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IN THE SUPREME COURT OF IOWA

No. 21-0841

MANDY TRIPP,

Petitioner-Appellant,

vs.

SCOTT EMERGENCY COMMUNICATION CENTER and IOWA MUNCIPALITIES WORKERS COMPENSATION ASSOCIATION,

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE MARK CLEVE
Scott County No. CVCV300684

PETITIONER-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENTS

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ROUTING STATEMENT

This case presents a substantial issue of first impression and a substantial question of changing legal principles, both of which are issues of broad public importance within the meaning of Iowa Rule of Appellate Procedure 6.1101(2). Therefore, this appeal should be retained by the Supreme Court.

The questions submitted in this appeal concern the legal causation test for mental-mental injuries (in this case PTSD), a category of workers' compensation claims that have increased in the twenty years since the Supreme Court last addressed this test. The Court's answers to these questions will have a broad impact, affecting all workers with mental-mental claims, but most especially first responders, police officers, and fire fighters.

More specifically, whether the legal causation test for mental-mental injuries in a workers' compensation case is an objective or subjective test is a substantial issue of first impression and one that affects many claims brought by Iowa workers. *See* Iowa R. App. P. 6.1101(2)(*c*), (*d*) (stating "[c]ases presenting substantial issues of first impression" and "[c]ases presenting fundamental and urgent issues of broad public importance requiring . . . ultimate determination by the supreme court" shall ordinarily be retained by the supreme court). The Iowa Workers' Compensation Commissioner and the District Court acknowledged in this case the absence of any binding precedent on this question. (App. 52; 67-68)

In the absence of binding precedent, the Commissioner attempted to reconcile the few factually driven cases heard before the Agency and the District Court looked to "persuasive precedent": a 1986 Montana case! (App. 68-69) The authorities upon which the Commissioner and District Court relied are no substitute for a thorough analysis by the Supreme Court using Iowa law, Iowa precedent, and Iowa public policy.

In addition, whether the Iowa Supreme Court should adopt a revised or new test for legal causation in cases of mental-mental injuries involving PTSD in light of the modern medical understanding of PTSD and public policy considerations presents a substantial question of changing legal principles and is an issue of broad public importance that requires resolution by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(*d*), (*f*) (stating "[c]ases presenting fundamental and urgent issues of broad public importance requiring . . . ultimate determination by the supreme court" and "[c]ases presenting substantial questions of . . . changing legal principles" shall ordinarily be retained by the supreme court).

STATEMENT OF THE CASE

I. Nature of the Case

This appeal is taken from a district court's review of a final agency decision made by the Iowa Workers' Compensation Commissioner ("Commissioner"). The district court affirmed the Commissioner's decision that Petitioner-Appellant Mandy Tripp (hereinafter, "Appellant" or "Tripp") did not sustain a compensable mental-mental injury because she did not satisfy the test for legal causation set forth in *Brown v. Quik Trip Corp.*, 641 N.W.2d 725 (Iowa 2002). That test is as follows: whether the claim "is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain . . . irrespective of the absence of similar stress on other employees." *Brown*, 641 N.W.2d at 729.

II. Course of Prior Proceedings

On November 15, 2018, Tripp filed an original notice and petition with the agency seeking workers' compensation benefits. (App. 7) Tripp alleged that while working as a 911 dispatcher, she sustained a compensable mental-mental injury on September 30, 2018 after taking a call from the mother of a 6-month-old infant who had died. (App. 7; *see also* App. 10, 15, 47, 119-127, 135-138, 185-188)

After hearing, Deputy James Christensen ("Deputy") filed his decision, concluding Tripp had failed to prove legal causation for a mental-mental injury under the *Brown* Standard. (App. 24-25) Although the Deputy believed this was "a

difficult case" and the "dead infant call" was "not a pleasant recording to hear," he concluded Tripp did not satisfy the test for legal causation because 911 dispatchers "routinely take calls involving death and traumatic injury." (App. 23-25)

Tripp filed a Motion for Rehearing asking the Deputy to reverse his ruling on legal causation because Tripp met the *Brown* Standard as a matter of law and as a matter of fact. Tripp also contended it was error for the Deputy to consider the testimony of other 911 dispatchers regarding their subjective impressions of the call, to in essence apply the "assumption of risk" doctrine in a workers' compensation case, and generally to apply *Brown* as a subjective test. In the alternative, Tripp asked the Deputy to distinguish, refine, and/or overturn the holding in *Brown*. (App. 27-32)

The Deputy denied Tripp's Motion, concluding the Dead Infant Call was not unusual or unexpected for a 911 dispatcher. (App. 43) The Deputy also noted that he did not have the authority to overturn or modify precedent of the Iowa Supreme Court. (App. 43)

Tripp appealed to the Commissioner. (App. 45) The Commissioner affirmed the Arbitration Decision and the Rehearing Decision with additional legal analysis. (App. 47-57) At the outset, the Commissioner denied Tripp's request to modify or overturn the *Brown* Standard, noting the agency lacked authority to overturn or modify Supreme Court precedent. (App. 49) The Commissioner then discussed

whether the *Brown* Standard is an objective or a subjective test,[1] acknowledging the Supreme Court (or Court of Appeals) has not specifically ruled on this issue. (App. 52) Analyzing agency and case law precedent, the Commissioner ruled, "Whether the traumatic event at issue stems from an unexpected cause or an unusual strain is determined by a subjective standard *that takes into account claimant's occupation*." (App. 56-57) (emphasis added)

On judicial review, the Iowa District Court for Scott County affirmed the Commissioner. (App. 72) Like the Commissioner, the District Court refused to modify or overturn the *Brown* Standard because it believed it did not have the authority to do so. (App. 66)

In addressing whether the *Brown* Standard is a subjective or an objective standard, the District Court acknowledged there was "no binding precedent" that had addressed the issue. (App. 67-69) In the absence of binding precedent, the District Court looked to "persuasive precedent," specifically a 1986 Montana case cited in *Brown*. (App. 68-69) Relying on Montana case law, the District Court held the Commissioner did not commit legal error by considering Tripp's "regular job responsibilities. . . in evaluating whether her harm was the result of an unexpected cause or unusual strain" under the *Brown* Standard. (App. 70-71)

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[1] The Commissioner cited to Black's Law Dictionary 1413 (7th Ed. 1999) for the general legal definitions of "objective standard" and "subjective standard." (App. 49)

The District Court also rejected Tripp's argument that the Commissioner's finding that the Dead Infant Call was not "an unexpected cause or unusual strain" was not supported by substantial evidence.[2] (App. 72) This ruling was based on the District Court's view that the Commissioner had the discretion to consider the traumatic event from a narrow or broad view. The District Court correctly identified that Tripp was arguing that *dead infant calls* were extremely rare, a conclusion that was undisputed on the record made at the hearing. The Employer, in contrast, argued that matters of life and death *in general* were relatively common for 911 dispatchers, a conclusion that was also undisputed on the record made at the hearing. (App. 72) (emphasis added)

Tripp filed a timely Notice of Appeal. (App. 74)

[2] The District Court also rejected Tripp's argument that the Commissioner improperly rejected expert evidence; however, Tripp does not present that argument on Appeal before the Court. (*See* App. 71-72)

STATEMENT OF THE FACTS

A. Background

Tripp has been a 911 dispatcher[3] since June 2002. (App. 182) Her current job at Scott Emergency Communication Center (SECC) is "Public Safety Dispatcher." (App. 141) Tripp is a motivated and hard worker. (App. 223-224, 229, 242; *see also* App. 183) Since 2003, she has been training other 911 dispatchers. (App. 114-115)

In her current position, Tripp handles roughly 50 to 200 calls each day. (App. 61) These calls are of various types, including 911 emergencies, 911 non-emergencies, and administrative calls. (App. 182-183, 112; *see also* App. 232-233) "So it could be anything from my neighbor's dog is barking and annoying to my boat has stopped in the river… " (App. 183) If medical care is required, Tripp transfers the call to Medic. (App. 113) She testified that a typical call lasts 35 seconds. (App. 113) As a rough approximation, Tripp has taken over 100,000 911 calls and *potentially* up to 500,000 911 calls in her time with SECC. (App. 184)[4] Before September 30, 2018, Tripp had never struggled with a 911 emergency

[3] "911 operator" is sometimes utilized in the record and testimony, which is another way of referring to Tripp's occupation.
[4] Sanders, who is the current director of SECC, did not have any issue with the number of 911 calls estimated by Tripp. (App. 240)

phone call[5] and had never been diagnosed with PTSD. (App. 184; *see also* App. 171-172)

<u>*B.*</u> <u>*Tripp's Work Injury On September 30, 2018*</u>

On Sunday, September 30, 2018, Tripp was at work. (App. 135) There had not been many calls that day. (App. 135) Then, without warning of what call would come next, Tripp answered a 911 emergency call and heard a mother screaming over and over, "help me, my baby is dead."[6] (App. 119-127, 135-138, 140, 151, 185-188) This call was nearly four times longer than the typical 35-second call; it lasted a grueling 2 minutes and 15 seconds due to the mother's inability to provide the information Tripp needed to summon assistance. (App. 62, 123-127, 186, 199)

After her call with the mother ended, Tripp continued to hear the radio traffic of other responders who were at the scene. (App. 136-139, 186-187; *see also* App. 146) She heard graphic details, such as the medic giving instructions on how to give CPR to an infant where "rigor was already set in," all while the mother was "screaming in the background." (App. 136-137, 187; *see also* App. 146) Everyone in the SECC Call Center *gasped* when the officer said the mark on the infant's head might be consistent with a claw hammer. (App. 136-137, 187; *see*

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[5] SECC director, Denise Pavlik, also testified that Tripp had never had issues with other 911 calls. (App. 231)

[6] Tripp testified to this traumatic event in her deposition and at hearing. (App. 119-120, 135-137, 185-188)

also App. 146) At that time, Tripp believed the infant might have died through possible trauma to the head. (App. 136-137, 187; *see also* App. 146)[7]

After this event, Tripp's supervisor, Kathy Schwartz, asked Tripp if she needed a break, and Tripp responded that she "needed another call to get that woman screaming out of [her] head…" (App. 188) Tripp texted her husband Dennis, a police officer for the Bettendorf Police Department, and told him she had a "bad call." (App. 16, 169-172) He called Tripp after receiving her text so that she could hear another voice. (App. 16, 169-172) He testified Tripp had never needed that type of help before. (App. 62, 169-172) Notwithstanding the traumatic events she had experienced, Tripp continued to take 911 calls that day and finished her shift. (App. 16, 188)

C. Tripp Is Diagnosed and Receives Treatment for PTSD

Over the next several days, Tripp began to notice her changing mental state: "I was on the verge of tears and I didn't want to answer phones, and I didn't want to really talk to anybody…" (App. 188) She told Schwartz, her supervisor, she was struggling with the call, (App. 129, 190-191) and shared with her co-workers, Denise Pavlik (director of SECC on September 30, 2018), Vanessa Wierman, and

[7] The Employer's witnesses who testified that this event was not unexpected or unusual never mentioned what happened after the 911 call had ended, such as Tripp continuing to hear the mother scream and hearing the responder's comments that rigor mortis had begun and that a claw hammer may have been used, a comment so unusual and unexpected that everyone in the SECC Call Center collectively gasped. (*See* App. 136-138, 186-187)

Tracey Sanders that the call was affecting her mental state (App. 148-150, 191, 227) Tripp spent hours with Denise, sobbing, and had a meltdown because the aftereffects of the Dead Infant Call[8] prevented her from doing her job. (App. 105-108, 131-132, 188) She was "on the verge of tears all the time." (App. 131-132) Tripp had never experienced this before: "I was crying and unable to process my emotions and wanted to sleep a lot and became very socially withdrawn." (App. 133; *see also* App. 16)

Tripp sought professional help from Lisa Beecher, LMHC, about two weeks later. (App. 16, 116-117, 130-132, 192) This visit was approved by SECC's HR department. (App. 116-117, 192-193) Ms. Beecher took Tripp off work and restricted her hours. (App. 157, 192; *see also* App. 16) Seeing that Tripp was not improving and thinking medication may help, Ms. Beecher referred Tripp to Dr. Robert Gillespie. (App. 194-195)

Dr. Gillespie, who specializes in PTSD, is the psychologist for the City of Davenport's police department and other first responders. (App. 133-134, 194) He treated Tripp for PTSD, and also referred her to her family physician, Dr. Stephen Thompson, for prescription medications. (App. 196; *see also* App. 18) Dr. Thompson prescribed medications for Tripp based upon his diagnosis of PTSD.

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[8] Appellant will refer to the September 30, 2018, 911 call involving the dead infant and the ensuing audio of the responders at the scene collectively as the Dead Infant Call.

(App. 163) Tripp continues to see Ms. Beecher every other week and Dr. Gillespie once a month, both for treatment of her PTSD. (App. 193, 196)

D. Evidence of Unusual Nature of the Dead Infant Call

In her 17½-year career, Tripp has taken three other 911 calls dealing with the death of an infant. (App. 118-119, 189) She testified those types of calls are "not typical" and "not often." (App. 119) Moreover, when Tripp answered the Dead Infant Call, she had no idea what type of 911 call she was going to receive. (App. 136)

Not only was it rare to receive an emergency call regarding a dead infant, this call was also unique in that it was the first time Tripp took a call from the actual mother of the dead infant. (App. 128, 137, 189; *see also* App. 201) "The tone of that call is different than ones I've taken before. When a child dies, a mom doesn't make a normal sound. I can't describe the sound. It is guttural, awful."[9] (App. 189) Furthermore, the mother screamed definitive language that "her baby was dead" rather than "the kid's not breathing." (App. 189-190) "My baby is dead" is atypical for a 911 dispatcher to hear as callers "never say a definitive my child is dead." (App. 190; *see also* App. 237) Although it is not unusual to speak with a distraught caller, this caller was significantly beyond "distraught" and the call

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[9] Pavlik (who was the director of SECC on 9/30/18) agreed that some calls are more traumatic than others. (App. 233; *see also* App. 100)

clearly involved a life/death situation. (App. 137, 189, 198, 206) Tripp – a skilled 911 dispatcher – was having trouble even getting an address from the mother. (App. 137, 189) As a result of the mother's desperate and overwrought state of mind, this call lasted an agonizing 2 minutes and 15 seconds, four times longer than a typical call. (*See* App. 113)

Even after the emergency call with the mother ended, the trauma continued. Tripp continued to hear the radio traffic of other responders who were at the scene. (App. 136-139, 186-187; *see also* App. 146) She continued to hear graphic details, such as the medic giving instructions on how to perform CPR on an infant where "rigor was already set in" and that the mark on the infant's head was consistent with a claw hammer, all while the mother was "screaming in the background." (App. 136-137, 187; *see also* App. 146)

Tripp's husband, Officer Dennis Tripp, testified that in his over 23 years of being a first responder in Scott County, he had never arrived to a scene of a dead infant. (App. 174-175) Furthermore, he testified that responding to such an event would be an unusual circumstance and unusual strain in Scott County. (App. 175) He also testified that 911 operators "don't anticipate a screaming parent of a dead child." (App. 177) Officer Tripp believed that the Dead Infant Call would have been traumatic, unusual, and unexpected for a 911 dispatcher. (App. 177)

The Employer called Jill Cawiezell, who was the medic dispatcher to whom Tripp transferred the Dead Infant Call, as a witness. (App. 211) Cawiezell knew the content of the Dead Infant Call before she took the call, as the record of the call showed Tripp told Cawiezell prior to transferring the call that "SHE IS SAYING HER BABY IS DEAD." (App. 147, 216-217; *see also* App. 123-127) Cawiezell acknowledged that she was able to mentally prepare herself before picking up the call. (App. 217) Moreover, at that time, Cawiezell had no idea what Tripp had actually heard on the call or what the mother had sounded like because Cawiezell did not hear Tripp's conversation with the mother that day. (App. 217-218) In addition, Cawiezell picked up the line after Tripp had already spent over 2 minutes attempting to calm the mother down. (App. 218)

In preparation for the hearing, Cawiezell listened to Tripp's conversation with the mother. (App. 218) Cawiezell testified that it was very rare to get calls of dead infants. (App. 219) She said she has taken about twelve such calls in her 24 years in the profession.[10] (App. 212, 214; *see also* App. 20) Cawiezell estimated that during her 24-year tenure as a medic dispatcher, she took approximately 141,000 medic phone calls. (App. 219) Recognizing that this number is a "ball park number," the percentage of taking a dead infant call is approximately

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[10] Cawiezell knew before taking these twelve calls that they would involve a dead infant, as medic dispatchers get an idea of what is happening from the 911 dispatcher before the call is transferred. (App. 220)

.00008511%. (*See* App. 219) Nonetheless, Cawiezell testified that this call was not sudden, unusual, or unexpected (App. 214-215, 221-222)

Denise Pavlik, who was the director of SECC at the time of the Dead Infant Call, also testified for the Employer. (App. 225-226) Pavlik was not physically present when the Dead Infant Call occurred; she first listened to the recording knowing that the audio involved the death of a 6-month-old infant. (App. 148)

Pavlik agreed that some calls for 911 dispatchers are more traumatic than others. (App. 233) She also corroborated that calls involving infant deaths are not typical, as she has taken about fifteen (15) in her 22 years in the profession, and in only three did the caller actually say "my baby is dead." (App. 20, 234-237) It was estimated that during her 22-year tenure as a 911 dispatcher, Pavlik has taken approximately 572,000 911 phone calls. (App. 234-237) Recognizing that this number is a "ball park number," her percentage of taking a dead infant call is approximately **.00002622%**. (*See* App. 236-237) Nonetheless, Pavlik testified that the Dead Infant Call Tripp took was not sudden, not unusual, and not unexpected. (App. 228)

E. Expert Medical Testimony

On January 18, 2019, Dr. Gillespie rendered expert opinions. (App. 76-80) On January 29, 2019, Ms. Beecher also provided expert opinions regarding Tripp.

(App. 81-85) As it relates to their expert medical opinions, the Agency made the following Finding of Facts:

> In a January 18, 2019 report, written by claimant's counsel, **Dr. Gillespie opined claimant's diagnosis was PTSD and that the PTSD was secondary to her work trauma on September 30, 2018**. Dr. Gillespie indicated that, in the DSM IV, the diagnostic criteria to traumatic exposure, for PTSD, ". . . explicitly contemplates the exposure risk for first responders, such as 9-1-1 operators." (Ex. 1, pp. 1-3) Dr. Gillespie indicated claimant was not at maximum medical improvement (MMI) as of November 18, 2019. He noted claimant continued to experience ongoing emotional distress but that the intensity and frequency of symptoms had decreased. He noted claimant may require continued psychotherapy medications for her PTSD symptoms. (Ex. 1, p. 4) In a January 29, 2019 letter, written by claimant's counsel, **Ms. Beecher agreed claimant had a diagnosis of PTSD secondary to the work trauma of September 30, 2018. Ms. Beecher believed claimant's PTSD was caused by the September 30, 2018 incident, but also opined that forced overtime and alleged understaffing might have contributed to the PTSD**. She agreed claimant was not yet at MMI and would require ongoing medical care in the future. (Ex. 2)

(App. 17-18) (emphasis added)

On September 4, 2019, Dr. Martin Carpenter provided an independent psychiatric evaluation. (App. 91-102) Dr. Carpenter is a board-certified psychiatrist. (App. 103-104) As it relates to his expert medical opinions, the Agency made the following Findings of Facts:

> In a September 4, 2019 report, Martin Carpenter, M.D., gave his opinions of claimant's condition following an independent psychiatric evaluation. Dr. Carpenter is a board-certified psychiatrist. **Dr. Carpenter agreed with claimant that the September 30, 2018 phone call exceeded the routine 9-1-1 phone calls by a substantial degree.** He noted some calls 9-1-1 operators take are more severe than

> others. (Ex. 5, pp. 26-35) **Dr. Carpenter opined the only diagnosis of claimant's condition was PTSD. He found claimant met the DSM V criteria for a diagnosis of PTSD, as she ". . . witnessed the actual event of a mother discovering her deceased child."** (Ex. 5, p. 32) He found claimant was at MMI. He opined claimant still required treatment and would probably require ongoing pharmacological management as well as psychotherapy. Dr. Carpenter recommended claimant be allowed to continue treatment with Dr. Gillespie and Ms. Beecher. (Ex. 5, p. 34) Dr. Carpenter noted the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition did not provide specific percentages of impairment for mental health disorders. Using federal guidelines, that Dr. Carpenter cited at 38 CFR, book C, he believed claimant had a 30 percent permanent impairment.

(App. 19) (emphasis added)

All three medical experts – Beecher, Dr. Gillispie, and Dr. Carpenter – have opined within a reasonable degree of medical certainty that the 9/30/18 Phone Call was "a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain," even when considering Tripp's job as a first responder. (App. 78, 83, 88, 100) The Employer offered no expert testimony to the contrary.

ARGUMENT SUMMARY

The main issue to be decided on appeal is whether the district court erred in affirming the agency decision that Tripp's PTSD (mental-mental injury) is not compensable because she failed to prove legal causation. Tripp argues the Commissioner erred as a matter of law by concluding that the *Brown* Standard is a subjective test, rather than an objective test. Tripp also argues that the *Brown* standard should be modified and/or abandoned as it relates to PTSD claims in light of modern medical understandings of PTSD and the harsh, unjust, and unintended denial of mental-mental claims for workers suffering from PTSD, especially first responders.

PTSD is a medical condition that can only be diagnosed after satisfying multiple criteria under the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-V), including that the person was exposed to a particular type of traumatic event (death, threatened death, serious injury) in a particular manner (directly, witness of, indirect exposure). The DSM-V was published in 2013, eleven years after the Iowa Supreme Court decided *Brown* and thirty-five years after the Montana decision that was the source of the *Brown* Standard.[11] *Brown*, 641 N.W.2d at 729 (citing *Tocco v. City of Great Falls,* 714 P.2d 160, 163-64

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[11] The DSM-III was published in 1980, the DSM-IV was published in 1994, and the DSM-V was published in 2013, so there have been two revisions since the Montana test, the pattern for the *Brown* Standard, was constructed.

(Mont. 1986)). As science, technology, and medicine advances, so should the Court's judicially created standards, such as the one created in *Brown*.

This case illustrates exactly why the *Brown* Standard should be modified and/or overturned: because that test creates a harsh, unjust, and unintended result for Iowa first responders, including 911 dispatchers, police officers, and firefighters. This case reveals that the *Brown* Standard and modern medical standards for PTSD are out of sync: how can a worker factually establish a diagnosis of PTSD—exposure to a traumatic, life-and-death event, yet be denied benefits because a first responder's job is to deal with traumatic events? The question the Court will need to answer is whether the workers' compensation law should be interpreted and applied in a manner that precludes Iowa first responders with PTSD from receiving benefits for a legitimate, work-related mental injury.

If the Court does not reverse the Commissioner based upon the identified problems with the *Brown* Standard, the Court should still reverse the Commissioner because his core factual finding—that the Dead Infant Call was not unexpected or unusual—is not supported by substantial evidence.

I. THE COMMISSIONER ERRED AS A MATTER OF LAW WHEN HE CONCLUDED THE LEGAL CAUSATION TEST FOR MENTAL-MENTAL INJURIES SET FORTH IN *BROWN V. QUIK TRIP CORP.*, 641 N.W.2d 725 (IOWA 2002), IS A SUBJECTIVE STANDARD.

A. Standard of Review

The Court created the legal causation standard for mental-mental injuries when it interpreted Iowa Code sections 85.3(1) and 85.61(4). *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 849-53 (1995). Legal causation presents an "issue of law." *Id.* at 853. The Court will review the Commissioner's legal interpretation of the workers' compensation statute, including Iowa Code sections 85.3(1) and 85.61(4), for errors at law. *Bluml v. Dee Jay's Inc.*, 920 N.W.2d 82, 84 (Iowa 2018) (citing Iowa Code § 17A.19(10)(*c*)); *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

The Court has "repeatedly declined to give deference to the commissioner's interpretations of various provisions of chapter 85." *Bluml*, 920 N.W.2d at 84 (quotations omitted) (citations omitted); *accord Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 243 (Iowa 2018) (holding that the Court will not give deference to the Commissioner's legal interpretation unless he has been "**clearly** vested with the authority" to interpret a provision of the law) (emphasis added).

B. *Governing Legal Principles*

1. Interpreting Workers' Compensation Laws

The Court strives for an interpretation of workers' compensation laws that is "reasonable," that "best achieves the statute's purpose," and that "avoids absurd results." *Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395, 399 (Iowa 2010) (internal quotations omitted). "The primary purpose of the workers' compensation statute contained in chapter 85 is to benefit the worker." *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). Therefore, workers' compensation statutes are to be "broadly and liberally construed" in favor of the employee in keeping with the humanitarian purpose of the statute. *Gregory*, 777 N.W.2d at 399. Consistent with this rule, the Court has said it "will not defeat the statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction." *Id.* (citation omitted).

In light of these governing principles, the Court should strive to ensure that Iowa workers, especially first responders, are eligible for workers' compensation benefits when they suffer a work-related injury. *See Paulsen v. City of Davenport*, File No. 5033124 (App. Dec. 4/9/13) (finding that the Agency favors the awarding of workers' compensation benefits to an injured police officer that may "fall between the cracks" in recovering benefits under Chapter 85 and Chapters

410/411); *see also Paulsen v. City of Davenport*, File No. 5033124 (App. Dec. 5/7/15).

2. Principles of Workers' Compensation Laws

Workers' compensation law is a "no fault" system and there is no assumption-of-risk defense available to an employer. *Secrest v. Galloway Co.*, 239 Iowa 168, 170, 30 N.W.2d 793, 795 (1948). A preexisting condition that is aggravated, accelerated, worsened, or lit-up by employment activity will be deemed a "personal injury." *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812, 815 (1962). Furthermore, a preexisting condition is not a defense. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 76 N.W.2d 756, 760-61 (1956). The principle that employers take employees "as they find them" extends to both physical and mental injuries: "We know of no reason to vary from the rule that the employer takes the employee as he finds him in physical injury incidents and apply a different rule in psychiatric injuries." *Leffler v. Wilson & Co.*, 320 N.W.2d 634, 635 (Iowa Ct. App. 1982) (emphasis added).

3. Mental-Mental Injuries

"[P]sychological conditions resulting from work-related physical trauma," i.e., a "physical-mental" injury, have been recognized as compensable by the Supreme Court. *Mortimer v. Fruehauf Corp.,* 502 N.W.2d 12, 17 (Iowa 1993). A worker does not need to establish legal causation for "physical-mental" injuries.

See Everhart v. Clarinda Correctional Facility, File No. 5007651, 2005 WL 2465835, p. 1-2 (Appeal Dec. 9/30/05); *see also Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 401-02 (Iowa Ct. App. 2007) (rejecting an attempt to "heighten the standard of recovery for a mental injury resulting from a work-related injury").

In *Dunlavey*, the Supreme Court held that the term "personal injury" under section 85.3(1) includes "pure mental injuries," also called mental-mental injuries. 526 N.W.2d at 846. In order for a worker to demonstrate she sustained a compensable mental-mental injury under Chapter 85, the Court imposed two requirements. "First, the employee must establish **factual or medical causation**; the employee must prove that the employee has a mental injury which was caused in fact by mental stimuli in the work environment." *Id*. at 847 (emphasis added). The second requirement imposed in *Dunlavey*—**legal causation**—addressed whether the "policy of the law will extend responsibility to those consequences which have in fact been produced." *Id.* at 853. After examining the various tests for legal causation from other states, the *Dunlavey* Court adopted an **objective standard** for mental-mental injuries:

> For all these reasons, we adopt an *objective standard of legal causation* and place the burden on the employee to establish that the mental injury was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer. Although evidence of workers with similar jobs employed by a

> different employer is relevant, evidence of the stresses of other workers employed by the same employer with the same or similar jobs will usually be most persuasive and determinative on the issue.

Id. at 858 (emphasis added).

Seven years later, the Court modified the legal causation test for mental-mental injuries where a "readily identifiable" event was the source of the mental condition. *Brown,* 641 N.W.2d at 728. In *Brown*, the claimant was an employee for a gas station/convenience store. *Id*. at 726. The claimant had witnessed a person being shot and was also a victim of a work-place robbery, which led to the development of PTSD. *Id.* The Commissioner concluded the claimant had not met his burden to prove legal causation under the *Dunlavey* standard because he had not introduced any evidence regarding the "stress experienced by other workers in similar jobs." *Id.* at 728.

The *Brown* Court – after reviewing its decision in *Dunlavey*, cases outside of Iowa, and a law treatise – held that evidence of stress experienced by similarly situated workers was not required "if the event or events giving rise to the claim are readily identifiable" under the following test set forth in the Court's decision:

> **When a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain, the legal-causation test is met irrespective of the absence of similar stress on other employees.**

Id. 728, 729 (emphasis added). Notably, under *Brown*, the test "is *not* whether the stress is greater than that experienced by similarly situated employees"; rather, the

focus is on whether the "readily identifiable" event or happening was "from an unexpected cause or unusual strain." *Id.*

4. Ruling in this Case

The Deputy stated in his decision that he believed Tripp had "some sort of mental health condition that was triggered, in part, by the phone call." (App. 25). Nonetheless, the Deputy concluded Tripp had not shown legal causation under the *Brown* Standard. (App. 25) As the District Court later noted in its Order on Judicial Review, "In reaching this decision, the Deputy Commissioner gave great weight to the testimony from the three other experienced dispatchers who opined that this call was within the norm for what an emergency dispatcher should expect in this job." (App. 64)

On appeal of the Deputy's decision to the Commissioner, the Commissioner determined that the *Brown* Standard was "not a purely objective test," and held, "Whether the traumatic event at issue stems from an unexpected cause or unusual strain is determined by a subjective standard that takes into account claimant's occupation." (App. 55-56) The Commissioner "performed a de novo review of the evidentiary record and the detailed arguments of the parties" and reached "the same analysis, findings and conclusions as those reached by the deputy commissioner. (App. 48)

On judicial review, the District Court relied on a 1986 Montana case cited in *Brown* to conclude the Agency had applied the correct test for legal causation and had properly considered "the regular job responsibilities of [Tripp] in evaluating whether her harm was the result of an unexpected cause or unusual strain." (App. 69, 71)

Tripp contends on appeal that the Commissioner and the District Court applied an incorrect interpretation of the *Brown* Standard for legal causation that is contrary to the Court's decision in *Brown*, that is inconsistent with workers' compensation law in general, and that undercuts the public policy of this state that the workers' compensation statute should be interpreted to benefit the worker.

C. *The Supreme Court Intended the* Brown *Standard to be an Objective Standard, which is Supported by a Plain Reading of* Brown*, the Court's Precedent with Respect to Workers' Compensation Laws Generally, and Public Policy Concerns.*

As noted, the Commissioner interpreted the *Brown* Standard to be a subjective standard *i.e.,* Tripp's occupation was considered when determining whether the Dead Infant Call was from an unexpected cause or an unusual strain. (App. 56-57) Whether the words "unexpected cause or unusual strain" were meant to be determined by a subjective or an objective standard must be considered in the context of the Court's precedent that workers' compensation law should be liberally and broadly construed in favor of the injured worker, that the employer

cannot raise the assumption of risk doctrine, and that the employer takes an employee as "she is."

Here, the Commissioner considered evidence from Tripp's co-workers that Tripp's job duties included the regular handling of 911 emergency calls and that the Dead Infant Call was not unexpected or unusual. Relying on this evidence, the Commissioner concluded the Dead Infant Call was not unexpected or unusual. The result of this interpretation of the *Brown* Standard is that first responders, police officers and firefighters will rarely, if ever, be able to recover benefits for PTSD caused by a work-related event, as responding to traumatic situations is part of their normal job duties. Surely, the prevention of an entire class of workers from recovering for mental injuries in fact arising out of and in the course of their employment is not consistent with statutory intent to interpret workers' compensation law liberally and broadly in favor of the employee. Moreover, this result in essence gives employers of first responders an assumption-of-the-risk defense, which is contrary to Iowa law. It is clear the *Brown* Standard should not be interpreted to allow the Commissioner to consider the occupation (training, experience, etc.) of a worker to deny compensation for a mental-mental injury stemming from an identifiable event. *See Leffler*, 320 N.W.2d at 635; *Secrest*, 30 N.W.2d at 795; *Gregory*, 777 N.W.2d at 399.

The error in allowing the Commissioner to interpret the words "unexpected cause or unusual strain" using a subjective standard is also supported by the Court's express statement in *Dunlavey* that legal causation is an "objective" test. 526 N.W.2d at 858. Nothing said in *Brown* changed the nature of the test to a subjective one and in fact, the *Brown* Court explicitly noted that "legal causation" would be met "**irrespective of the absence of similar stress on other employees.**" 641 N.W.2d at 729 (emphasis added). This language specifically precludes evidence or testimony of other similarly situated workers – such as Cawiezell, Pavlik, and Sanders in the instant case – that they did not view the event as unusual or unexpected.[12]

An Illinois case, *Diaz v. Illinois Workers' Compensation Commission*, 989 N.E.2d 233 (Ill. App. Ct. 2013), is helpful to a consideration of the instant appeal. In that case, the claimant, a police officer, responded to a neighborhood disturbance where he was "gunned down by a toy gun," which at the time he and at least 40 other officers believed was real. *Id*. at 236. The claimant developed PTSD as a result of that incident and filed a workers' compensation claim. *Id*. at 237-38.

The Commission held that the claimant failed to prove he sustained a compensable injury, particularly because a police officer "is trained in weapons

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[12] Tripp objected to the testimony of these witnesses regarding their subjective impressions as irrelevant under the *Brown* Standard, which should be evaluated by how Tripp experienced the Dead Infant Call. (*See* App. 213, 229-230)

[and] also trained to handle encounters with subjects who are considered armed and dangerous." *Id*. at 238. The Commission found that the incident "is not an uncommon event of significantly greater proportion than what he would otherwise be subjected to in the normal course of employment." *Id*. at 238-39.

On appeal, the Illinois Appellate Court held that the standard the Commission applied was too narrow and was out of context. *Id*. "Under the Commission's analysis it would be virtually impossible for police officers or others involved in dangerous occupations to qualify for a mental-mental claim." *Id.* at 242. The Court held that "whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard, rather than a subjective standard that takes into account the claimant's occupation and training." *Id*. The claimant in *Diaz* reacted as a person of normal sensibilities and his PTSD was found to be compensable by the Appellate Court. *Id*.

As the court in *Diaz* recognized, public policy best supports an objective standard,[13] so as to ensure that first responders have the ability to recover workers'

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[13] The Court appears to favor objective tests in employment-related cases. *See, e.g., Van Meter Indus. v. Mason City Human Rights*, 675 N.W.2d 503, 511 (2004) (holding that fact finders must apply an objective standard to determine whether a constructive discharge occurred); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988) (concluding the test to show an element for the tort of bad faith is an objective standard); *Cowman v. Hornaday*, 329 N.W.2d 422, 425-27 (Iowa 1983)

compensation benefits for work-caused PTSD. As one authority has noted: "In recognizing the value of law enforcement occupations, compensation should certainly be available to those suffering from the inevitable rise in mental illness." Lee Anne Neuman, *Workers' Compensation and High Stress Occupations: Application of Wisconsin's Unusual Stress Test to Law Enforcement Post-Traumatic Stress Disorder*, 77 MARQUETTE L. REV. 147, 177 (1993) (arguing for a modified test for law enforcement occupations under Wisconsin's mental-mental injury standard). To hold otherwise would cause the unreasonable denial of benefits for legitimate mental-mental injuries, contrary to the rule that the workers' compensation statute should be interpreted broadly and liberally in favor of the worker.

The arguments made in this case by the Employer highlight the very issue addressed in the *Diaz* case and in the cited law review article. In defending this claim, the Employer argued that Tripp had received training to deal with emergency calls, she had taken emergency calls in the past, and taking emergency calls was part of her job description.[14] (*See* App. 109) The Employer also argued that other dispatchers were not affected by the Dead Infant Call, clearly irrelevant

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(concluding that the "patient rule," which requires an objective test, was better suited to control the relationship of the patient and physician in the case).

[14] Similar arguments were made by the defendants and rejected by the deputy in *Schuchmann v. Dept. of Transportation & State of Iowa*, File No. 5035676 (Arb. Dec. 6/20/12). *See also Diaz v. Ill. Workers' Comp. Comm'n*, 989 N.E.2d 233, 238-42 (Ill. App. Ct. 2013).

testimony under an objective standard. Allowing the denial of benefits to Tripp on this basis – along with similar denials that will undoubtedly occur in the future – will cause unnecessary delay in mental health care for first responders. The basis for this denial also perpetuates and furthers the stigma for first responders who have PTSD, and indicates to them that PTSD is a personal weakness and something the law does not deem compensable. (*See, e.g.,* App. 109, 150) This result is not good public policy, especially since there is already an epidemic of first responders (and veterans) in this country who have untreated PTSD due to the lack of awareness, lack of understanding, and lack of acceptance that PTSD is a legitimate condition from which people suffer. (*See* App. 150, 173, 207-210; *see also* App. 241)

The Commissioner's interpretation and the District Court's Ruling failed to consider the above law and policy concerns, and instead rested on Agency cases and a 1986 Montana case. (App. 68-69) As a result of their error, the Deputy's decision that relied on the testimony of three co-workers was allowed to stand. Those witnesses (Cawiezell, Pavlik, and Sanders) were permitted to testify to their subjective impressions of the 911 call on September 30, 2018, a call that none of them experienced in real time. All three witnesses knew they were going to listen to a dead infant call prior to hearing it, and none of the three witnesses testified to the events Tripp experienced after the call was transferred. Thus, none of these

witnesses experienced the call and the following events like Tripp did, who testified that the Dead Infant Call was unique, sudden, unexpected, and unusual. Their testimony, nonetheless, was considered and accepted based upon the Commissioner's interpretation of the *Brown* Standard as a subjective standard.

Importantly, these same witnesses testified to the *infrequency* with which dispatchers receive dead infant calls. (*See* App. 219, 236-237) This objective data revealed that such calls were extraordinarily *rare*. Yet this objective evidence that the Dead Infant Call was an unusual event was given no weight, as the Deputy, Commissioner, and District Court had erroneously determined that the test was a subjective one.[15]

Based upon the Commissioner's and District Court's erroneous interpretation of the law, Tripp requests that the Court reverse on appeal and conclude that Tripp established legal causation as defined in *Brown*.

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[15] Inexplicably, the Deputy rejected Tripp's argument that the unique nature of the particular call she took was an important part of the analysis of legal causation:

> Claimant seems to argue that the September 30, 2018 call is somewhat different, as she has never taken a dead infant call from the mother, or when a caller said a child was dead. (Tr. pp. 49-50) Claimant's counsel also suggests that screaming heard on the call somehow makes the call more unusual or unexpected. (Tr. pp. 12, 154) This argument may make a factual distinction. *However, under* <u>Brown</u>*, it does not make a legal distinction.*

(App. 24) (emphasis added)

II. THE SUPREME COURT SHOULD MODIFY OR OVERTURN THE TWENTY-YEAR-OLD *BROWN* STANDARD FOR MENTAL-MENTAL INJURIES RESULTING IN PTSD BECAUSE THAT TEST IS INCOMPATIBLE WITH MODERN MEDICAL UNDERSTANDINGS OF PTSD AND RESULTS IN A HARSH, UNJUST, AND UNINTENDED DENIAL OF BENEFITS TO WORKERS SUFFERING FROM PTSD, ESPECIALLY FIRST RESPONDERS.

A. Standard of Review

The standard of review is for correction of errors of law. *See* statutes, cases, and citations cited and discussed above with respect to the standard of review for Issue I.

B. Governing Legal Principles

1. Interpreting Workers' Compensation Laws

The Court strives for an interpretation of workers' compensation laws that is "reasonable," that "best achieves the statute's purpose," and that "avoids absurd results." *Gregory*, 777 N.W.2d at 399 (internal quotations omitted). The Court has consistently acknowledged that workers' compensation laws are to be broadly and liberally construed in favor of the worker in keeping with the humanitarian objective of the statute. *Id*. The Court "will not defeat the statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction." *Id.*

"[B]ecause the Workers' Compensation Act is purely a creature of statute, it is the legislature's prerogative to fix the conditions under which the act's benefits may be obtained." *Darrow v. Quaker Oats Co.*, 570 N.W.2d 649, 652 (Iowa 1997). Yet, in *Dunlavey*, the Court created a prerequisite for recovery for mental-mental injuries—legal causation—without legislative action.

Interpretations of the law should accord with contemporary understandings of our society. *Ortiz v. Loyd Roling Constr.*, 928 N.W.2d 651, 655 (Iowa 2019). As noted in *Ortiz*, the Court interprets statutes in a manner that "promotes the objectives of the statute" and in a manner that does not "put statutes and courts out of touch with change that is expected and desired in life." *Id.* at 655 (holding that service by email satisfied service under Chapter 17A as that is how attorneys, judges, and the courts primarily communicate)

2. Principles of Workers' Compensation Laws

Appellant incorporates the entirety of **Part I(A)(2)**, *infra*, including all statutes, cases, and citations.

3. Mental-Mental Injuries

Appellant incorporates the entirety of **Part I(A)(3)**, *infra*, including all statutes, cases, and citations.

C. The Court Should Adopt A New Test for Mental-Mental Injuries Resulting in PTSD that Is Compatible with Modern Medical Understandings of PTSD (e.g., the DSM-V) and that Does Not Result in the Harsh, Unjust, and Unintended Denial of Benefits to Workers Suffering from PTSD Caused by a Work Event.

In 1995, the *Dunlavey* Court first implemented the legal causation requirement for mental-mental injuries. 526 N.W.2d at 847. Legal causation presents an issue as to whether the "policy of the law will extend responsibility to those consequences which have in fact been produced." *Id.* at 853. In that case, the Court considered "a pure nontraumatic mental injury" and concluded a worker could recover for such an injury only if she proved "the mental injury 'was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs,' regardless of their employer." *Id.* at 855 (citation and emphasis omitted).

In 2002, the Court considered a case of a mental injury caused by a specific traumatic incident. *Brown*, 641 N.W.2d 725. The Court noted in *Brown* that the *Dunlavey* unusual-stress requirement was based on the following rationale:

> Where a mental injury occurs rapidly and can be readily traced to a specific event, ... there is a sufficient badge of reliability to assuage the Court's apprehension. Where, however, a mental injury develops gradually and is linked to no particular incident, the risk of groundless claims looms large indeed.

Id. at 728 (quoting *Graves v. Utah Power & Light Co.,* 713 P.2d 187, 192 (Wyo.1986)). The Court decided in *Brown* that claims of mental injury based on a sudden event should not require proof of unusual stress:

> When a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain, the legal-causation test is met irrespective of the absence of similar stress on other employees.

Id. at 729 (citing *Tocco v. City of Great Falls*, 714 P.2d 160, 163-64 (Mont. 1986)).

The Court's rationale that mental injuries caused by a sudden traumatic event have a "sufficient badge of reliability" to support an award of workers' compensation benefits is still wise. Yet, the legal causation standard for such mental injuries should reflect the modern medical definitions and understandings of PTSD, not a Montana Supreme Court case issued over 35 years ago.

The present case illustrates exactly why the *Brown* Standard should be modified and/or overturned: in cases involving first responders and similar workers, the *Brown* Standard creates a harsh, unjust, and unintended result. It is virtually impossible for such workers to recover for mental injuries resulting from a sudden traumatic incident if such incidents are considered expected and usual for first responders, as the Dead Infant Call here was considered to be. This case also illustrates how the *Brown* Standard and modern medical standards for PTSD are in direct conflict, as discussed below.

1. PTSD Is A Medical Condition That Can Only Be Diagnosed After Meeting Certain Objective Criteria, Including Experiencing A Life-Death Experience.

Unlike depression, anxiety, and other mental health disorders, there are strict criteria that must be met before a medical professional can diagnose PTSD.[16] These criteria are found in the DSM-V (published in 2013). Dr. Martin Carpenter, a board-certified psychiatrist who performed an independent psychiatric examination of Tripp, (App. 103-104), described in detail how Tripp met the criteria for PTSD. (App. 97-101) The first criterion requires that the person be exposed to a particular type of traumatic event (death, threatened death, serious injury) in a particular manner (directly, witness of, indirect exposure). Dr. Carpenter determined Tripp met the DSM-V criteria for a diagnosis of PTSD, as she ". . . witnessed the actual event of a mother discovering her deceased child," an experience "disturbing enough to qualify as a traumatic exposure." (App. 97)[17] He noted that the DSM-V recognizes that work-related traumatic exposures can occur by electronic means and telephonic audio. (App. 97; *see also* App. 78)

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[16] *See* Exhibit 5 (noting the objective criteria in the DSM-V); *see also* Lee Anne Neuman, *Workers' Compensation and High Stress Occupations: Application of Wisconsin's Unusual Stress Test to Law Enforcement Post-Traumatic Stress Disorder*, 77 Marquette L. Rev. 147, 156-60 (1993) (noting the objective criteria in the DSM-III).

[17] All of the mental health providers treating Tripp also diagnosed her with PTSD. (Lisa Beecher, MS, LMHC (App. 82); Robert Gillespie, Ph.D. (App. 77, 87) All three concluded the Dead Infant Call was the cause of Tripp's PTSD. (App. 77, 82, 87, 99) The Employer did not retain any medical expert to refute that Tripp met the criteria for PTSD under the DSM-V or to address medical causation in general.

As an examination of the DSM-V reveals, a mental health care provider cannot diagnose a person with PTSD unless that person has met this objective criterion: experiencing, directly or indirectly, an identifiable traumatic event involving death, threatened death or serious injury. Consequently, when a decisionmaker finds medical causation in a PTSD case, by necessity, the decisionmaker is finding that the worker has experienced a work-related traumatic event.

2. PTSD From A Single Traceable Work Event Should Automatically Fall Under the *Brown* Standard With No Need To Determine Whether The Event Was "Unexpected" or "Unusual."

In light of the current DSM-V criteria for PTSD and the principle that workers' compensation laws should be broadly and liberally construed in favor of the injured worker, Appellant contends the following modification of *Brown* should be made: **if a worker proves she has PTSD caused by a work event, that worker should be deemed to have satisfied legal causation as a matter of law irrespective of the absence of similar stress on other employees and with no additional requirement to demonstrate the event was "unexpected" or "unusual."** This modification is warranted because a proven diagnosis of PTSD resulting from a work event contains sufficient reliability of the worker's experience of a traumatic event that concerns of fraudulent claims (and "slippery

slope" arguments that any mental injury will be compensable) disappear.[18] And those were the very reasons the *Dunlavey* court imposed the legal causation requirement in the first place. *See Dunlavey*, 526 N.W.2d at 856. Accordingly, in cases of PTSD, a separate showing for legal causation is unnecessary and "the policy of the law [should] extend responsibility to those consequences which have in fact been produced."[19] *See id.* at 853 (stating this definition of "legal causation"). Such a holding by the Court would give meaning to the Court's assertion that it "will not defeat the [workers' compensation] statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction." *Gregory*, 777 N.W.2d at 399 (citation omitted).

Importantly, the proposed modification of the *Brown* Standard for PTSD claims would align the law with contemporary medical understandings of PTSD. *See Ortiz,* 928 N.W.2d at 655 (interpreting the law consistent with modern technology and societal practices). It is also an interpretation of the law that allows a worker suffering from work-related PTSD to obtain workers' compensation benefits even when the worker's job requires the worker to deal with emergencies. What possible public policy is furthered by denying benefits to first responders,

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[18] A worker who gets a paper cut while at work would clearly be unable to meet the requirements for PTSD.

[19] The Deputy noted in his decision that other jurisdictions treat PTSD claims as an accidental injury *i.e.,* the worker does not need to show legal causation, citing cases from New York, New Jersey, North Carolina, Texas, and Virginia. (App. 23)

911 dispatchers, police officers, and firefighters who have proved they have PTSD from "a readily identifiable" work event? *See Brown*, 641 N.W.2d at 728 (modifying the *Dunlavey* test when the mental injury is caused by "a readily identifiable" work event). Holding the *Brown* requirement is not met for workers who customarily confront emergencies, as happened in this case, produces a harsh, unjust, and unintended result.

For the stated reasons, Tripp submits that her work-related PTSD should be found compensable **as a matter of law**

III. THE COMMISSIONER'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

If the Court determines that the *Brown* Standard is a subjective standard and that it should not be modified/overturned for a diagnosis of PTSD, Tripp submits that the Commissioner's Decision is not supported by substantial evidence as a reasonable fact-finder would have found that Tripp's PTSD stems from an "unexpected cause or unusual strain." *See Brown*, 641 N.W.2d at 729.

A. Standard of Review

A party may successfully challenge the Commissioner's Decision if it is based on a determination of fact that is not supported by substantial evidence. Iowa Code § 17A.19(10)(*f*). "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1). Importantly,

> [t]he adequacy of the evidence in the record before the court to support a particular finding of fact *must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it*, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Id. § 17A.19(10)(*f*)(3) (emphasis added).

Evidence is substantial when a reasonable mind could accept it as adequate to reach the same finding. *Lee v. EAB*, 616 N.W.2d 661, 665 (Iowa 2000). In opposite, evidence is not substantial if a reasonable mind could not accept it as adequate to reach the same finding. *See id.*

The appellate review of the record is "fairly intensive" and "we do not simply rubber stamp the agency finding of fact. *Cedar Rapids Community School Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011).

B. Governing Legal Principles

The Court has adopted the *Brown* Standard for the Commissioner to apply when determining if a worker has suffered a mental-mental injury traceable to an identifiable event. *Brown*, 641 N.W.2d at 727-29. The Court stated that:

> When a claim is based on a manifest happening of a sudden traumatic nature from an **unexpected cause or unusual strain**, the legal-causation test is met irrespective of the absence of similar stress on other employees.

Id. at 728 (emphasis added). To be successful under the *Brown* standard, an injured worker needs only show that the work event was "unexpected" **or** "unusual;" a worker does not need to show both. *See id.*

Merriam-Webster Dictionary defines "unusual" as "not usual, uncommon, rare." *Unusual*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/unusual (last visited July 28, 2021). The same dictionary defines "unexpected" as: "not expected, unforeseen." *Unexpected*, Merriam-

Webster Dictionary, http://www.merriam-webster.com/dictionary/unexpected (last visited July 28, 2021).

C. The Commissioner's Finding That the Dead Infant Call Was "Not Unexpected or Unusual" Is Not Supported by Substantial Evidence as All Witnesses Testified to the Extreme Rarity of Receiving a 911 Call of a Mother Experiencing the Death of Her 6 Month Old When Considering the Content of the 911 Call, Duration of the 911 Call, and the Continuing Trauma After the 911 Call Ended.

Tripp claims the Dead Infant Call caused her PTSD and resulting disability. The critical question, then, is whether the Dead Infant Call was "unusual" and/or "unexpected" in light of all the evidence presented at hearing.

As noted earlier in this brief, the District Court rejected Tripp's argument that the Commissioner's finding that the Dead Infant Call was not "an unexpected cause or unusual strain" was not supported by substantial evidence. (App. 72) This ruling was based on the District Court's view that the Commissioner had the discretion to consider the traumatic event itself from a narrow or broad view. The District Court correctly identified that Tripp had argued to the agency that *dead infant calls* were extremely rare. The Employer, in contrast, argued that matters of life and death *in general* were relatively common for 911 dispatchers. (App. 72) (emphasis added) The District Court erroneously concluded that the Commissioner was "free to accept this broader testimony." (App. 72)

Initially, Tripp points out that the Agency's broad view of this traumatic event contradicts its own precedent. One of those Agency decisions is *Schuchmann v. Dept. Transp.*, File No 5035676 (Arb. Dec. 6/20/12) (aff'd on appeal).

In *Schuchmann,* the Agency determined a motor vehicle enforcement officer had a compensable mental-mental injury after viewing the charred body of a driver killed in a burning car wreck. In explaining why this event was unexpected and unusual under the *Brown* Standard, the Agency stated:

> Claimant's being at the scene of a motor vehicle accident as he was on March 24, 2008, was not per se an unusual event. Being at the scene of a motor vehicle accident was not an atypical stressor for other peace officers or even for other motor vehicle enforcement officers performing their incidental duties of assisting with motor vehicle crashes and other public safety emergencies. *Notwithstanding that fact, viewing the remains of a body "charred from mid chest to the top of the head" is a manifest happening that even seasoned peace officers do not routinely encounter or expect to encounter routinely.* It is a manifest happening of a sudden traumatic nature and certainly constitutes an unusual strain. . . . As the viewing of the charred remains was a sudden traumatic event from an unexpected cause and constituted an unusual strain, legal causation is properly assessed under [*Brown*] and has been demonstrated.

Schuchmann v. Dept. Transp., File No 5035676, p. 8 (Arb. Dec. 6/20/12).

Another agency case worth noting is *Christensen v. Pottawattamie County*, File No. 5051440 (Arb. Dec. 3/23/17). In this case, the claimant was a county detention officer who witnessed a gruesome suicide attempt scene. He described seeing blood all over the walls and floor of the cell, seeing his co-workers covered in blood as they attempted to tend to the inmate, thinking that the inmate must be

dead from all the blood loss, and being frightened when the inmate became conscious. In analyzing legal causation, the Agency said:

> Certainly there is evidence in the record that suggests suicide attempts were expected events in the prison or jail setting. *However, when they may occur, the nature of the suicide attempt and the gruesomeness of the scene are not predictable or expected.* While an argument could be made that a "suicide" attempt is an expected at a county jail, I interpret the Iowa Supreme Court's decision in *Brown* to suggest that the suicide event experienced or witnessed by claimant as being sufficiently unexpected, sudden, and traumatic as to satisfy the legal standard for a mental-mental claim.

Christensen v. Pottawattamie County, File No. 5051440, pp. 7-8 (Arb. Dec. 3/23/17) (emphasis added).

As these decisions illustrate, the Agency did not take a broad view of the traumatic events in *Schuchmann* and *Christensen*. As the Agency noted in *Schuchmann*, it is not unusual for DOT workers to assist at the scene of an accident. No doubt, it is not unusual for these accidents to involve serious injury or death. Nonetheless, Schuchmann's mental injury was deemed compensable because "viewing the remains of a body 'charred from mid chest to the top of the head' is a manifest happening that even seasoned peace officers *do not routinely encounter or expect to encounter routinely.*" Similarly, in *Christensen,* the Agency acknowledged that "suicide attempts were expected" in jails. Nonetheless, the Agency held the detention officer who witnessed the scene of a suicide attempt had a compensable mental-mental claim because not all suicide attempts are the same:

"when they may occur, the nature of the suicide attempt and the gruesomeness of the scene are not predictable or expected."

Notwithstanding the manner in which the Agency analyzed legal causation under the *Brown* Standard in prior similar cases, the Agency decided to take a broad view of Tripp's claim, noting 911 dispatchers "routinely take calls involving death and traumatic injury." The District Court ruled that the Agency had discretion to focus on the "broader testimony" and reject the undisputed evidence that calls involving a dead infant were extraordinarily rare, that this call lasted four times longer than a typical call because the mother was so distraught, and that grisly details of the event continued to be conveyed to Tripp by the first responders on the scene even after the call itself ended. Like the suicide attempt in *Christensen*, not all emergency calls are the same: the nature of the call, the duration and intensity of the call, and the shocking or gruesome details of the emergency "are not predictable or expected." The Agency ignored this precedent in determining Tripp had not established legal causation under the *Brown* Standard.

Turning to the record, Tripp claimed the Dead Infant Call was distinguishable from the common life-and-death emergency calls 911 dispatchers routinely handle, and the evidence overwhelmingly supported that claim. Notably, this call involved a mother experiencing the death of her infant; it lasted over two

minutes; and it involved gruesome details about the possible cause of the infant's death.

Tripp, who has been a dispatcher for over 17 years, testified that it is extremely rare (*i.e.,* unusual) to take 911 calls regarding dead infants, especially where the mother is the caller. (App. 118, 119, 189) Tripp's testimony is not only unrebutted, but it is directly supported by the Employer's witnesses.

Cawiezell testified that infant deaths are not typical, as she has taken about twelve (12) in her 24 years in the profession. (App. 212, 214; *see also* App. 20) Cawiezell estimated that during her 24-year tenure as a medic dispatcher, she has taken approximately 141,000 medic phone calls. (App. 219) Recognizing this number is a "ball park number," the percentage of calls that are dead infant calls is approximately **.00008511%**. (*See* App. 219)

Like Cawiezell, Pavlik confirmed that infant deaths are not typical, as she has taken about fifteen (15) in her 22 years in the profession. (App. 234-237; *see also* App. 20) She estimated that during her 22-year tenure as a dispatcher, she has taken approximately 572,000 911 phone calls. (App. 234-237) Recognizing this number is a "ball park number," her percentage of calls involving a dead infant is approximately **.00002622%**. (*See* App. 236-237)

Testimony by Officer Tripp also corroborated that infant deaths in Scott County are unusual. Officer Tripp – who has been a police officer for over 23

years in Scott County – has *never* responded to call involving a dead infant. (App. 175) That is zero percent 0% for Officer Tripp, who believed that dispatchers "don't anticipate a screaming parent of a dead child" while at work. (App. 177)

Tripp testified that the Dead Infant Call was unusual and unexpected for a few other reasons. First, the mother was screaming "help me, my baby is dead" over-and-over in an obviously "life-or-death" situation, which is atypical because callers "never say a definitive my child is dead." (App. 190) Co-worker Pavlik's testimony corroborated the rarity of this circumstance. Of the 15 dead infant calls taken by Pavlik during her 22-year tenure as a dispatcher, in only *three* did the caller say "my baby is dead." (App. 237) As the SECC director, Pavlik agreed that some 911 calls are more traumatic than others. (App. 233)

Tripp also testified that the Dead Infant Call was unusual in duration, testimony that was uncontroverted. A typical 911 emergency call is 35 seconds (App. 113), but Tripp was on the Dead Infant Call for over two minutes while the mother made "guttural, awful" screaming sounds. (App. 137, 189) The call went on and on because Tripp, a seasoned dispatcher, had trouble getting even get an address from the mother due to her extremely distraught state. (App. 123-127, 186, 199)

By viewing the Dead Infant Call as just a life-and-death call that 911 dispatchers regularly handle, the Agency also failed to consider the unusual

continuation of this traumatic event after Tripp transferred the call. (App. 118-120, 127, 135-138, 185-190, 206) Specifically, Tripp continued to be exposed to and heard other responders' audio channels – including hearing about CPR being performed on the dead infant even though rigor mortis had set in and that a claw hammer might have been used to strike the infant's face. (App. 136-138, 186-187) This continued exposure to explicit details further evidences that the Dead Infant Call was unusual and unforeseen.[20]

Ignoring this undisputed testimony regarding the exceedingly rare content of this call, its duration, and its intensity, the Agency chose to rely on the conclusory testimony of three co-workers who testified that in their experience this call was not unexpected or unusual. Whether this testimony is substantial, however, must be judged in light of relevant evidence that detracts from the Agency's finding. Amazingly, in this case, the most important evidence that detracts from the testimony upon which the Agency relied comes from the very same witnesses. How can the co-workers' opinions that this call was not unexpected or unusual be judged substantial when these *same* witnesses testified that such calls constituted approximately <u>.00002622% and/or .00008511%</u> of the calls handled by 911

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[20] As noted earlier, none of the Employer's witnesses who testified the Dead Infant Call was not unusual or unexpected even mentioned the continuing nature of this traumatic event.

dispatchers?[21] The rarity of such calls by definition makes them unexpected and unusual, even for 911 dispatchers. When the record is viewed as a whole, the Court must conclude the Agency's finding is not supported by substantial evidence, even when considering the nature of Tripp's occupation.

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[21] It is interesting that the Iowa Court of Appeals' decision in *Brown*, which was vacated by the Iowa Supreme Court on further review, made the following apt observation regarding statistical evidence:

> Given the available statistics regarding the low incidence of death or injury of gas station attendants due to violence on the job, we would question whether the commissioner's conclusion that violent acts are "quite common" in the gas station business is supported by substantial evidence. However, Brown did not challenge on appeal the sufficiency of the evidence to support this conclusion.

Brown v. Quik Trip Corp., 2001 WL 1132735, at *3 (Iowa Ct. App. 2001).

CONCLUSION

WHEREFORE, Appellant Mandy Tripp respectfully requests that the Supreme Court REVERSE the District Court's Order as it was shown that the District Court and the Agency erred as a matter of law when they did not apply the correct legal standard for mental-mental injuries resulting in PTSD under Chapter 85 of the Iowa Code. Appellant requests that her mental-mental injury be found compensable as a matter of law and that her case be REMANDED to the Agency for the determination of benefits and remaining issues.

REQUEST FOR ORAL ARGUMENTS

Claimant requests that the case be submitted with oral arguments.

Respectfully submitted,

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We hereby certify that the costs paid for printing Petitioner-Appellant's Brief was the sum of $0.00.

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