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Post-Traumatic Stress in the Workplace: Workers' Compensation Update on Mental Disability Claims

by Michael L. Forrester and Leslie T. Ridings



The Tennessee Supreme Court and the Workers' Compensation Panel released several significant workers' compensation decisions in 2005 pertaining to the issue of an employer's liability for psychiatric conditions which were alleged to have been caused by specific work occurrences. Below is a brief discussion of these psychiatric disability cases and an analysis of the current state of mental disability workers' compensation claims in Tennessee.

- In *Saylor v. Lakeway Trucking, Inc.*, the Tennessee Supreme Court reviewed a trial judge's decision to award 100% permanent total disability to a truck driver who was transporting hazardous liquid materials. While investigating a possible leak in the containers, he claimed that some of the chemicals splashed on him. The employee began to feel ill and feared that he might die, and underwent extensive psychiatric treatment. He was eventually diagnosed with post traumatic stress disorder ("PTSD"), depression, and fatigue. The Supreme Court upheld the permanent total disability award and ordered the employer to pay total disability and medical benefits.
- In *Lifepoint Hospital v. Morgan*, the Tennessee Workers'

Compensation Panel reviewed the claim of a nurse who developed PTSD following a traumatic work incident. One of the nurse's patients fell from a gurney, resulting in the release of cerebrospinal fluid from the patient's skull. In relying upon a psychiatrist's testimony that the employee's disability was not caused by PTSD, but instead resulted from many other life stressors and a personality disorder, the Panel determined that the employee did not suffer a compensable psychiatric injury.

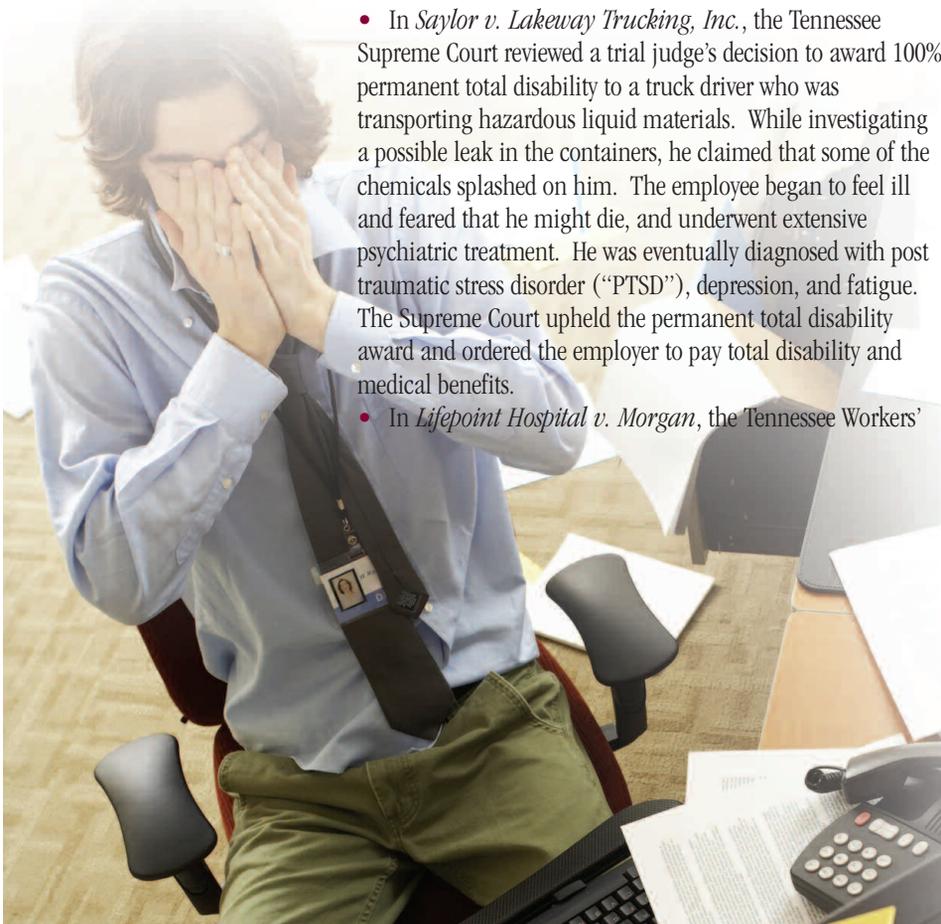
- In *Winters v. Jackson Oil Co.*, the employee had previously suffered from a mental disorder and had received extensive treatment for psychiatric symptoms. While working at a convenience store, the employee was the victim of an armed robbery. Not surprisingly, the Workers' Compensation Panel found that she had sustained a compensable mental injury. The Court based its decision, in part, on the fact that even though the employee had a pre-existing mental condition, that condition had not incapacitated her prior to the robbery incident; the robbery was the "catalyst" that furthered the pre-existing mental condition to the extent that it became disabling requiring subsequent psychiatric treatment.

In 2002, the legislature made revisions to the statutes to address mental/stress related injuries.

- *T.C.A.* § 50-6-102(12) – defining injury and personal injury was revised to include "a mental injury arising out of and in the scope of employment."
- *T.C.A.* § 50-6-102(16) outlines 2 compensable mental injuries and an exclusion:

- 1 Loss of mental faculties or a mental behavioral disorder is compensable if the proximate cause is a compensable physical injury that results in permanent disability.

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Veterans and the Law: Spotlight on the New USERRA Regulations

by Laura A. Steel

The Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) prohibits employers from discriminating against veterans, those who serve in the military or those who apply to serve in the military. USERRA also sets out the rights of those qualified individuals for reemployment and continuation of benefits upon return from military service. On December 19, 2005, the Department of Labor issued new, final regulations for USERRA that became effective January 18, 2006. No new legal requirements were created in the regulations. Instead, they are intended to clarify employee and employer responsibilities. Here are some highlights of the new regulations:

- They are written in a question-and-answer format and in “plain English,” much like the Family and Medical Leave Act regulations.
- An “employer” under USERRA includes, among others:
 - ▲ Any public or private employer, regardless of size
 - ▲ Supervisors and managers (meaning that individual liability, a concept not necessarily recognized under other employment laws, is possible under USERRA)
 - ▲ But NOT an independent contractor (and the requirements for meeting this status are set out in the regulations).
- Temporary, part-time, probationary, and seasonal employees are covered under the antidiscrimination and antiretaliation provisions of USERRA, but potentially not under the reemployment and benefits sections.
- Employees must meet the criteria set out in the regulations to be eligible for reemployment.
- An employer does not have to give its permission before leaving for service.
- The employee does not have to announce his/her intention to return to employment upon completion of service.
- Different time limits are imposed upon employees to return to work or apply for reemployment, and those are determined based upon the length of uniformed service.
- An employee does not lose reemployment rights by applying for or obtaining employment with another employer during the period of time

in which a reemployment application is to be made. The exception to this is where the other employment would cause the employer to discharge any employee (such as going to work for a direct competitor in violation of company policy).

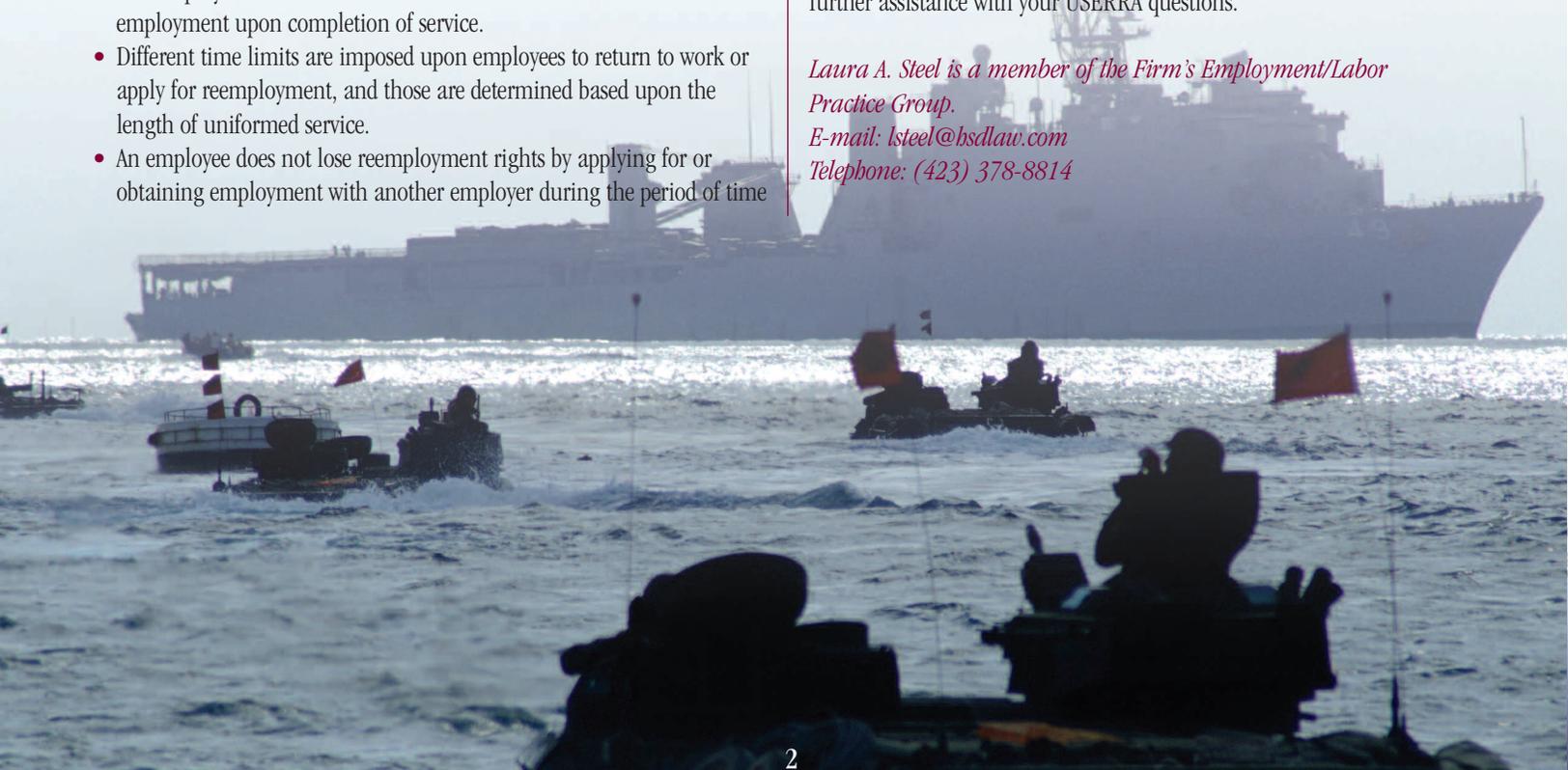
- Employees on service leave are considered to be on furlough or leave of absence status. Your company’s policies for benefits available to employees with such status will, therefore, apply to your military leave employees. If you have more than one type of nonmilitary leave, then you should defer to the one that provides the most generous form of leave.
- If health plan coverage for the employee or a dependent ceases because of service in the uniformed services, that coverage must be reinstated upon reemployment and without a waiting period.
- Return to employment must take place “as soon as practicable under the circumstances,” which, absent unusual circumstances, is generally within 2 weeks of application for reemployment.
- Employers have obligations regarding opportunities for promotions and eligibility for promotions to returning service members.

Again, these are just a few of the highlights. More information is available by downloading the Fact Sheet prepared by the Department of Labor at http://www.dol.gov/vets/programs/userra/userra_fs.htm, or a copy of the question-and-answer regulations at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.htm>. Also, don’t forget to display the poster required by USERRA, which can be found at http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal. Contact any member of the Labor and Employment team for further assistance with your USERRA questions.

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Eminent Domain in the Wake of *Kelo*: Take It or Leave It?

by Senitria A. Goodman

On August 29, 2005, Hurricane Katrina wreaked havoc on New Orleans, killing hundreds of residents and leaving the city in ruins. Conceivably the most devastating natural disaster in United States history, Katrina concentrated much of its devastation on the city's most impoverished communities. The catastrophic impact of Katrina left New Orleans virtually uninhabitable and in dire need of repair.

As New Orleans formulates plans to redevelop, government planning officials plan to create a new infrastructure, bring in new jobs and implement a general boost to the city's economy. Truly, Hurricane Katrina has created the perfect opportunity for the government to rebuild a better New Orleans. Amidst uncertainty as to how to rebuild the ravaged city, eminent domain seems to present a workable solution.

For the Good of the People

Eminent domain describes the legal authority that allows the government to take private property for "public use," such as building schools, roads, or bridges. The power of eminent domain may be exercised by our lawmakers when they pass a new statute that identifies particular property to be acquired for public use. The power may also be delegated to others to act on development plans designed to benefit the public.

The United States Supreme Court has approved of the use of eminent

Paying Fair

The law states that the government must pay "just compensation" when it acquires private property through eminent domain. Just compensation is calculated by using the property's "fair market value." Homes are usually worth more to the owners than their "fair market value." But how do you calculate the fair market value of a home in an uninhabitable area, such as the areas destroyed by Katrina? How much is a home truly worth if there is nothing to sustain the neighborhood?

domain in various "public use" scenarios, from redistributing the concentration of land ownership to effecting urban renewal. With the Court's latest ruling in *Kelo v. City of New London*, we are seeing a new era in the exercise of eminent domain under a more expansive view of "public use."

In *Kelo*, the city of New London instituted a redevelopment plan which called for the purchase of over 90 acres of real estate in the project area by a private developer, but some landowners refused to sell their property. The city responded by initiating an action for condemnation, a process that transfers title to privately-owned land to the government. The landowners challenged the condemnation by filing a lawsuit to keep their homes.

The Supreme Court found that because the city's redevelopment plan was subjected to an extensive public approval process, approved by the city council and executed pursuant to this carefully considered scheme, the plan constituted a valid public use. Ultimately, this decision allowed the city of New London to force landowners to sell their property to another private entity against their will.

Opening the Floodgates

In the wake of *Kelo*, there is fear that all private property is now at risk of being taken by the government and given to another private owner under the guise of economic development, which may be contrary to "public use."

Supporters of the *Kelo* decision feel that New Orleans presents a prime opportunity to develop low-cost rentals targeted at low and moderate income households, and in that way use eminent domain for legitimate economic growth.

The exercise of eminent domain may be a double-edged sword for New Orleans' poor residents. On one hand, few landlords and homeowners will likely be able to rebuild in a meaningful way in a community where rebuilding is actually a viable option unless there is government access to certain areas. Conversely, some fear that eminent domain can be abused to effect a mass exodus and remove the poor from the city.

Undoubtedly, eminent domain has the greatest impact on minorities and economically disadvantaged communities. As a result, eminent domain has often been criticized as a government tool used against politically weak communities with high concentrations of minorities. In situations like *Kelo*, the use of eminent domain has been dubbed "corporate welfare" or the government helping the rich get richer.

The reality is that New Orleans must take drastic action to effectively rebuild the once majestic city. Therefore, it may take something as drastic as eminent domain to target certain areas for redevelopment and renewal. Facing the fact that the use of eminent domain in New Orleans may displace the very residents it aims to help will be a key question for decision makers to consider in the months to come.

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Too Close to Home?

In response to *Kelo*, Congress has introduced various bills that are presently on the House and Senate floor. Additionally, over half of the states have proposed bills and constitutional amendments to limit the effects of *Kelo*.

Currently, Tennessee law only authorizes municipalities to exercise eminent domain powers for very specific uses, such as:

- Airports
- Controlled-access highways
- Drainage ditches
- Electric plants
- Gas systems
- Industrial parks
- Parks
- Public transportation systems
- Public works projects
- Railroad systems
- Recreational systems
- Schools
- Sewers
- Utilities

Tennessee law seems to be at odds with the *Kelo* decision since our laws prohibit the use of eminent domain to promote economic development or increase revenue; however, in the last legislative session, 16 bills addressing eminent domain were filed in an attempt to change the way Tennessee defines "public use" and to clarify whether eminent domain should be used for economic development purposes.

Hunter, Smith & Davis Corporate Partners are Making News

Mark Dessauer, for the second year in a row, has been named a top lawyer in the state of Tennessee by *Business TN* magazine. Mr. Dessauer was named to the "150 Best Lawyers" listing for 2006.

He is a partner in the firm and Chair of the firm's Corporate/Business Practice Group. He is described by his nominating peers as "handling major corporate reorganizations." Mr. Dessauer is a member of the Board of Directors of the Mid South Commercial Law Institute and is a former member of the Tennessee Bar Association Board of Governors.

Bill Argabrite recently took over as Managing Partner of the Firm and **Jimmie Miller** is the new President of the Northeast Tennessee Chapter of the Federal Bar Association.

Michael S. Lattier and **Scott T. Powers** were recently named Partners of Hunter, Smith & Davis, LLP.

Mr. Lattier is a member of the firm's Corporate/Business Practice Group and Employment/Labor Practice Group. He practices in the areas of labor and employment law, corporate law, as well as commercial and civil litigation. He is a member of the Tennessee, Florida and Montana Bar Associations and is a past president of the Kingsport Bar. He is licensed to practice before the state courts of Tennessee, various federal district and appellate courts and the U.S. Supreme Court.

Mr. Powers is a member of the firm's Corporate/Business Practice Group and practices in the areas of corporate law and corporate transactions, including mergers and acquisitions. He is admitted to practice before the Tennessee Supreme Court, United States District Court and United States Bankruptcy Court for the Eastern District of Tennessee and the Sixth Circuit Court of Appeals.

William C. Bovender, was recently elected a Fellow of the Tennessee Bar Foundation, an association of 620 attorneys across the state. Invitations to membership, which is a position of honor, were extended to 33 attorneys this year by the Board of Trustees. The introduction of new Fellows took place in January at the annual Fellows' Dinner in Nashville.

Hunter, Smith & Davis Corporate Partners are, left to right seated: Mark Dessauer, Jimmie Miller, Bill Bovender and Bill Argabrite. Standing left to right are: Mike Lattier and Scott Powers.



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Post-Traumatic Stress *cont'd.*

2. Mental injury is compensable when proximate cause is an identifiable work-related event resulting in sudden or unusual mental stimulus.
3. "A mental injury shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities"

Prior to 2002, a "mental faculty" injury was considered a scheduled member, and disability benefits could be awarded for up to 400 weeks. The 2002 revisions changed a mental injury to the body as a whole. (*T.C.A.* § 50-6-207(3)(F)). The change can be significant; only whole body injuries (not individual scheduled injuries) may be considered for permanent total disability benefits. *T.C.A.* § 50-6-207(4)(A)(B). Permanent total disability benefits may now exceed 400 weeks, and can be paid until "the employee is eligible for Old Age benefit[s] . . . under the Social Security Act."

The new cases suggest that each mental disability claim will have to be assessed and decided on a case-by-case basis. Like so many other workers' compensation issues, the issue of medical causation will be crucial to a determination of whether the employer is responsible for disability and healthcare benefits, and any reasonable doubt on the causation issue will be construed in the employee's favor. In light of the 2002 Amendments and recent court decisions, establishing that causal connection in cases of permanent total disability can significantly impact an employer's financial exposure, particularly with younger disabled employees. We are seeing more and more psychiatric disability claims, so stay tuned; this will get interesting.

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