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(Court of Appeals No. 72323-5-1)

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHARLES L. KIMZEY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**DEPARTMENT OF LABOR & INDUSTRIES  
ANSWER TO PETITION FOR REVIEW**

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 ORIGINAL

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## I. INTRODUCTION

Fundamental to administrative law is the requirement to exhaust administrative remedies. Charles Kimzey does not deny that he now argues a theory he never argued before the Board of Industrial Insurance Appeals. He also cannot deny that RCW 51.52.104 required him to raise the issue at the Board. This Court should not consider his belatedly raised argument.

In any event, the record and law supports the Court of Appeals' decision that the Legislature's decision to exclude stress-based mental health conditions from workers' compensation coverage applies to Kimzey's case. During his career as a paramedic, Kimzey witnessed traumatic events that resulted in debilitating stress, resulting in post traumatic stress disorder. Mental conditions caused by stress from the "[o]bjective or subjective stresses of employment" are not compensable as an occupational disease. WAC 296-14-300(1)(j). Trauma is not separate and apart from stress as Kimzey postulates—rather it caused stress that resulted in the disorder.

No issue of substantial public interest is presented here: a case involving a claim that was waived and is not supported by the record. This Court should deny review.

## II. ISSUES

This Court should not grant review, but if it does the following issues would be presented:

1. RCW 51.52.104 provides that a party waives any issue not raised in the petition for review of an industrial appeals judge's proposed decision to the Board. Did Kimzey waive his argument about trauma by not raising it in his petition for review at the Board?
2. Is Kimzey's post traumatic stress disorder an occupational disease when RCW 51.08.142 and WAC 296-14-300 exclude coverage of mental health conditions caused by ongoing workplace exposure to stress as occupational diseases, and when the undisputed evidence shows that Kimzey's post traumatic stress disorder was caused by stressful workplace exposure to traumatic events?

## III. STATEMENT OF THE CASE

### A. Kimzey Experienced Traumatic Stress That Caused Post Traumatic Stress Disorder

Kimzey, a paramedic, filed a claim for workers' compensation benefits in which his doctors listed the diagnosis as post traumatic stress disorder and major depression, probably caused by workplace exposure. BR Ex. 1.<sup>1</sup> This was due to 25 years of exposure to "horrific incidents" at work. BR Ex. 2. The Department rejected Kimzey's claim, explaining that claims based on mental conditions caused by stress are excluded from coverage by law. BR 30. Kimzey appealed the denial to the Board.

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<sup>1</sup> "BR" refers to the certified appeal board record. Testimony is cited as "BR" followed by the witness name.

His doctor, Dr. Gary Koch, testified that Kimzey's post traumatic stress disorder was caused by the accumulation of multiple stressful events at work. *See* BR Koch 11-12, 16, 18. His nurse practitioner testified to the same thing. BR Burgett 13, 33. Although ARNP Rachel Burgett noted that the exposure to traumatic events caused the post traumatic stress disorder, neither she nor Dr. Koch differentiated between post traumatic stress disorder caused by trauma and post traumatic stress disorder caused by stress. BR Burgett 11, 33; BR Koch 16, 18. ARNP Burgett was asked by Kimzey's counsel as to whether there may be other events "outside of his workplace stressors" that Kimzey discussed with her. BR Burgett 14. She could not identify another event other than work-related stressors. ARNP Burgett confirmed that the accumulation of stressful events at work over time caused Kimzey's condition. BR Burgett 33.

Dr. Koch had similar testimony. BR Koch 16. Determining whether Kimzey could return to work hinged on whether "he would trigger all of his stressful stuff if he went back and [was] placed in a stressful situation of a paramedic role." BR Koch 16. Dr. Koch was asked outright, "Is it your opinion that the diagnosis [of post traumatic stress disorder] was caused by the stresses of his employment?" BR Koch 18. Dr. Koch responded that that was a safe assessment and a safe conclusion. BR Koch 18. Kimzey admitted that both of his medical witnesses testified

that his condition “was caused by his occupational exposures to thousands of unpredictable, but very substantial, physical and psychological stresses over 25 years.” CP 27.

**B. At the Board, Kimzey Did Not Argue That There Was a Difference Between Trauma and Stress**

At the Board, Kimzey did not distinguish exposure to workplace stress from exposure to workplace trauma. His notice of appeal to the Board acknowledges that his condition was caused by “on-the-job stress.” BR 26. His petition for review referred to the “depth and magnitude of the mental stress” to which he was exposed. BR 4. It focused on “an extreme traumatic stressor” to cause post traumatic stress disorder. BR 5.

The Board affirmed the Department’s denial of Kimzey’s claim, concluding that the evidence showed that Kimzey’s claim could not be allowed under RCW 51.08.142 because his own medical witnesses established that it was caused by cumulative exposure to stresses at work rather than a specific injurious event. BR 1, 15-24.

**C. The Court of Appeals Affirmed the Board and Reversed the Superior Court, Holding That Kimzey Waived His Argument About Trauma and Also That the Record Did Not Support This Argument**

The superior court reversed the Board, and the Court of Appeals reversed the superior court to affirm the Board and the Department.

*Kimzey v. Dep’t of Labor & Indus.*, No. 72323-5-I (Wash. Ct. Appeals).



Nov. 30, 2015) (referred to as “slip op.”). The Court of Appeals held that the plain and unambiguous language of RCW 51.08.142 and WAC 296-14-300(1) excluded mental conditions and disabilities caused by stress that are not the result of a single traumatic event from the definition of occupational disease. Slip. op at 14. “Because the undisputed testimony establishes that Kimzey’s PTSD and depression was the result of traumatic and stressful events over time while working as a paramedic, we hold the superior court erred in reversing the Department’s denial of benefits as an occupational disease.” Slip op. at 14. The Court of Appeals also held that Kimzey waived his argument about trauma because he did not raise that argument at the Board as required by RCW 51.52.104. Slip op. at 15. The Court of Appeals further noted the record did not support such an argument. *Id.* at 15-16.

#### **IV. ARGUMENT**

Perhaps recognizing that the decision of the Court of Appeals is consistent with other appellate decisions, Kimzey’s basis for seeking review of this unpublished decision is based solely on a purported issue of substantial public interest. But contrary to his claims that the issues involved here have “bearing on all workers, especially first responders,” this case affects only one worker who did not preserve his arguments at the administrative level and did not present a record in support of his

claims. Pet. 8. No issue of substantial public interest is presented by such circumstances.

**A. No Issue of Substantial Public Interest Is Presented by an Issue That Was Not Argued at the Administrative Level**

Kimzey asks this Court to take review of an issue that he did not raise at the Board. But the Industrial Insurance Act requires parties to raise issues to the Board in order to gain judicial consideration, RCW 51.52.115. And a party waives any issue not raised in the petition for review:

Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

RCW 51.52.104.

Washington courts have held on numerous occasions that under RCW 51.52.104, a party waives legal arguments that are not presented to the Board in his or her petition for review. *E.g.*, *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279-80, 580 P.2d 636 (1978) (claimant waived argument of Board chairman's potential disqualification by failing to present argument to Board).<sup>2</sup>

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<sup>2</sup> See also *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (claimant waived argument that closing order was not final because she failed to raise it in her appeal to the Board or petition for review of the Board's decision); *Merlino Const. Co. v. City of Seattle*, 167 Wn. App. 609, 616 n.3, 273 P.3d 1049 (2012) (party waived argument that a police officer was an independent contractor by failing to

Just like the claimant in *Hill*, Kimzey failed to contest an issue at the Board. In Kimzey's petition, he did not raise his theory that trauma was somehow different than stress in causing his post traumatic stress disorder.

The exhaustion of remedies principle "is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). This requirement allows development of a factual record, facilitates the exercise of administrative expertise, allows an agency to correct its own errors, and prevents the circumvention of administrative procedures through resort to the courts. *Id.*

By failing to raise the trauma issue at the Board, Kimzey denied the Board the opportunity to apply its expertise to Kimzey's theory. His notice of appeal to the Board acknowledges that his condition was caused by "on-the-job stress." BR 26. His petition focused on the "depth and magnitude of the mental stress" to which he was exposed. BR 4. At no point did he argue his trauma theory. His new theory should not now be entertained.

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present argument to the Board or trial court); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (claimant waived objection on grounds of insufficient notice because it was not set out in her petition for review to the Board).

**B. No Issue of Substantial Public Interest Is Raised by an Issue That Is Not Supported by the Law or the Record**

Recognizing the pervasiveness of stress in the workplace, the Legislature has directed that no stress-based mental health claims shall be covered as an occupational disease. RCW 51.08.142.<sup>3</sup> Stress includes all types of employment-related stress, including traumatic stress. WAC 296-14-300. The Legislature directed the Department to adopt a rule addressing stress claims and the Department's rule provides that (1) no mental health condition caused by stress can be allowed as an occupational disease, but (2) "stress resulting from exposure to a *single traumatic event* will be adjudicated with reference to RCW 51.08.100," as an industrial injury. WAC 296-14-300 (emphasis added).<sup>4</sup> Thus, WAC 296-14-300 covers a mental condition caused by one traumatic event as an industrial injury, but excludes cumulative traumatic events against a claim of occupational disease.

Exclusion of cumulative stressful traumatic events has been recognized by the courts, including when the Court of Appeals held that the stress bar applies to the circumstance of mentally traumatic events

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<sup>3</sup> The full text of RCW 51.08.142 is "The department shall adopt a rule pursuant to chapter 34.05 RCW that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140."

<sup>4</sup> This is the version of the regulation that was in place at the time of the Board and superior court proceedings. On October 23, 2015, the regulation was amended.

causing a mental condition. *Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn. App. 771, 781, 206 P.3d 347 (2009). There, a custodian had to clean up the scene of a suicide of a high school student (whom she knew personally), clean up the candles and cards left at the scene of the suicide, and also search for bombs. *Rothwell*, 149 Wn. App. at 775-76. These multiple traumatic events caused Rothwell's post traumatic stress disorder. *Id.* at 778. The court held that because there was not just one traumatic event causing the condition, the exclusions in RCW 51.08.142 and WAC 296-14-300 applied. *Id.* at 780-82. "Here, the *emotionally traumatic experiences* suffered by Ms. Rothwell after the suicide did not occur suddenly or have an immediate result." *Id.* at 781 (emphasis added). The *Rothwell* Court recognized that mental conditions caused by cumulative traumatic events are excluded from coverage under the statutory bar for stress claims. *Id.* at 780-82. This bar applies unless there is a sudden and traumatic event that can be subject to coverage as an injury. *Id.*

Kimzey cites to the record about "trauma" causing his post traumatic stress disorder. But Kimzey does not and cannot deny that his doctors did not distinguish between stress and trauma, properly recognizing that traumatic stress can cause post traumatic stress disorder. Both ARNP Burgett and Dr. Koch's testimony establishes that during his career as a paramedic, Kimzey was exposed to traumatic events that

resulted in debilitating stress and his post traumatic stress disorder was caused by stress. Slip op. at 16; BR Burgett 13, 33; BR Koch 16, 18. Kimzey now forwards a theory that when trauma is involved, the stress condition is covered by the Industrial Insurance Act, but neither the record nor the law supports that distinction. The Court of Appeals properly applied the plain language of the statute and rule, and Kimzey presents no basis for review of this decision under RAP 13.4.

## V. CONCLUSION

A waived issue does not present an issue for substantial public interest. Neither does an issue not supported by the law and record. The statutory definition of occupational diseases excludes workplace stress as a cause of an occupational disease—this includes traumatic stress that causes post traumatic stress disorder. This Court should deny review.

RESPECTFULLY SUBMITTED this 29th day of January, 2016.

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NO.  
(Court of Appeals No. 72323-5-I)

**SUPREME COURT OF THE STATE OF WASHINGTON**

CHARLES L. KIMZEY,  
  
Petitioner,  
  
v.  
  
DEPARTMENT OF LABOR  
AND INDUSTRIES OF THE  
STATE OF WASHINGTON,  
  
Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S ANSWER TO PETITION FOR REVIEW and this CERTIFICATE OF SERVICE in the below described manner:

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**Via First Class United States Mail, Postage Prepaid to:**

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DATED this 29th day of January, 2016.



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**COA Case No. 72323-5-I**  
**RE: Charles Kimzey v. Department of Labor and Industries**

Dear Mr. Carpenter:

Attached for filing is the Department's Answer to Petition for Review and Certificate of Service in the above referenced matter.

Thank you,  
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