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No. 699962

COURT OF APPEALS, DIVISION ONE

OF THE STATE OF WASHINGTON

RONALD WASTEWATER DISTRICT, Respondent

v.

RODOLFO APOSTOL, Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

This case started on August 28, 2008 when Apostol filed complaint to King County Superior Court of Washington State against his former employer Ronald Wastewater District for employment discrimination and termination. Apostol now appeals his denied motion under CR 60 (b) from the same court.

II. ASSIGNMENT OF ERRORS

Assignment of Errors

No.1 The trial court incorrectly applied Washington Law Against Discrimination (Title 49.60), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101), and the Industrial Insurance Act (Title 51 RCW) in this case. This was an error of law and is reviewed de novo.

No.2 The trial court erred in denying Apostol's supporting declarations as inadmissible evidence. Expert testimony admissibility is reviewed under an abuse of discretion.

No. 3 The trial court erred in denying Apostol a new trial. Extraordinary circumstances exist in this case which warrants vacation under CR 60(b) (11). Denying the motion is reviewed under an abuse of discretion standard.

Issues Pertaining to Assignment of Errors.

No. 1 The main issue is legal: whether Apostol is entitled to judgment as a matter of law. Specifically, on record is Apostol entitled to relief under CR 60(b) (11).

The trial court erred by denying Apostol's motion in favor for the Respondent for disability discrimination, wrongful discharge in violation of Public Policy, and negligence claims under WLAD and The Industrial Insurance Act. This is an error of law and requires vacation.

Chapter RCW 49.60.180 WLAD mandates liberal construction. Apostol workers' compensation claims are central issues to Apostol's litigation. It is proven fact that these claims are not time barred as Respondent claims. Industrial Insurance Acts states that work injuries are tolled from the date which the injury of the worker becomes disabling and from the date the worker seeks treatment for that injury. Not from the date the injury occurred as Respondent and the trial and appeals court concluded in this case and the final judgment. This is an error of law and requires relief. Although, Apostol's wrist fracture injury occurred on August 1, 2005, when assigned by supervisor George Dicks to break concrete using only a sledgehammer for four hours that morning; that injury did not become apparent to Mr. Apostol until he sought medical treatment on January 4, 2006 at Virginia Mason Hospital in Seattle, from Orthopedic Surgeon

M.D. David Kim. CP 1456-1458. Declaration of Randy Baker, CP 1479-1483, SUPRA. Washington State Department of Labor and Industries approved and paid benefits for treatment and lost wages to Apostol workmen's compensation claim. Ibid. On remand, Apostol can present genuine issues and material facts for disability discrimination and retaliation for wrongful discharge in violation of Public Policy. «1». Chapter RCW 51 Industrial Insurance Act. The exclusive remedy provision of the Industrial Insurance Act (RCW Title 51) does not bar common law actions against an employer for injuries that fall outside the basic coverage of the act, i.e., that constitute neither an "injury" nor an "occupational disease" under the act. «2».

Apostol's mental injuries of depression and post-traumatic stress disorder mirror that of Wheeler. Apostol's PTSD worker's compensation claim was denied by the Division Two, Court of Appeals decision in Apostol v. Department of Labor and Industries, as in Wheeler. Division Two wrote: "The judge concluded that Apostol did not sustain an industrial injury on September 21, 2005, and that his claim for a stress-related mental condition from a culmination of a series of events was not an occupational disease." «3». The Division II court further states: "The Industrial Insurance Act provides the exclusive remedy for workers

injured in the course of employment and does not authorize the tort recovery Apostol seeks. «4». The Division Two court concludes: "Rodolfo Apostol appeals the superior court's decision rejecting his claim for workers' compensation benefits because he neither sustained an industrial injury nor suffered from an occupational disease. We affirm." Ibid, P. 2.

In the ruling, the Division Two court quoted Apostol's proximate cause of mental injury resulting permanent mental disability. Apostol's tort claim for mental anguish and pain and suffering for negligence and intentional infliction of emotional distress should be remanded for jury trial and claims for noneconomic damages. Apostol states:

"The ploy used by my employer for over eleven and a half years of employment consisted of constant threats of false write-ups and false accusations, verbal and physical abuse, demotions, denied opportunity for advancement, and threats of my firing. . . . The physical and mental injuries I suffered during my course of employment culminated on September 21, 2005 which [sic] my employer made false accusations and threats which were precursors of me being fired. "AR at 3-4.[Ibid., Page 5].

Furthermore, the declaration from Steve Paulis, CP 1510-1513, Apostol's supervisor for over nine years from July 1994-October 2003, he states:

"I observed several of Apostol's co-workers deride him, because he refrained from certain activities to avoid exposure to those chemical fumes. On several occasions I spoke with Montgomery about harassment Apostol was experiencing. Each time I raised the issue, Montgomery told me to not get involved with it. The issue of the harassment of Mr. Apostol

was discussed numerous times at the Board of Commissioners meetings. Art Wadekamper, who is a commissioner of Ronald Wastewater District, told me I should not be involved with this issue. During the numerous conversations, he told me that I could be replaced. I understood that to mean that my continuing to try to stop the harassment of Mr. Apostol could cause me to be fired."

Furthermore, Mr. Paulis continues:

"Mr. Apostol was senior to some of the employees and his job required that he give direction to those employees. Apostol came into my office several times and told me his subordinates refused to accept his direction. He reported they made threatening gestures towards him in responses to his efforts to direct them. Mr. Apostol told me several times those co-employees Chad Sehnert and Jason Sharpe regularly made derogatory remarks towards him and physically threatened him."

And Mr. Paulis states:

"Mr. Apostol diligently followed safety rules while working. I observed that it was necessary to remind some of the other employees to comply with safety requirements."

The trial court erred when it denied Apostol's motion. Here, the court of appeal should reverse and remand for claims of noneconomic damages for Apostol's pain and suffering.

It is correct that once the moving party has met its burden of offering factual evidence showing that it is entitled to judgment as a matter of law, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." «5». But "[i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted

affidavits or other materials." «6». Judge Ramsdell writes on February 7, 2013 his denial of Apostol's motion that factored into his decision included pleadings Apostol submitted to the superior court and states: " The pleadings previously filed by Mr. Apostol in the above referenced cause number when he was representing himself." CP 1765. Here, Judge Ramsdell's motion denial, he considered Apostol's original pleadings, Apostol's witnesses' declarations, declarations from expert testimony, and commits legal error. Judge Ramsdell decision is legal error and requires vacation. Discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. «7».

No.2. Can this court determine Defendant is liable for damages due to Apostol?

In ELLINGSON v. SPOKANE MORTGAGE CO., had held that a person could recover damages for mental anguish under RCW 49.60. «8». The decision noted that such recovery is distinguishable from common law recovery for emotional distress based on intentional discrimination or intentional tort because it is created by statute. «9». The opinion recognized that the term "actual damages" included humiliation, mental anguish and suffering. In KELLY v. AMERICAN STANDARD, INC., affirmed emotional distress damages under RCW 49.60 in an action for

age discrimination. «10». There too the trial court refused an instruction requiring outrageous and extreme conduct. «11».

Under RCW 49.60., proof of discrimination results in a finding of liability. The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60. The damages result from the injury, the discrimination. «12». In Dean v. Metro, Metro proposed the following instruction which sets out a tort standard for recovery of damages for emotional distress. "To recover for mental anguish and emotional distress, plaintiff must prove that defendant intentionally engaged in outrageous and extreme conduct which resulted in severe emotional distress to plaintiff. ". «13».

The measure of damages for emotional distress has been based primarily on the intentional infliction of emotional distress giving rise to the tort of outrage. «14». Neither of those cases arose under RCW 49.60. RCW 49.60.030(2) provides for recovery of "actual damages sustained by him . . ." In GLASGOW v. GEORGIA PAC. CORP., «15», damages for emotional distress under RCW 49.60 were upheld, the court stating:

"[P]laintiffs have proved the requisite elements necessary to establish their claim of sexual discrimination. Accordingly, the plaintiffs were entitled to recover damages for physical, emotional and mental suffering as they did."

In Robel v. Roundup Corp, Robel filed suit against Fred Meyer stating claims for disability discrimination (RCW 49.60.180(3)), retaliation for filing a workers' compensation claim (RCW 51.48.025(1)), negligent and intentional infliction of emotional distress, and defamation. The trial court denied Fred Meyer's motion for summary judgment. «16». In MARTINI v. BOEING CO., Martini argues all damages proximately caused by wrongful discrimination, including loss of pay, may be awarded as "actual damages" pursuant to RCW 49.60.030(2). He further argues an award of damages for front and back pay following a finding of discrimination in violation of RCW 49.60.180(3) is consistent with previous Washington cases, «17», in particular Dean v. Municipality of Metro. And, that the cases cited by Boeing are not controlling. «18». Martini cites Bulaich v. AT&T Info. Sys., the Washington case which adopted the doctrine of constructive discharge, arguing constructive discharge was intended to benefit employees, and that Boeing's proposition is contrary to the intent of Washington's law against discrimination as interpreted by this court. The Washington Employment Lawyers' Association filed a brief as amicus curiae which support Martini's position. «19».Washington's law against discrimination (RCW

49.60) permits recovery of front and back pay for a successful discrimination claim when these damages are proximately caused by unlawful discrimination. The issue presented arises under Washington's law against discrimination, which mandates liberal construction, RCW 49.60.020 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."); «20», and which this court has declared "embodies a public policy of the 'highest priority.'" «21» In WHEELER v. CATHOLIC ARCHDIOCESE, our Supreme Court states: "For purposes of awarding attorney fees in a discrimination action under RCW 49.60.030(2), a plaintiff is a "prevailing party" if it succeeds on any significant issue which achieves some benefit the party sought in bringing suit." «22». Here, Apostol is entitled to attorney fees if he is the "prevailing party". In DEAN v. METROPOLITAN SEATTLE, Dean testified that while pursuing another position within Metro he exhausted his financial resources. He was forced to sell furniture, clothing and jewelry to live. He moved to California and stayed with his mother. He borrowed money from his family and was forced to go on medical assistance. There was sufficient evidence introduced to warrant an instruction on emotional distress damages. The jury, after weighing the evidence, could have found that Dean suffered mental anguish as a result

of the discrimination. However, since neither party requested a special verdict, it is impossible to determine the precise amount or indeed whether the jury awarded anything for mental anguish Under RCW 49.60, proof of discrimination results in a finding of liability. The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60. The damages result from the injury, the discrimination. «23». Here, Apostol's situation mirrors Dean, Apostol could find no meaningful work despite his excellent academic achievement, a Bachelors of Science degree in Engineering from Washington State University June 1981, Professional Engineering Certificate from the State of Washington, January 2001, No. 23811., Apostol had no money for rent or pay for bills, he moved out of his apartment in Seattle and moved home with his parents in May 2007 in Lacey, Washington. Apostol had to borrow money from his family and from his bank for his medical bills and medications, his health worsen until he started receiving Social Security Disability Income in July 2011, Apostol was overwhelmed with his own legal matters since no attorney would represent him and Apostol learn the law pertaining to his case online, Apostol wrote and submitted all his legal briefs, appeared pro se

in all his judicial and administrative proceedings, searched and spoke with potential healthcare providers for his worsen medical conditions, had been hospitalized for overnight sleep studies, met with many medical doctors and psychologist for interviews and testing, and followed up on ongoing medical problems concerning colitis and gastritis diagnosis, dealing with constant body pain, headaches, insomnia, anxiety. A jury would agree with Apostol had suffered mental anguish and his health was frail.

Here, on remand, Apostol can prove damages as required under statute and common law under Chapter RCW 49.60 WLAD and Chapter RCW 51. the Industrial Insurance Act (IIA).

No. 3 APOSTOL WAS FOUND DISABLED UNDER THE AMERICAN'S WITH DISABILITIES ACT (ADA) BY THE SOCIAL SECURITY ADMINISTRATION (SSA).....16.

1. The Social Security Administration determined Apostol became disabled on September 21, 2005 and within the statute of limitations for Apostol's litigation.

2. Our Washington State Supreme Court adopts the definition of disability under the ADA in McClarty v. Totem Electric (2006).

3. If Findings were made, the trial court would find Apostol disabled and summary judgment would not have been made.

Without Findings Apostol's appeals were fruitless and prejudice his case. Summary Judgment would not have been proper.

a. Apostol's disability discrimination and retaliation claims under Chapter RCW 49.60.180 and Chapter RCW 51. would be reversed.

b. THE INDUSTRIAL INSURANCE ACT IS NOT EXCLUSIVE AND MANDATES A TORT IN CIVIL COURT FOR INJURIES (PTSD) SUFFERED OUTSIDE COVERAGE OF THE ACT. (NOT AN INDUSTRIAL INJURY AND NOT AN OCCUPATIONAL DISEASE). Division II, in the case of Apostol v. Department of Labor and Industries, «24».

THE TRIAL COURT ERRED IN DENYING APOSTOL'S CR 60(b) (11) MOTION.

Assignment of Errors.

1. The trial court denied Apostol a new trial. This is an abuse of discretion and an error of law and should be vacated.

2. The trial court's failure to make the necessary findings of fact and conclusions of law is an error of law and requires vacation. If the trial court had made findings, the record demonstrates that the Respondent

suffered no prejudice and that the Appellant had good reason for bringing his action when he did.

3. The record is filled with constitutional and statutory violations made by the Respondent that were not properly weighed by the trial court.

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THE TRIAL COURT AND THE RESPONDENT MISAPPLIED WASHINGTON'S LAWS AGAINST DISCRIMINATION (WLAD) CHAPTER RCW 49.60.180 AND THE INDUSTRIAL INSURANCE ACT (IIA) OF WASHINGTON STATE CHAPTER RCW 51. DUE PROCESS REQUIREMENTS.....30

The Supreme Court has the ultimate authority to construe statutes. «25». And the Supreme Court has the ultimate authority to construe RCW 49.60.030. «26». Here, Apostol has sufficient evidence to present to a jury.

No.4 DUE PROCESS REQUIRES THAT APOSTOL MEET THE FIRST STANDARD OF COMPENTENCY (WHEN HE IS CAPABLE

OF UNDERSTANDING THE NATURE OF THE PROCEEDINGS AND IS CAPABLE OF RATIONALLY ASSISTING HIS COUNSEL IN DEFENDING) IN ORDER FOR THE PROCEEDINGS TO GO FORWARD AND THAT HE BE REPRESENTED BY COUNCEL IF HIS ABILITY TO ADEQUATELY REPRESENT HIMSELF IS NOT CONFIRMED.

An attorney who was not competent at the time of a disciplinary proceeding is entitled to have the findings from the proceeding vacated and to have a de novo proceeding when he is competent. Apostol is entitled to have the trial court judgment vacated and have a new trial with counsel when he is competent.

Although trial Judge Ramsdell stated Apostol was sufficient capable in handling his affairs during trial and during the interactions with defendant legal counsel, his psychiatrist testified through declarations that his mental condition at the time of his summary judgment hearings interfered with his understanding of the underlying situation and made it impossible for him to respond appropriately or to raise legitimate defenses. These are not mere mistakes in judgment, as argued by Defendant counsel. These symptoms of mental illness may affect Apostol's legal competence to appear in his oral arguments at Superior court and the Court of Appeals.

III. STATEMENT OF THE CASE

Apostol became disabled while working for Ronald Wastewater District. Washington State Laws against Discrimination (WLAD) and the Americans with Disabilities Acts (ADA) of 1990 were violated by the employer. Justice demands an award for Damages to Apostol. At what cost?

IV. SUMMARY OF ARGUMENT

In order to preserve due process rights, certain rules and guidelines must be met in this case. Pro se pleadings must be liberally construed. WLAD and the Industrial Insurance Act (IIA) mandate liberal construction and favor goes to the injured and disabled worker carried down through Legislation (RCW 49.60.010), and Supreme Court rulings. Misconduct and irregularities in court procedures (displayed here) will not do. The proper legal standards in court procedures for mental disabled pro se litigants in civil cases must be met in order to meet due process requirements.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a decision granting a motion to vacate under CR 60(b) is abuse of discretion. Luckett v. Boeing Co., «27». A court

abuses its discretion when its decision is based on untenable grounds or reasoning. «28». Questions of law are reviewed de novo, Morin, 160 Wn.2d at 753. Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. Braam v. State, «29».

B. SCOPE OF REVIEW

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT

(a). Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

MULTIPLE GROUNDS UNDER CR 60(b)

A party seeking the vacation of a judgment may raise as many of the grounds set forth in CR 60(b) as is appropriate under the circumstances. «30».

DISABILITY DEFINED

A person has a "disability" for purposes of a disparate treatment disability discrimination claim under RCW 49.60.180 if the person (1) has a

physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment. A "major life activity" is a task that is central to a person's everyday activities. "Substantially limits" means unable to perform a major life activity that the average person in the general population can perform. «31». Social Security Administration's (SSA) determination can be found at CP1498-1503.WSLAD, the Americans with Disabilities Act (ADA) of 1990 (ADA), and the ADA Amendments Act of 2008 concluded by SSA Administrative Law Judge Thomas Robinson. CP 1473-1475. ALJ Robinson DECISION states:

Based on the application for a period of disability and disability insurance benefits filed on March 20, 2009, the claimant has been disabled under sections 216(i) and 223(d) of the Social Security Act since September 21, 2005.

If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, limited burden of going forward with evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional

capacity, age, education, and work experience (20 CFR 404.1512(g) and 404.1560(c)).SSA ALJ made the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The claimant has not engaged in substantial gainful activity since September 21, 2005, the alleged onset date (20 CFR 404.1520(b) and 404.1571 et seq.).The claimant worked after the established disability onset date, but this work activity did not rise to the level of substantial gainful activity (Ex. 3D).
2. The claimant's date last insured is March 31, 2011.
3. The claimant has the following severe impairments: depressive disorder not otherwise specified; personality disorder with passive aggressive, negativistic, obsessive compulsive, and avoidant traits; and PTSD (20CFR 404.1520)).
4. The severity of the claimant's impairments meets the criteria of section 12.08 of 20 CFR Part 404, Subpart P, Appendix 1 (20CFR 404.152(d) and 404.1525).

In making this finding, ALJ Robinson considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and the evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. ALJ Robinson have also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-6p and 06-3p.

"The claimant's impairments meet the criteria of section 12.08. The "paragraph A" criteria are satisfied because the claimant has a pattern of feeling unappreciated and misunderstood by others, impaired social skills, difficulty forming relationships with others, problems regulating his mood, anger control problems, negativistic attitudes, and depressive mood. The "paragraph B" criteria are satisfied because the claimant's impairments cause marked restriction in activities of daily living, marked difficulties in maintaining social functioning, moderate difficulties in

maintaining concentration, persistence or pace. There is no evidence that the claimant has had any episodes of decompensation, of extended duration."

"I observed the claimant at the hearing, and his behaviors and the way he presented himself were consistent with the opinions of the consultative examination report prepared by Melinda Losee, PhD, on July 7, 2009 (Ex. 17). In the consultative examination report Melinda Losee described of the claimant as having "impaired interpersonal functioning," and she opined that the claimant "would likely have marked difficulty responding appropriately to supervision, co-workers, and the public" (Ex. 17F/5). The consultative examiner (CE) also concluded that much of the claimant's mood, interpersonal, and vocational problems are a result of his personality disorder (Ex. 17F4)."

"My observations of the claimant's presenting of himself as the hearing also consistent with the psychological consultation conducted by David M. Dixon, PhD, in November, 2007 (Ex.6F). David Dixon described the claimant as having pressured speech, and observed that the claimant "tends to get off-track at times and diverts with obsessive thinking" (Ex. 6F/6). David Dixon also observed that the claimant "tends to worry excessively and may interpret neutral events as problematic" (Ex. 6F/7). The client is also described as being suspicious of others, avoidant, and introverted (Ex. 6F/7)."

"The record also indicates that the claimant is very bright and academically accomplished, but that he has underachieved in employment (Ex. 3E/8; 7E; 6F/3; 17F/1). The claimant reports having been bypassed for promotions five times in eleven years and that he was referred to anger management by his employer, and had numerous incidents interacting with coworkers (Ex. 6; 17F/1; 7E)."

"……The claimant reports being harassed and picked on by coworkers and claims that those instances of harassment have increased the severity of his condition (Ex. 7E; 6F; 17F/1). Melinda Losee reported that the claimant complained that he cannot return to work because of his "inability to deal with the stress and rejection" and the fact that stress brings back memories of the traumatic experiences he has had at work in the past (Ex. 17F/4)."

"The claimant also reported that he lives with his parents and is financially supported by them (Ex. 7E; 6E). ….the claimant describes being "overwhelmed with fatigue" and become dependent on others for many of his activities of daily living (Ex. 6E; 7E/5; 17F/4)."

MEDICAL NEXUS

This ensures that an employer violates its duty to accommodate only where the employee has proved a medical nexus exists and the employer fails to provide reasonable accommodations, absent a showing of undue hardship. However, in the case of depression or PTSD, a doctor's note may be necessary to satisfy the plaintiff's burden to show some accommodation is medically necessary. Although a doctor may not be able to prescribe a specific form of accommodation, a letter or note will provide a sufficient nexus between the disability and the need for accommodation. This nexus appropriately limits the employer's duty to accommodate and assures that an employer is not required to provide unnecessary accommodations. «32». Here it is undisputed fact that Apostol provided medical notes from his Doctors to meet the medical nexus requirement. Apostol's disparate treatment claim. Apostol has produced evidence showing a genuine issue of material fact as to whether Respondent's stated reasons for firing and/or not rehiring Apostol are pretext for a discriminatory purpose. Therefore, it is inappropriate to grant summary judgment on this issue.

ADA AMMENDMENT ACT OF 2008

The revised guides reflect changes to the law stemming from the ADA Amendments Act of 2008, which make it easier for veterans with a wide range of impairments – including those that are often not well understood -- such as traumatic brain injuries (TBI) and post-traumatic stress disorder (PTSD), to get needed reasonable accommodations that will enable them to work successfully. [Prior to the ADA Amendments Act, the ADA's definition of the term "disability" had been construed narrowly, significantly limiting the law's protections.]

In GOODMAN v. BOEING CO. , The injury in an LAD claim is the violation of the right to be free from discrimination. «33». As explained in Reese, LAD compensates an employer's discriminatory response, not the employee's underlying disability. «34». In Apostol, WLAD compensates employer Ronald Wastewater District (RWD), not Apostol's underlying disabilities. In Reese, the dignitary injury of discrimination has produced further physical injury; the discrimination acted as an intervening cause to cut off the arm of the IIA. «35». Similarly, in Apostol, the dignitary injury of discrimination has produced Apostol further physical injury; the discrimination acted by employer RWD acted as an intervening cause to cut off the arm of the IIA. As contemplated by

Reese, the trial court satisfied the concern for double recovery by setting off the jury award by Plaintiff's IIA compensation. See Reese, «36».

PLEADINGS

Pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements, «37»; in which the U.S. Supreme Court noted that pleadings drafted by pro-se litigants should be held to a less stringent standard than formal pleadings drafted by lawyers.

Judge Ramsdell writes in his denial of Apostol's motion dated February 7, 2013 he considered in his decision Apostol's pleadings. Since motions to reconsider under Rule 60(b) (6) apply only to "extraordinary situations" and "should be only sparingly used." «38». Relief under Rule 60(b)(6) is only allowed "[w]hen a party [such as Mr. Pollard] timely presents a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust...." Good Luck, 636 F.2d at 577 (citations omitted). As the pleadings submitted as part of this motion for reconsideration are devoid of any such fact, Mr. Pollard has not satisfied his burden and Rule 60(b) (6) provides him with no basis for relief. In sum, the Court finds that Mr. Pollard has no avenue for relief under Rule 60(b) (6). Here, Apostol's pleadings (CP 1772-1789)

submitted as part of his motion vacation and considered by Judge Ramsdell includes the central facts of Apostol's litigation. Apostol has satisfied his burden and Rule 60(b)(6) «39», provides him basis for relief.

MISCONDUCT

Misconduct by Defendant counsel in this case which the judgment was obtained by improper conduct of the party in whose favor it was rendered. Respondent denied knowledge of Apostol's worker's compensation claims and only admit knowledge after summary judgment ruling and verbally admitted in the oral arguments proceedings in Court of Appeals, Division One, when questioned by Judge Lau. CP 1436. Deception occurred by Respondent counsel when he writes in their briefs and misled the courts that the employer did not removed Apostol from Standby Duty on August 30, 2005 (declaration by George Dicks CP867-922 SUPRA) which is an adverse employment action committed by Respondent against Apostol that is within the three year statute of limitations and which misled the trial court as well as the court of appeals and in whose favor it was rendered. For continuing violations to extend outside the statute, at least one act of harassment or adverse employment action must occur within the three statute of limitation period to apply for continuing

violations. Summary judgment was improperly entered by misconduct committed by Respondent counsel and Respondent employer Ronald Wastewater District. A normal reasonable person would question the conduct committed by the Employer and Respondent counsel. What it coincidence or intent made by opposing parties that any evidence Apostol produced in this case that occurred within the statute of limitations were either denied of knowledge-Apostol worker's compensation claims-Apostol's PTSD claim in September 2005 and Apostol's wrist fracture on January 4, 2006; denied of ever occurring-George Dicks removing Apostol from Standby Duty on August 30, 2005, harassment made by management and coworkers made against me for over eleven and a half years or fabricated a story so no liability could be found on their part-Apostol's termination because Apostol failed to attend a Loudermill hearing on February 13, 2006, rather they terminated me because I filed two bona fide workers' compensation claims resulted in my in capacitance. The acts committed by the Respondents' counsels from Stoel Rives Law Firm, Tim O'Connell, etc., from early litigation through years of grievances, years of administrative proceedings at the Board of Industrial Insurance Appeals, Superior Court of Thurston County, King County, Court of Appeals Division I &II, Washington State Supreme

Court, Equal Employment Opportunity, Washington State Human Rights Commission, and United States Federal District Court Western Division. Respondents' acts were intentional and calculated and committed misconduct and deception upon the courts. It is not that Apostol has to prove each allegation here for relief of judgment; the court of appeals would still hold that these facts constitute a persuasive "other reason justifying relief from the operation of the judgment." As the United States Supreme Court states in the case Radack v. Norwegian Am. Line Agency, Inc., "Fed. R. Civ. P. 60(b) (6) is "a 'grand reservoir of equitable power to do justice in a particular case." «40». In SUBURBAN JANITORIAL v. CLARKE AMERICAN, held that counsel's letter did not generate a duty to speak, and that the failure to respond was not a misrepresentation, we would still hold that these facts constitute a persuasive "other reason justifying relief from the operation of the judgment." CR 60(b) (11). «41».

The court of appeals can find in Apostol v. Ronald Waster District that under clause (6) (clause (11) for Washington's equivalent counterpart) substantial rights to either party are not affected if Apostol's motion qualifies for relief of judgment. However, even if Apostol was in fact competent to APPEAR under this standard, it does not follow that he was

capable of DEFENDING himself, pro se, in the oral argument proceedings. Analogously, a finding that a criminal defendant is competent to stand trial is not equivalent to a finding that a criminal defendant is competent to appear pro se. «42». Our Supreme Court extended this rule to attorneys appearing in disciplinary proceedings. «43». Even in fact Judge Ramsdell's concluded Apostol APPEAR competent under this standard, it does not follow that Apostol was capable of DEFENDING himself, pro se, at summary judgment oral hearings as well as the Court of Appeals oral hearings. The Court of Appeals should extend this rule to Apostol appearing in any judicial proceedings.

Attorney disciplinary hearings must meet the requirements of due process. «44». If an attorney does not have the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself or herself, the attorney's due process right to a fair hearing is violated if the attorney is allowed to appear pro se. «45». It is undisputed that Apostol appeared pro se throughout his proceedings. CP 1424. It is undisputed that the trial court never made any Findings of Facts as required in CR 52 DECISIONS, FINDINGS AND CONCLUSIONS in regards to Apostol's mental capacity. Although

Judge Ramsdell noted in the summary judgment rulings that he considered Plaintiffs Pleadings CP 1773-1789 in his decision CP 1790-1791, 1793-1794 which included uncontroverted testimonials by Apostol and his psychiatrist Dr. David Dixon, describing Apostol's mental disabilities and diagnosis and limitations, nowhere had Judge Ramsdell mentioned any findings of facts or conclusions of law whether Apostol was competent to stand trial, nor his ability to defend himself in the proceedings. Furthermore, the Court of Appeals did not make any mention of Apostol's mental competence in the appeal decision authored by Judge Lau and signing Judge Grosse, Leach concurs. CP 1419-1437. The Court of Appeals, Division II, in the case of Apostol v. Department of Labor and Industries, noted at 153 Wn. App. 1027, «46». states:

> "...Apostol also asserts that he is seeking remedy for the emotional distress suffered during the proceedings related to his claim, apart from the distress he suffered during employment. The Industrial Insurance Act provides the exclusive remedy for workers injured in the course of employment and does not authorize the tort recovery Apostol seeks."

Furthermore, Apostol claimed the meeting held on September 21, 2005(letter is at CP 878-879) was harassment made by the Respondent since this ploy of intentional emotional harm had been repeated throughout Apostol's employment. It is undisputed facts and evidence in the records. Ibid, SUPRA CP 1-1416. A reasonable person to conclude

the Respondent intended not to promote Apostol and cause emotional, physical and mental harm through Respondent's acts of not promoting Apostol, write unwarranted and false write ups, put Apostol on probation, put Apostol on leave without pay numerous times in his employment, take away Apostol's Annual Bonus pay which was included in the bargaining agreement that the Respondent contracted with Local Union 763, Apostol's Union among others. The emotional harm caused damage to Apostol which made him depressed and eventually caused his Post-Traumatic-Stress-Disorder (PTSD). Apostol was declared disabled by the Social Security Administration in a letter dated June 22, 2011 by ALJ Robinson. And stated as fact that the day Apostol became disabled was on September 21, 2005, the exact same day the Respondent held that fateful meeting with Apostol and falsely accusing him of flagging violations and were preparing to discipline him immediately since he was on a one year probation from January 2005 – January 2006, any more violation would result immediate termination as written in Apostol's files and is supported in the records. The Respondent's overwhelming intentional adverse employment actions which is harassment in every sense of the word because these actions were NOT WARRANTED. CP 1440-1439, PLAINTIFF'S MOTION. (Division Two of this court in

APOSTOL v. DEPARTMENT OF L&I, See APPENDIX I, states it was permitted) It is fact that Apostol's work performances were excellent as his supervisor, Maintenance Manager Steve Paulus, wrote throughout Apostol

employment. CP 1-1416 SUPRA, until Paulis's retirement in October 2003. George Dicks replaced Paulis in October 2003 and when General Manager Phil Montgomery retired as well in the same time October 2003, both Mike Derrick whom replaced Phil Montgomery, and George Dicks, increasingly scrutinized Apostol his every move. The continuing emotional, physical and mental harm made against Apostol by the Respondent was intentional since other co-workers who are Caucasian as noted by the Appeals Court Division One, in 153 Wn. App. 1027, July 5, 2011; SUPRA. All were promoted to higher position with higher responsibility while Apostol was demoted from Maintenance Technician A to Technician B. It is fact that Mark Neumann, Al Dann, held the same title as myself and we were all performing the same work, and both were Caucasian and both were promoted to Technical Specialist position. When Apostol was demoted to Technician B in December 2004, Technicians Chad Sehnert and Jason Sharpe were promoted to Technicians A in 2005. These are undisputed facts and in the records.

Mark Dewey a Caucasian male was hired as Technical Support Specialist in 1995 when Apostol had originally applied for the position. Charlie Brooks half white and half Hispanic was promoted to Crew Chief. It is fact that Apostol's Standby Duty were taken away by Respondent, specifically made by George Dicks which he denied in his declaration CP 932-967 (see CP 919-920 Exhibit 6 titled: Overtime Report Standby Duty and Apostol has provided proof in his briefs and can be proven in oral presentation at trial unless Respondent concedes this issue. The declarations submitted by George Dicks contains time sheets signed by me and initialized by George Dicks as shown from Respondent submitted this document via Respondent's attorneys Dave P. Mallove and attorney Scott R. Sawyer of DANIEL P. MALLOVE LAW FIRM PLLC CP 920. This issue along with Apostol's termination on February 2006 and the harassment on September 21, 2005 made by Respondent's verbal announcement of immediate disciplinary action will be decided. These are facts contained within the statute of limitations which the trial court and COA Division One omitted as facts and evidence. Substantial evidence that can be presented to a jury as proof of adverse employment actions committed to Apostol by the Respondent.

Apostol well understood it meant termination (warning letters in the records and given to Apostol from Respondent stated facts of immediate termination since Apostol was still on a one year probation period from December 2004 through December 2005 from the disciplinary action made by the Respondent when Apostol left a staff meeting in early December 2004. The disciplinary action and adverse employment action included demotion, 30 day leave without pay and Apostol's Annual Bonus Pay contracted through his Local Union 763 Bargaining Agreement. This letter is at A52-A53 in the APPENDIX submitted and included into Judge Ramsdell's rulings. (And, it is in the records). Apostol now in this suit is requesting authorizing from this Court of Appeals, Division One to AFFIRMED a claim for DAMAGES for pain and suffering and non-economic damages and other relief deems just due to Apostol. The appeals court Division One decision on July 5, 2011 made no mention regarding the competency of Apostol to stand trial, nor his ability to defend himself at summary judgment and court of appeals oral hearings. Rather, the courts of appeals utilize the strict standard which pro se litigants are held to the same standard as attorneys. . «47». Moreover, the Washington Supreme Court signed by Chief Justice Madsen denied Apostol's petition for review. CP 73. Lastly, in Apostol's

CR 60 (b)(11) motion ,here, Judge Ramsdell again considered Apostol's supporting affidavits submitted declarations by Apostol, Attorneys Randy Baker and Susan Mindenbergs, Doctors Dixon, Berman, and Mayeda, Mr. Steve Paulis and Apostol's pleadings; Judge Ramsdell wrote:

"Despite any mental infirmary that Mr. Apostol may have suffered from when pursuing his claim originally before the court, the records in the court file, Mr. Apostol's correspondence with opposing counsel and Mr. Apostol's conduct in open court before the undersigned judge leads this court to conclude that Mr. Apostol was sufficiently capable of representing himself so as to make the relief requested under CR 60(b) (11) unwarranted.''

This is legal error and Apostol's due process rights are not met. Legal error in the result of a judicial abuse of discretion can be considered an abuse of discretion and qualify for vacation. A decision based on legal error is reviewed under an abuse of discretion. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. «48». Legal error also constitutes an abuse of discretion. «49». A trial court's discretionary decision that is based on an error of law constitutes an abuse of discretion. «50». The uncontroverted testimony of Apostol's psychiatrist is that Apostol was not capable of representing himself at the time of the hearings. Dr. David Dixon states:

"It is my opinion that Mr. Apostol's mental illnesses likely rendered him unable to represent himself in court or in any adversarial proceeding in 2005 and that they continue to render him unable to do so through the present. It also is my opinion that these mental illnesses rendered him

incapable of testifying as a witness, and being cross-examined, even with the representation of counsel, between September 2005 through, at least, 2008. It is probable that Mr. Apostol's mental illness impaired his ability to effectively respond to his employer's requests from September 21, 2005 to spring of 2006. This impairment also likely would have substantially interfered with his capacity to correctly to convey to his physician specific information demanded by his employer to excuse his attendance at work. My observations of Mr. Apostol at his 2007 hearing before the Board of Industrial Insurance Appeals of the State of Washington were fully consistent with my assessment of his mental condition. At the hearing he was not able to satisfactorily explain and justify and demonstrate rational grounds of explanation for his case. He spoke softly and slowly with a lack of confidence. He was distractible and easily derailed. He displayed difficulties concentrating. At times he stuttered. Objections disrupted his train of thought, and he was unable to cognitively shift sets and adapt or react. He could not answer or ask questions out of the scope of my expertise. At times he was essentially incoherent and his questions made little sense. When disrupted he became disorganized. My evaluation of him in June 2012 revealed that he remains disabled and affected by a mental disorder (General Anxiety Disorder and Major Depressive Disorder), Mr. Apostol's mental condition has improved. The post-traumatic stress disorder, which had been chronic and acute, has significantly, although not completely, abated. My Axis V General assessment of functioning rating of Mr. Apostol in June 2012 was 50 on a scale of 100. In contrast, in February 2007 my Axis V General Assessment placed him at 40 on a scale of 100. This improvement likely is due in large part to the cessation of the trauma inducing harassment at Mr. Apostol's workplace, which followed Mr. Apostol's cessation of work at Ronald Wastewater District. I believe Mr. Apostol now is capable of testifying as a witness and being subjected to cross examination, including in this case concerning his own trauma related experiences while employed at Ronald Wastewater, although he remains incapable of representing himself in such proceeding." CP 1519-1520.

IN RE MEADE, the Supreme Court stated: An attorney is mentally competent to be subjected to a disciplinary proceeding when he is capable

of properly understanding the nature of the proceedings and is capable of rationally assisting his counsel in defending against disciplinary charges. The fact that an attorney meets this standard of competency does not indicate that the attorney is competent to conduct his own defense. Due process requires that the attorney meet the first standard in order for the proceeding to go forward and that he be represented by counsel if his ability to adequately represent himself is not confirmed. «51».

Analogously, even in fact Apostol, a non-attorney, is mentally competent to be subjected to judicial hearings when he is capable of properly understanding the nature of the proceedings and is capable of rationally assisting his counsel in defending against his actionable civil claims. The fact that Apostol meets this standard of competency does not indicate that Apostol, a non-attorney, is competent to conduct his own defense. Due process requires that Apostol meet the first standard in order for the proceedings to go forward and that he be represented by council if his ability to adequately represent himself is not confirmed. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. «52». Untenable reasons include errors of law. «53».

Furthermore, Defendant's arguments rely upon Washington Standards for Legal "Competance", Chapter RCW 5.60.050. This chapter refers to Witnesses-Competency. This standard Respondent rely do not meet the due process requirement our Supreme Court Due discussed IN RE MEADE. Defendant's argument is inapplicable and without merit. Nowhere in Respondent's argument mention the requirement that Apostol is competent to conduct his own defense. The due process requirement is absent. Furthermore, the Respondent offers no expert testimony that Apostol was competent to stand trial, nor offer expert testimony that Apostol is competent to conduct his own defense. The Respondent offer no expert testimony that even if they had an expert that they had firsthand knowledge and an in person evaluation of Apostol's mental capacity. Moreover, the Respondent cites no legal authority which addresses due process requirements our Supreme Court adopts in IN RE MEADE. «54». Here, the trial court relied upon its own personal opinion and Defendant counsel relied upon his own personal opinion. Neither one offered outside expert testimony in the field of expert witnesses. Their professional field of expert is the law, not psychiatry nor forensic psychology. ER 702 states: Expert testimony is admissible under ER 702

if the witness qualifies as an expert and the testimony will be helpful to the trier of fact. «55».

The exclusion of evidence at trial is reviewed under the abuse of discretion standard. «56». The admission of expert testimony is a matter addressed to the trial court's discretion. «57». Expert testimony is admissible under ER 702 if it will assist the jury in understanding uncommon matters. «58».

Under the Rules of Evidence (ER), which serve as guidelines in disability hearings, an expert witness must have a reasonable basis of information about the subject before offering his or her expert opinion. See ER 702, 703. ER 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." «59». Here, even if they did have an expert, the Respondent did not indicate that Apostol is competent to conduct his own defense. Plus, the Respondent offered no argument whether Apostol is required to right to counsel with or without confirmation of his competence. Due process requires that Apostol meet the first standard in order for the proceeding to go forward and that he be represented by counsel if his ability to adequately represent himself is not confirmed. «60».

In STATE v. GREENE, this same court states: If a particular scientific theory or technique is sufficiently accepted within the relevant scientific community, any concerns regarding the possibility of error or mistake in the case at hand are to be addressed under the admissibility standard of ER 702 or by the trier of fact. Dixon is one of Apostol's expert witnesses to testify in a jury trial. Since Apostol has demanded a jury trial in his case and paid the required fee (stated fact and evidence in the records supports this fact: Docket at Superior court reads: Sub 4 08-29-2008 JURY DEMAND RECEIVED - TWELVE Jury Demand Received - Twelve $250.00) , the trier of fact would be a jury trial as Apostol demanded and not a judge. (See also CP 42, which is the brief I submitted to Judge Ramsdell at the King County Clerk's Office with an official Court stamped date Received April 7, 2010, Time: 12:12 pm. The very front of the brief states in bold face caps: JURY TRIAL DEMANDED. I had also mail a copy to Attorney Scott R. Sawyer as well as to Judge Ramsdell and have mailed receipts from both as proof. Both the Judge and Attorney stated they never received such brief. These are irregularities which go against the proceedings as well as misconduct under CR 60(b).

It is stated fact that Apostol never waived any rights to a jury trial. And a judge cannot waive one for him without his knowledge.

In IN RE ELLERN, states: The provision of Rem. Rev. Stat., § 6930, relating to a hearing in insanity proceedings before a jury like the territorial statute, does not accord an absolute right, but it is conditional upon a demand being made for a jury trial; and the right is waived unless a demand is timely made.

The records show a jury demand was demanded and paid on August 29, 2008 and during summary judgment hearings before Judge Ramsdell I verbally demanded a jury trial and Judge Ramsdell responded: "You do not have any evidence." Nowhere in this provision nor in Section 21 of Art. I of the constitution provides as follows: "The right of trial by jury shall remain inviolate . . .". Furthermore, an error of law is committed when the court makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction. And finally Ellern states: Proceeding to determine the question of insanity of an alleged insane person without a jury after one was demanded, was an irregularity within Rem. Rev. Stat., § 464, designating irregularity in obtaining a judgment as a ground for vacating it; and although the person so charged might have taken an appeal from the judgment

adjudging him to be insane, that remedy is not exclusive and he has the right to proceed under § 464 to have the judgment vacated. «61». Applying this same due process standard to Apostol; Apostol now have the right to proceed to have his judgment vacated.

Although the trial court denied defendants motion to strike the Declarations of Susan Mindenbergs, Doctors Dixon, Berman and Mayeda, and Steve Paulis.; Judge Ramsdell commented in his ruling: "In the context of this proceeding, the court believes that Respondents can most efficiently and effectively be considered as going to the weight to be accorded the declarations and not their admissibility."

Another issue is whether the trial court abused its discretion when it refused to admit the admissibility of the Declarations of Susan Mindenbergs, Doctors Dixon, Berman and Mayeda, and Steve Paulis. And, if the court abused its discretion, was its decision harmless error? The question then is whether the trial court's ruling prejudiced Apostol when it denied Apostol's motion. The court of appeals question here is whether the error prejudiced Apostol. «62».

Although testimony indicates that Apostol intellectually understood the nature of the summary judgment proceedings, his psychiatrist testified

that his mental condition at the time of the summary judgment hearings interfered with his understanding of the underlying situation and made it impossible for him to respond appropriately or to raise legitimate defenses. These are not mere mistakes in judgment, as argued by bar counsel. These symptoms of mental illness may affect Apostol's legal competence to appear in court proceedings.

However, even if Apostol was in fact competent to APPEAR under this standard, it does not follow that he was capable of DEFENDING himself, pro se, in the summary judgment hearings. Analogously, a finding that a criminal defendant is competent to stand trial is not equivalent to a finding that a criminal defendant is competent to appear pro se. «63». Our Washington Supreme Court extended this rule to attorneys appearing in disciplinary proceedings. Here, the Court of Appeals should adopt this standard to Apostol's defense in this case.

Moreover, the United States Supreme Court stated, "Attorney disciplinary hearings must meet the requirements of due process. «64». Similar, Apostol, a non-attorney appearing pro se, must meet the requirements of due process. Here, Apostol must meet the requirements of due process; the Court of Appeals must adopt the same approach used by the U.S. Supreme Court IN RE RUFFALO. If an attorney does not

have the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself or herself, the attorney's due process right to a fair hearing is violated if the attorney is allowed to appear pro se. «65». If Apostol does not have the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself, Apostol's due process right to a fair hearing is violated when he was allowed to appear pro se.

Ph.D. psychologist Hanan Berman wrote in his declaration:

"My working diagnosis for him (Apostol) during our periods of therapy was primarily 309.28 (DSM-4), adjustment disorder with features of anxiety and depression. In 2006, his condition appeared to have deteriorated substantially since my observations of him in 1997 and 1999. In light of that deteriorated condition, I doubt that Mr. Apostol was capable of adequately and effectively representing himself in a lawsuit against his employer in 2006, or that he was fully capable of testifying and being cross-examined in such a lawsuit even if represented by counsel. The symptoms I observed might well have materially impaired Mr. Apostol's capacity to appropriately focus on matters related to his litigation and to deliberate effectively in any sustained fashion about matters. There is a substantial possibility that a lay person, such as an attorney whom Mr. Apostol might have approached about representing him in a discrimination lawsuit against Ronald Wastewater, would have noticed Mr. Apostol's mental impairment, and that it would have caused concern about whether Mr. Apostol effectively could testify for himself and be cross-examined in such a lawsuit. The deterioration I observed in Mr. Apostol's mental health between 1999 and 2006 appears to have been triggered largely by the harassment he felt he had experienced at work during this period, and to stress arising from his efforts to redress that harassment." CP 1546.

Our Washington Supreme Court wrote IN RE MEADE: "An attorney who was not competent at the time of a disciplinary proceeding is entitled to have the findings from the proceeding vacated and to have a de novo proceeding when he is competent." «66». Under this same standard, Apostol was not competent at the time of trial court summary judgment proceedings and court of appeals oral arguments proceedings in 2010-2011 and is entitled to have the judgment from the proceedings vacated and to have a new trial when Apostol is competent.

Furthermore, Attorney Susan Mindenbergs wrote:

"In about May 2005, Rodolfo Apostol retained me to represent him in discussions with his employer at the time, Ronald Wastewater District in Shoreline, Washington about harassment he was experiencing in the workplace. In the course of this representation, which included communication with representatives of Ronald Wastewater District, I came to the conclusion that Mr. Apostol was being subjected to harassment, hostile work environment, and dangerous working conditions while working at Ronald Wastewater District. I further concluded that Ronald Wastewater District was refusing to take reasonable measures to remedy the situation, and that the working environment was causing Mr. Apostol emotional distress. In September 2005, Mr. Apostol informed me that he was being threatened with immediate termination. I spoke with him on the telephone at the time. Mr. Apostol was extremely distraught and that senior management was falsely accusing him of misconduct and threatening to terminate him based on the false accusations. He mentioned suicide. He asked me to file a civil suit on his behalf against the Ronald Wastewater District. While I believed Mr. Apostol likely had a meritorious case of employment discrimination based on his Filipino ethnicity and retaliation for his complaints against his employer, I declined to represent him because I believed his mental condition had deteriorated to the point where it would have rendered him unable to

withstand the stress entailed in prosecuting a civil rights suit even while being represented by counsel."

From Dr. Berman and Susan Mindenbergs testimonies, the court of appeals could conclude that Apostol was not competent to stand trial at the earliest date of September 2005. The testimonial confirms Dr. David Dixon's assessments and wrote: "I first met Rodolfo Apostol, plaintiff in this action, in December 2006.... Apostol advised me that he had been subject to frequent acts of harassment, by co-workers since his hiring in July 1994. He explained that the mistreatment by co-workers escalated considerably in October 2003. He began receiving repeated physical threats by co-workers, his personal property was being vandalized, he was required to perform physical labor unnecessarily subjected him to physical injury, supervisors were falsely reporting that his job performance was deficient, and he was demoted. Apostol advised me that he repeatedly complained about this improper treatment to senior management, to his union, to the Washington State Human Rights Commission and the Equal Employment Opportunity Commission. He said these complaints did not result in correction of the abuse. Apostol further told me that this treatment had made him extremely depressed both at home and at work, that he had become anxious almost constantly, and that it become increasingly difficult for him to sleep and

that he was receiving medication from his personal physician to treat these

symptoms. Mr. Apostol explained the work environment ultimately became unbearable for him at a meeting he was ordered to attend with the General Manager of Ronald Wastewater and Apostol's immediate supervisor in September 21, 2005. At this meeting, the General Manager read a letter to Apostol falsely asserting that Apostol had been observed committing traffic safety violations…The general manager and supervisor then berated Apostol and threatened him with disciplinary action amounted to the commencement of his termination. I performed a psychological evaluation on Mr. Apostol in February 2007. ….. I then then testified on Mr. Apostol's behalf before the Board of Industrial Insurance Appeals of the State of Washington, Docket No. 06 12871, Claim No. Y-677589 on February 20, 2007, hearings conducted before Industrial Appeals Judge Judit E. Gebhardt. Mr. Apostol represented himself during these proceedings, which provided me the opportunity to observe his functioning outside the office setting. Based on my meetings with the assessment of Mr. Apostol in 2006, 2007 and 2012, I determined that Mr. Apostol suffered from, and continues to suffer from Post-Traumatic Stress Disorder (PTSD), a condition which interferes

with an individual's mental functioning. The hallmark symptoms include nightmares with themes of the traumatic event, flashbacks of the event, especially with stimulations of cues which remind the individual of the event and avoidance of the place or people related to the traumatic event. The traumatic event leads to the person's fear for his/her life or security. In addition Mr. Apostol suffered from and continues to suffer from Generalized Anxiety Disorder. This is a mood disorder, characterized by an excessive, irrational, and uncontrollable worry and dread. People suffering this condition tend to anticipate the worst. Their emotions are disproportionate with the actual source of worry and interfere with daily functioning. The condition has a host of associated physical, emotional, and mental symptoms. It is my opinion that Mr. Apostol's mental illnesses likely rendered him unable to represent himself in court or in any adversarial proceeding in 2005 and that they continue to render him unable to do so through the present. It also is my opinion that these mental illnesses rendered him incapable of testifying as a witness, and being cross-examined, even with the representation of counsel, between September 2005 through, at least, 2008. I believe Mr. Apostol now is capable of testifying as a witness and being subjected to cross examination, including in this case concerning his own trauma

related experiences while employed at Ronald Wastewater, although he remains incapable of representing himself in such a proceeding. Although an appellate court will deny review of a constitutional claim raised for the first time on appeal if the record on appeal is insufficient to evaluate the merits of the claim. «67». The reviewing court can conclude the record is sufficient to evaluate the merits of the claim on a constitutional claim raised for the first time on appeal.

In re Disability Proceeding Against Diamondstone , a hearing officer may conclude that an attorney lacks the capacity to practice law based on expert testimony in the record that the attorney has a mental illness; that the attorney's judgment, ability to process information, and ability to stay on task are impaired by the illness; that the attorney's thoughts and speech are derailed and tangential; that the attorney misperceives information; and that the attorney suffers from delusions and paranoia. «68» Ibid.

Analogously, the Court of Appeals can conclude that Apostol lacks the capacity to represent himself in judicial proceedings base on expert testimony in the record that Apostol has a mental illness; that Apostol's judgment, ability to process information, and ability to stay on task are impaired by the illness; that Apostol's thoughts and speech are derailed

and tangential; Exhibit 4, CP 1514-1520, Declaration of Dixon, supra; Exhibit 7, CP 1543-1547, Declaration of Berman, supra; Exhibit 2, CP 1507-1509, Declaration of Mindenbergs, supra; Exhibit A, CP 1498-1503, FINDINGS OF FACT AND CONCLUSION, Administrative Law Judge Thomas Robinson, Social Security Administration, Office of Disability Adjudication and Review; Exhibit 9, CP 1552-1554, Declaration of Mayeda, SUPRA.

The record is adequate to determine Apostol is competent to appear in court proceedings. On remand, the Court of Appeals may proceed with a jury trial as demanded by Apostol in his complaint and in his oral hearings briefs (CP 42) before Judge Ramsdell (no transcripts available). However, Apostol must be represented by counsel in these proceedings. If Apostol is not able to retain counsel within a reasonable time, this court may appoint counsel to represent him.

IRREGULARITIES

Our Supreme Court further explained, 60(b) (11), the case must involve 'extraordinary circumstances,' which constitute irregularities extraneous to the proceeding. «69». A defendant can only move to vacate judgment under CR 60(b)(11) when his circumstances do not permit moving under

another subsection of CR 60(b).«70». A definition of irregularity was adopted by this court in the case of Merritt v. Graves, 52 Wash. 57, 100 Pac. 164, as follows:

"An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner."

In addition, in LITTLE v. KING the trial court could have reasonably concluded that the lack of findings and conclusions was an "irregularity in obtaining a judgment," for purposes of CR 60(b) (1). " An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.' " «71». In Apostol's case, 'extraordinary circumstances,' exist, which constitute irregularities extraneous to the proceedings and the judgment must be vacated.

VII. CONCLUSION

PRAYER FOR RELIEF

WHEREFORE, the Appellant prays that this Court assume jurisdiction of this cause, the Respondent be cited to appear, and after trial by jury or by

default, a judgment be entered against the Respondent for its violations of state and federal law and public policy as follows:

A. The Appellant's back pay, future lost wages, pain and suffering damages, and other traditional economic and non-economic losses in an amount to be proven at trial, to be assessed against the Respondent.

B. A declaration that the Respondent is guilty of violating the laws.

C. Punitive damages, injunctive relief or other relief as may be awarded in law or equity, or by statute.

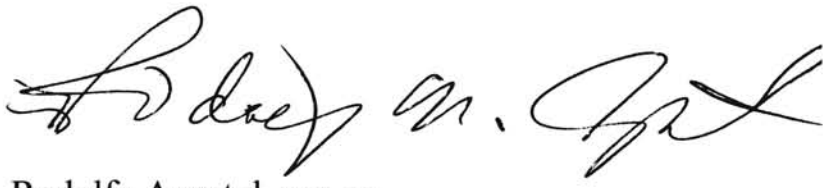
D. Reasonable attorneys' fees, cost, and interest as may be provided by contract, statute, or recognized grounds in equity.

E. Where discrimination is found, damages as may be awarded under federal TITLE VII, as incorporated by reference in RCW 49.60.

F. Such other and further relief as the court deems just.

July 1, 2013

Respectfully submitted,



Rodolfo Apostol, pro se

VII. APPENDIX I

APPENDIX I

Page

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RODOLFO M. APOSTOL, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 39370-1-II ORDER CORRECTING CAPTION

The unpublished opinion for this appeal was filed on December 8, 2009. Due to an inadvertent error, the incorrect respondent was named in the filed opinion. The correct respondent is Department of Labor & Industries. It is hereby

ORDERED that respondent Board of Industrial Insurance Appeals is removed from the caption of the filed opinion and Department of Labor and Industries is inserted as respondent.

IT IS SO ORDERED.

DATED this _____ day of _____, 2010.

_____
Armstrong, J.

We concur:

_____
Quinn-Brintnall, J.

_____
Van Deren, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RODOLFO M. APOSTOL, Appellant, v. BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondent.	No. 39370-1-II UNPUBLISHED OPINION

Armstrong, J. – Rodolfo Apostol appeals the superior court's decision rejecting his claim for workers' compensation benefits because he neither sustained an industrial injury nor suffered from an occupational disease. We affirm.

Facts

Apostol began working as a maintenance technician for Ronald Wastewater District in 1994. On September 21, 2005, at 4:25 pm, his immediate supervisor called him into the general manager's office. Apostol requested the presence of a union representative, but management denied his request because the meeting was not an investigation. Rather, the general manager presented Apostol with a letter instructing him to improve his work performance. Apostol denied the allegations and refused to sign for receipt of the letter.

Apostol decided to leave but was instructed to stay and complete the meeting. When he insisted on leaving, he was told the meeting would continue the next morning. Apostol went to his car, left a message for his union representative, called his attorney, and then "broke down." Administrative Record (AR) at 10. He did not return to work and eventually was fired.

> 4. Rodolfo M. Apostol's mental health condition diagnosed after September 21, 2005, was a culmination of a series of events that Mr. Apostol considered traumatic, exacerbating an underlying anxiety disorder, which then became more flagrant, more pronounced, and more disabling to Mr. Apostol.

AR at 13. The judge concluded that Apostol did not sustain an industrial injury on September 21, 2005, and that his claim for a stress-related mental condition from a culmination of a series of events was not an occupational disease. The judge recommending affirming the Department's dismissal of Apostol's claim.

In his petition for review, Apostol argued that he had provided sufficient evidence to support his claim and that the industrial appeals judge had erred:

> The ploy used by my employer for over eleven and a half years of employment consisted of constant threats of false write-ups and false accusations, verbal and physical abuse, demotions, denied opportunity for advancement, and threats of my firing. . . . The physical and mental injuries I suffered during my course of employment culminated on September 21, 2005 which [sic] my employer made false accusations and threats which were precursors of me being fired.

AR at 3-4. The three-member Board denied his petition and adopted the proposed decision and order as its final decision and order. Apostol then appealed to the Thurston County Superior Court. Following a bench trial, the superior court affirmed the Board's decision and adopted its findings and conclusions. Apostol petitioned for direct review to the Washington Supreme Court, which transferred his case here.

ANALYSIS

I. Recovery for Industrial Injury and Occupational Disease

A. Standard of Review

The decision of the Board of Industrial Insurance Appeals is prima facie correct, and a party attacking that decision must support its challenge by a preponderance of the evidence.

RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). On review, the superior court may substitute its own findings and decision for the Board's only if it finds, from a preponderance of the evidence, that the Board's findings and decision are incorrect. *Ruse*, 138 Wn.2d at 5. Appellate review is limited to examining the record to see whether substantial evidence supports the findings made after the superior court's de novo review and whether the court's conclusions of law flow from the findings. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986). Where there is disputed evidence, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. *Garrett Freightlines, Inc.*, 45 Wn. App. at 340.

The superior court adopted the Board's findings of fact. Apostol appears to challenge findings 3 and 4 in his opening brief to this court. We will examine the record to determine whether substantial evidence supports these findings and whether they, in turn, support the conclusions that Apostol did not sustain an industrial injury or occupational disease for which he can recover workers' compensation benefits under the Industrial Insurance Act, chapter 51 RCW.

B. Industrial Injury and the September 21 Meeting

An industrial injury is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. Finding of fact 3 alludes to this definition in stating that Apostol

did not experience a sudden and tangible happening of a traumatic nature on September 21, which produced an immediate result in the course of his employment, and in adding that Apostol's stress-related mental health condition was not the result of the September meeting. Finding of fact 4 adds that Apostol's mental health condition after September 21 was the result of a series of events that he considered traumatic.

Apostol does not challenge an earlier finding stating that the September 21 meeting was not violent, vulgar, abusive, or physically threatening to Apostol's safety or well-being, and that it was held only to present a letter requesting improvement in his work performance. Apostol testified that the meeting left him in a state of emotional trauma, but he admitted that he was on antidepressants beforehand. He also described a series of traumatic events that occurred at work before the September 21 meeting that caused his mental health to deteriorate. Dixon stated that the experiences over the last two to five years had caused Apostol's preexisting depression and generalized anxiety to develop into post-traumatic stress disorder. He testified that the September 21 meeting was the culmination of a series of events that Apostol experienced as traumatic and that the meeting made his anxiety disorder more flagrant, more pronounced, and more disabling.

Despite this testimony, Apostol insists that the September 21 meeting constituted a traumatic event sufficient to cause industrial injury, and he cites as support *Boeing Co. v. Key*, 101 Wn. App. 629, 5 P.3d 16 (2000). In *Boeing*, the court approved a jury instruction stating that:

> A worker may not receive benefits for a mental disability caused by stress resulting from relationships with supervisors, co-workers, or the public, unless she has a mental disability caused by stress which is the result of exposure to a sudden and tangible happening of a traumatic nature producing an immediate and prompt result.

Boeing Co., 101 Wn. App. at 632. The evidence showed that stress between Key and a coworker had been building up for some time before Key became distraught after a meeting in which she allegedly received death threats from the coworker. *Boeing Co.*, 101 Wn. App. at 634. Key sought workers' compensation benefits for the post-traumatic stress disorder caused by her employment, but the jury rejected her claim. *Boeing Co.*, 101 Wn. App. at 631-32. Division One affirmed, reasoning that the jury could have found that Key's claim did not meet the definition of an industrial injury because her emotional distress resulted from a result of events that unfolded gradually over a period of time, rather than from a sudden, tangible, traumatic incident that produced an immediate result. *Boeing Co.*, 101 Wn. App. at 634.

Here, the superior court found that Apostol's claim did not meet the definition of an industrial injury because his emotional distress was the result of events that unfolded over a period of time. Substantial evidence supports the superior court's finding that the September 21 meeting did not constitute a sudden and tangible happening of a traumatic nature, and this finding supports the conclusion that Apostol did not sustain an industrial injury.

C. Occupational Disease

The findings of fact cited above also led the superior court to conclude that Apostol did not suffer from an occupational disease for which he may recover workers' compensation benefits. The Industrial Insurance Act defines "occupational disease" as "such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140. In 1988, the legislature directed the Department to adopt a rule stating that claims based on mental conditions or mental disabilities caused by stress

do not fall within the statutory definition of occupational disease. RCW 51.08.142. The resulting rule, WAC 296-14-300, provides:

> (1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140.
>
> Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from:
>
> (a) Change of employment duties;
>
> (b) Conflicts with a supervisor;
>
> (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;
>
> (d) Relationships with supervisors, coworkers, or the public;
>
> (e) Specific or general job dissatisfaction;
>
> (f) Work load pressures;
>
> (g) Subjective perceptions of employment conditions or environment;
>
> (h) Loss of job or demotion for whatever reason;
>
> (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;
>
> (j) Objective or subjective stresses of employment;
>
> (k) Personnel decisions;
>
> (l) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers.
>
> (2) Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.

Although there are no stress-related exclusions for industrial injury claims, RCW 51.08.142 and WAC 296-14-300 proscribe claims for occupational disease based on stress-caused mental conditions or mental disabilities. *Boeing*, 101 Wn. App. at 632. The rule expressly excludes relationships with supervisors and coworkers as well as actual or perceived threats of disciplinary action as grounds for a stress-related occupational disease claim. WAC 296-14-300(1)(c),(d); *Boeing*, 101 Wn. App. at 632.

As the industrial appeals judge observed, most if not all of Apostol's complaints about his

working environment fall within the examples in WAC 296-14-300. The superior court agreed, noting that Apostol's claim of occupational disease might have succeeded before the rule's adoption in 1988. Under current law, however, Apostol's claim could not succeed as either an occupational disease or an industrial injury because it was based on long-term employment stress. The court explained to Apostol the narrow exception currently allowed for stress-related injury:

> We're going to leave a small room where if there's a single traumatic event that kicks off something like post-traumatic stress syndrome, we'll look at that. An example might be say you're an ironworker and you're working on the job and somebody drops a big steel girder right at your feet, and that causes you from that point on to have post-traumatic stress disorder and you can no longer [work] the steel work because of what they did to you. That might qualify you for an industrial injury of post-traumatic stress syndrome. But that's different than the occupational disease. . . . [T]he legislature has said we're not going to compensate for work-related stress conditions any more since 1988. And that's where you're caught.

Report of Proceedings (Jan. 25, 2008) at 36.

The superior court's findings support its conclusion that Apostol did not suffer from an occupational disease sufficient to support a claim for workers' compensation benefits.

D. Other Claims

Apostol raises several claims related to the two issues already discussed. He first contends that the industrial appeals judge erred in failing to give a jury instruction on the "lighting up" theory. *See McDonagh v. Dep't of Labor & Indus.*, 68 Wn. App. 749, 751 n.1, 845 P.2d 1030 (1993) (where a pre-existing dormant or latent condition is activated or "lighted-up" by an industrial injury or occupational disease, the worker is entitled to benefits for the disability resulting therefrom). This claim fails for several reasons. First, there was no jury to instruct during the hearing before the industrial appeals judge. Apostol could have requested a jury trial in

CERTIFICATE OF SERVICE

I, Rodolfo Apostol, hereby certify that on July 1, 2013, I served copies of Appellant Brief on the following parties by way of U.S. mail.

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