this Note is the inclusion of indemnification as a benefit available to first responders who suffer purely mental injury such as PTSD. This change could be realized by simply amending the current first responder statute by adding the words “and indemnity” after providing for medical benefits. In addition, it would be useful to briefly discuss a method to be adopted by Florida courts that would assist with handling these types of claims. In light of Florida's apprehension and resistance to allowing such mental injury claims, the proposed method may offer some guidance that further mitigates concerns surrounding mental–mental claims. This Part provides a model statute to be adopted by the Florida legislature as well as a general methodology for evaluating mental injury claims of first responders.

A. Model Statute

The fix is an easy one. The definition of the term “first responder” provided in the current Florida first responder workers' compensation statute is already adequate, and sufficiently covers all individuals at a heightened risk of being exposed to traumatic or stress-inducing

does “unjustifiable violence to the intent of the workers' compensation act, for reasons that are without support in either legal or medical theory”).

206. Burke, *supra* note 51, at 907.

207. *Id.*

208. *Westphal*, 194 So. 3d at 322.

209. *Id.* at 323.

stimuli.²¹⁰ However, if concern over the breadth of the statute persists, a new definition can be constructed to encompass only first responders who have been exposed to specific stimuli or traumatic experiences.²¹¹ The advocated change addresses section 112.1815(1)(3) of the statute, that currently states “only medical benefits . . . shall be payable for mental or nervous injury” and “payment of indemnity . . . may not be made unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.”²¹² To adequately and equitably compensate first responders who suffer this type of injury, the statute should be changed to read: “medical benefits *and indemnity* . . . shall be payable for mental or nervous injury” and the provision specifically addressing a denial of indemnity should be deleted.²¹³ Additionally, a provision should be added to further define “indemnity” to clarify what specific benefits fall under the purview of that term. Lastly, legislators would be wise to add an additional provision to section 440.093 that summarizes the first responder exception to claiming mental or nervous injuries. This addition would ensure that no conflict remains between section 112.1815 and section 440.093. These changes would ensure first responders who suffer proven and legitimate claims of PTSD or other mental injury will be fully and fairly compensated for their injury and the purpose of the workers’ compensation statutes will be fulfilled.

B. *Suggested Methodology for Mental–Mental Injury Claim Evaluation*

An ideal methodology for reviewing first responder mental–mental injury claims would be one that incorporates both subjective and objective components. Such a method would mitigate the concern of malingering and fraud, yet still allow claimants who genuinely believe they have suffered a legitimate mental injury their day in court and a chance at redress. In short, the new standard of reviewing mental injury claims, such as a claim of PTSD, would first involve the subjective determination of whether the first responder genuinely believes that he suffered a legitimate mental illness caused by workplace stimuli. Judicial fact finders would hear testimony presented by the claimant and experts

210. FLA. STAT. § 112.1815(1) (2017) (defining “first responder” under the statute as a law enforcement officer, a firefighter, or an emergency medical technician or paramedic employed by the state or local government, including volunteers).

211. Criteria from particular mental injuries could be selected from the DSM-IV and DSM-V to accomplish this. *See DSM-V, supra* note 38, at 271 (listing examples of PTSD-inducing traumatic events).

212. § 112.1815(1)(3).

213. *Id.* § 112.1815(3) (“However, payment of indemnity as provided in s. 440.15 may not be made unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.”).

and determine whether or not the employee's belief is legitimate. Then, the judge would objectively determine through the evidence and testimony presented whether, by clear and convincing evidence,²¹⁴ the mental injury was actually *caused*²¹⁵ by workplace stimuli.

When evaluating an employee's workers' compensation claim it should be imperative that she actually believed she sustained a legitimate injury. It may seem obvious, but inevitably courts will have to hear a claimant's statements regarding the seriousness of the injury sustained, and substantiation of those statements is the first step in preventing fraud and abuse of the workers' compensations system. The Michigan legislature, for example, adopted an approach in 1978 that if a claimant factually establishes that he honestly believes some personal injury incurred during the ordinary course of his employment and that his employment caused his disability, then the claimant is entitled to compensation.²¹⁶ With such a standard, the fact finder uses a "subjective approach focus[ing] on whether the claimant is being honest or is malingering."²¹⁷ This is where the malingering factors discussed in Subsection III.C.1 and other DSM-V criteria will come into play. This "subjective causal nexus"²¹⁸ test alone is flawed, however, because of its failure to take into account whether an injury was actually objectively sustained, and whether the injury was actually caused by stimuli in the workplace, a fundamental tenet of the workers' compensation system.²¹⁹ The whole point of the workers' compensation system is to compensate employees for injury sustained while at work; such a goal would be unduly frustrated by not requiring a claimant to prove workplace stimuli was the underlying cause of their injury.²²⁰ While requiring the claimant to prove she actually believes she suffered a mental injury is important,

214. *Id.*

215. Using the same causal nexus standard cited in Florida Statutes section 440.093 that the workplace stimuli "must be and remain the major contributing cause of the mental or nervous condition and the compensable physical injury as determined by reasonable medical certainty must be at least 50 percent responsible for the mental or nervous condition as compared to all other contributing causes combined." § 440.093(2).

216. Tucker, *supra* note 19, at 475 (referencing the Michigan Supreme Court decision in *Deziel v. Difco Labs, Inc.*, 394 Mich. 466 (1975) that prompted the legislative adoption in 1978). The Michigan legislature discontinued that adopted standard by 1982, however. 4 LARSON, *supra* note 53, § 56.04 (amending the standard to reflect an objective component: that "mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof").

217. Tucker, *supra* note 19, at 475; *see also* 4 LARSON, *supra* note 53, § 56.04 (stating that at the heart of the *Deziel* decision was the notion that, if the claimant honestly, albeit mistakenly believed he sustained disability due to a work injury, the resulting disability should be compensable).

218. 4 LARSON, *supra* note 53, § 56.04.

219. Tucker, *supra* note 19, at 475, 483.

220. *Id.* at 483.

an objective standard of reviewing that belief and for determining the causal nexus aspect of the claim is critical.

Therefore, the second component of the proposed standard is an objective determination of whether the claimant *actually sustained* verifiable injury, and whether the injury sustained was objectively *caused* by workplace stimuli. This test poses a significantly more difficult hurdle for claimants to clear than just simply proving they believe they sustained a compensable injury. As previously discussed, a battle of the experts and other evidentiary proof is necessary to determine whether the claimant suffered a legitimate mental injury and whether the injury was caused by workplace stimuli.²²¹ Fact finders will be tasked with objectively evaluating a claimant's mental state, and should lean heavily on psychology and psychiatry experts well versed with the most recent Diagnostic and Statistical Manual of Mental Disorders in fulfilling this task.

New Jersey adheres to this objective standard of review,²²² making no distinction between physical and mental injuries, but requires a claimant to produce "objective evidence that supports a medical diagnosis of psychiatric disability" to support his claim of mental disorder and a workplace causal connection.²²³ In articulating this standard, a New Jersey court framed the issue as "not whether a workers' compensation claimant *malingered*," but instead focused primarily on whether the "stress, admittedly subjective, stemmed from objectively proven stressful work conditions, rather than conditions which only the petitioner found stressful (or, perhaps, conditions which were not shown objectively to exist at all)."²²⁴ Other states have also adopted different wrinkles to their objective-causal-nexus standards. In addition to requiring objective evidence of mental injury and a causal nexus to workplace stimuli, Pennsylvania requires the workplace incident to have been an "abnormal

221. See *supra* notes 154–57 and accompanying text.

222. Burke, *supra* note 51, at 901. New Jersey's standard has been dubbed "the *Goyden Test*" and includes five prongs that must all be met before an injury, physical or mental, may be compensated:

- (1) the working conditions must be objectively stressful, (2) there must be evidence showing that the claimant responded to them as stressful, (3) the objectively stressful working conditions must be 'peculiar' to the work environment, (4) there must be objective evidence supporting a medical opinion of the resulting psychiatric disability in addition to the 'bare statement of the patient,' and (5) the workplace exposure must have been a 'material' cause of the disability.

Id. at 901–02.

223. *Id.* at 911.

224. Tucker, *supra* note 19, at 475–76 (quoting *Goyden v. State Judiciary*, 256 N.J. Super. Ct. App. Div. 438 (1991)).

working condition.”²²⁵ Under this additional requirement, a claimant would be unable to recover for mental injury caused by a particular event if that employee received specific training for that type of event, or if that event was common for the type of work the employee does.²²⁶ Such a requirement could have obvious applicability to the first responder circumstance, though unfettered speculation of what is a foreseeable event for first responders engaged in dangerous work could have negative implications.²²⁷ New York employs a similar standard, requiring the stress inducing accident to be “greater than an ordinary work environment.”²²⁸

No matter what standard the Florida legislature adopts, an objective component is critical, as it helps prevent fraudulent claims while allowing workers with genuine mental injury a form of redress.²²⁹ While observation of a claimant may establish subjective belief in mental or emotional disability,²³⁰ the causal nexus between observable and verifiable symptoms must also be established. To establish such causation, an objective standard of review is necessary.

CONCLUSION

First responders are an integral part of disaster relief efforts, and when disaster strikes, the affected localities expect first responders to be ready and willing to assist, even if it means putting their own well-being at risk. While it is true that first responders take on this selfless responsibility voluntarily, at minimum they should have assurances that, in the event they develop adverse health conditions related to their emergency response duties, they will be adequately compensated by workers' compensation benefits. The Florida legislature must reconsider its stance on first responder mental injury, and provide first responders with adequate and complete support. We as a society have a duty to take care of the men and women who have selflessly volunteered to take care of us.

225. Burke, *supra* note 51, at 909–10 (“Although there is no bright-line test for abnormal working conditions . . . claims have been denied if a claimant received training for a certain type of event or if such an event was foreseeable for the type of work at issue.”).

226. *Id.* at 910 (providing the example of a convenience store clerk who was given training on how to handle armed robberies, and concluding that a subsequent armed robbery would likely fail the abnormal working condition test because of its foreseeability and the prior training the employee received).

227. In the case of Officer Realin, this requirement could lead to litigation over whether a mass shooting, and removal of bodies of victims from that shooting, was foreseeable for his line of employment.

228. Burke, *supra* note 51, at 912.

229. *Id.*

230. Tucker, *supra* note 19, at 475.

