NO. 72323-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHARLES L. KIMZEY,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

DEPARTMENT OF LABOR & INDUSTRIES REPLY BRIEF

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I. INTRODUCTION

The Industrial Insurance Act precludes coverage of any mental health condition caused by exposure to workplace stressors as an occupational disease. Kimzey attempts to create a dichotomy between mental health conditions caused by stress and mental health conditions caused by trauma, arguing that only the former are excluded from coverage by law, and he attempts to do so without either a valid legal argument or any medical evidence to support his argument.

This Court should reject Kimzey's attempt to create such a dichotomy, as it would be false: these are not mutually exclusive categories of causes. They are one and the same: whether the mental condition is caused by "stress" or "trauma," both words refer to the effects of external events on a person's mental health. Coverage for mental health conditions caused by ongoing workplace exposure to stress is expressly prohibited by RCW 51.08.142. The distinction Kimzey seeks to create does not exist, and even if it did, he has waived this argument by not making it below. Nor does his evidence support any distinction: his expert medical witnesses testified that Kimzey's condition was caused by stress, and it is therefore not subject to coverage under the Industrial Insurance Act as an occupational disease. The superior court erred when it accepted Kimzey's claim, and this Court should reverse.

II. ARGUMENT

There is no distinction between a mental health condition caused by *stressful* exposures over time and a mental health condition caused by *traumatic* exposures over time. Furthermore, Kimzey has waived any argument that such a distinction exists by failing to make it below. RCW 51.52.115. Even assuming the dichotomy between stress and trauma in fact exists, as Kimzey now argues, the record does not support his argument. Medical testimony is required to support eligibility for benefits under the Industrial Insurance Act. Neither medical witness testified to the distinction Kimzey attempts to create here, but instead used "trauma" and "stress" interchangeably. *See, e.g.*, BR Burgett 11, 13, 33; BR Koch 9, 11, 16, 18, 19. Because neither "stress" nor "trauma" is a legally sufficient cause of an occupational disease under the Industrial Insurance Act, Kimzey is not eligible for coverage of his condition.

A. Kimzey Has Waived Any Argument Regarding a Factual or Legal Distinction Between Stress and Trauma Because He Did Not Make This Argument Before the Board

Kimzey waived the right to argue that RCW 51.08.142 recognizes a distinction between "stress" and "trauma" because he did not argue this distinction below. A party waives arguments on appeal by not making them in the first instance to the Board of Industrial Insurance Appeals (Board). RCW 51.52.115 ("Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice

of appeal to the board, or in the complete record of the proceedings before the board."); *see also* RCW 51.52.104 ("petition for review shall set forth in detail the grounds therefor and the party . . . shall be deemed to have waived all objections or irregularities not specifically set forth therein"); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 176 Wn.2d 1018 (2013) (holding that since worker's petition for review did not argue that attending physician had not received order, issue was waived on further appeal); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (holding that even if notice of payment reduction was insufficient, argument waived if not set out in petition for review).

Requiring a party to raise an argument at the administrative level is a well-recognized principle of law. Its purpose, as the Supreme Court has recognized, is to allow the agency to apply its expertise and correct its errors, protect the integrity of administrative decision-making, discourage the flouting of administrative processes, aid judicial review, and promote judicial economy. *King County v. Wash. State Boundary Rev. Bd. for King Cnty*, 122 Wn.2d 648, 668-69, 860 P.2d 1024 (1993). Kimzey's argument that traumatic events are different than stressful events is new. He did not make this argument while his appeal was before the Board and the Board was not allowed to apply its expertise to the question, nor was the Department able to defend against it.

Kimzey's attempt to distinguish exposure to workplace stress from exposure to workplace trauma is not found within any of the written filings contained in the record. To the contrary, throughout this appeal Kimzey has consistently stated that his mental health condition was caused by stressful exposure. His notice of appeal to the Board acknowledges that his condition was caused by "on-the-job stress." CB 26. Nor did he make this argument to the industrial appeals judge who heard the evidence: she understood him to argue that he "suffered from distinct instances" but the record did not show that "Kimzey sustained a sudden and traumatic event." BR 22.[1] His petition for review referred to the "depth and magnitude of the mental stress" to which he was exposed. BR 4. He agreed with his witnesses in his petition for review that there must be "an extreme traumatic stressor" to cause PTSD. BR 5. At no point while this case was being heard by the Board did Kimzey suggest the distinction he argues now: if he had, the Department could have questioned his witnesses about it.

Kimzey argues now the Department has ignored the record and that the record before the superior court shows his condition was caused by trauma. Resp't Br. 15. Yet, in his trial brief submitted to the superior

[1] If Kimzey's condition was in fact caused by one discrete event, and he filed a claim for benefits within one year of that event, it could be covered as an industrial injury. WAC 296-14-300(2) (stress resulting from exposure to single traumatic event adjudicated as industrial injury); RCW 51.28.050 (claims must be filed within one year). The evidence does not support this result. *See* Appellant's Brief 20-23.

court, he argued repeatedly that "stress" caused his PTSD. CP 21-30. He alluded to the "depth and magnitude of the mental stress" to which he was exposed, CP 22; described the "emotional conditions and intense stress in the line of duty," CP 24; and he argued he "meets the elements in a mental stress claim." CP 24. He referred to the "stress he experienced as a paramedic," stated that "stress . . . was clearly a condition of his employment," reiterated "that stress arose out of and in the course of his employment," and he explained that his witnesses testified to "the stress he experienced as a paramedic" as being different than "that stress attendant to normal everyday life." CP 25. All of his lay witnesses testified to the "stress experienced by paramedics," and agreed that work as a paramedic is "highly stressful." CP 26. Kimzey's medical experts believed that his "mental illness was caused by his 27 years of exposure to intense psychological stress." CP 26. Kimzey asserted 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. He concluded his trial brief by highlighting that "the stress" he experienced was unusual. CP 29. Yet, despite his previous arguments, Kimzey now argues that his condition was not caused solely by stress, but additionally, by trauma.

Kimzey has waived any argument that seeks to distinguish stress from trauma as causing his mental health condition. The Department's

order expressly notified him that his condition was being rejected because it was an occupational disease that was caused by stress. BR 30. The industrial appeals judge expressly agreed with the Department's determination. BR 22-23 ("I must agree with the Department . . . that any type of stress claim due to the distinctive conditions of employment is not compensable."). The time to make this argument was during the presentation of his evidence or else in his petition for review, but he did not do so. *See* RCW 51.52.104 and .115. Even if this Court considers Kimzey's argument despite his failure to raise it before now, this Court should reject it, as it lacks merit, as explained below.

B. RCW 51.08.142 Unambiguously Excludes Stress as a Cause of an Occupational Disease

RCW 51.08.142 unambiguously precludes acceptance of a claim for an occupational disease if it involves a mental health condition that was caused by exposure to workplace stress. RCW 51.08.142.[2] As illustrated above, Kimzey agrees that his condition was caused by stress. *See also* Resp't Br. 13. But Kimzey now contends that his condition was also caused by trauma, that "stress" and "trauma" are two different causes, and that the statute does not bar coverage of a mental health condition caused by trauma because an occupational disease can have multiple

[2] 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." The rule adopted by the Department is WAC 296-14-300. Both are attached in an appendix for ease of reference by the Court.

proximate causes. This argument attempts to insert an exception into the statute that the Legislature did not include. It also confuses the rule regarding multiple proximate causes, because at least one of those causes must qualify the condition for coverage, but stress as a cause disqualifies the condition for coverage unless some other legally sufficient cause is also present, and since "trauma" is not medically distinguishable from "stress," trauma is not legally sufficient as a cause.

1. RCW 51.08.142 Directs That Mental Conditions Caused by Stress Are Not Occupational Diseases

There is no reasonable confusion about what the Legislature intended by RCW 51.08.142. The goal of statutory interpretation is to discern and implement the Legislature's intent. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). In doing so, the court looks first to the plain meaning of the language of the statutes. *Id.* at 737. When determining a statute's plain meaning, the court considers all related statutes. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). The court does not add language, or create exceptions, that the Legislature chose not to include. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

According to Kimzey's theory, a disease is not "caused by stress" under the statute if the events that caused it were also traumatic. If this were true, the statute would instead read: "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 *unless the condition was also caused by trauma.*" But the Legislature did not include this exception. This Court should not add it now.

Moreover, the related statutes provide further evidence that Kimzey cannot prevail in his attempt to distinguish his condition as caused by trauma from other conditions caused by stress. The rule attendant to RCW 51.08.142 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." WAC 296-14-300 (emphasis added). The clear import of this rule is that while a mental health condition resulting from a *single* traumatic exposure can be covered, a mental health condition resulting from *multiple* traumatic exposures (such as Kimzey's) cannot.

The rules of statutory construction apply to rules. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). To express one thing in a law implies the exclusion of the other. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002); *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988) (under principle of *expressio unius est exclusio alterius*, the express inclusion of certain conditions excludes the implication of others). Here, the rule expressly includes a

single traumatic event, but noticeably absent is any mention of multiple traumatic events. Thus, when the relevant provisions are read together, the law is clear in excluding mental health conditions caused by exposure to multiple traumatic events; Kimzey's argument to the contrary is wrong.

Kimzey is correct, however, in that statutes must be read in harmony, but that principle does not support his arguments here. Resp't Br. 27. On the contrary, reading RCW 51.08.142 in harmony with RCW 51.08.140, RCW 51.08.100, and WAC 296-14-300, further shows the statutory bar to coverage here. An industrial injury is a sudden and tangible happening. RCW 51.08.100. An occupational disease arises naturally and proximately out of employment. RCW 51.08.140. Every claim under the Act must be cognizable as either an injury or occupational disease. *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 566, 829 P.2d 196 (1992), *rev'd on other grounds by* 124 Wn.2d 634 (1994). According to RCW 51.08.142, no mental health condition caused by stress can be covered as an occupational disease. As WAC 296-14-300 explains, a mental health condition may still be adjudicated as an industrial injury, even though it cannot be allowed as an occupational disease, if it was caused by a sudden and tangible event. There is nothing inconsistent with these statutes in denying coverage of Kimzey's mental health condition as an occupational disease.

Nor is there any ambiguity in the statute such that it can be construed in favor of Kimzey. Neither party has alleged any ambiguity, so the rule of liberal construction does not apply. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (court does not construe unambiguous terms). Rather, Kimzey has created a false factual distinction but the statutory bar applies to Kimzey's claim regardless of how the cause of his condition is phrased.

2. The *Rothwell* Court Held That the Industrial Insurance Act Excludes Mental Conditions Caused by Multiple "Emotionally Traumatic Experiences"

The Court of Appeals has held that the mental stress bar applies in the instance of mentally traumatic events causing a mental condition. *Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn. App. 771, 781, 206 P.3d 347 (2009). Kimzey attempts to distinguish *Rothwell* by implying that unlike Rothwell "his PTSD was caused by workplace *trauma*—not stress." Resp't Br. 19. But no such distinction is found in *Rothwell.* In *Rothwell,* 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. 149 Wn. App. at 775-76. These multiple traumatic events caused Rothwell's PTSD. *Id.* at 778. The Court held that because there was not just one traumatic event, the exclusions in RCW 51.08.142 and WAC 296-14-300 applied. *Id.* at 780. "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 multiple traumatic events are excluded from coverage under the statutory bar for stress claims. *Id.* This bar applies unless there is a sudden and traumatic event which can be subject to coverage as an injury.

3. No Cause of Kimzey's Condition is Legally Sufficient for Coverage Under the Act

The statutory bar to coverage also operates to defeat Kimzey's argument that there are multiple proximate causes of his condition so it can still be subject to coverage under the Act. Resp't Br. 13-14. While it is generally true that there can be multiple proximate causes, this does not defeat the clear exclusion to coverage required by RCW 51.08.142. The Legislature has conclusively prohibited coverage of a mental health occupational disease through RCW 51.08.142 when stress is a cause.[3]

A mental health condition caused by stress cannot be covered as an occupational disease. RCW 51.08.142; WAC 296-14-300. It does not, therefore, matter if there were other causes of Kimzey's condition; a statutory bar operates to end the causation question by answering it

[3] Arguments regarding multiple proximate causes are common when the workplace conditions act on a pre-existing condition or other non-work causes are also involved. *See, e.g., Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977) (providing that "the 'multiple proximate cause' theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities."). There is no evidence supporting any other cause here but the stressful workplace exposure.

negatively. *See Schwab v. Dep't of Labor & Indus.*, 76 Wn.2d 784, 459 P.2d 1 (1969) (regarding RCW 51.32.020—which bars recovery for a widow when her husband's death results from intentional act—as "erecting a statutory bar between cause and a proximately related result"). Thus, if stress is a cause of a mental condition, absent a physical cause, the rule of proximate causes does not apply since stress operates as a bar to coverage. But here there were not multiple proximate causes: stress was the only cause identified by both medical experts, although sometimes this was mentioned in terms of traumatic events rather than the stress those events created.

C. There is No Medical Support for the Alleged Distinction Between "Trauma" and "Stress" in the Record

No medical witness provided any support for a distinction between whether Kimzey's PTSD was caused by stress as opposed to having been caused by trauma. While the court should liberally construe the Industrial Insurance Act in favor of "those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive benefits provided by the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955). The rule of liberal construction does not extend to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). It was Kimzey's burden to show

that his condition was not, in fact, caused by stress such that it is not excluded by RCW 51.08.142. RCW 51.52.050, .115.

Contrary to Kimzey's arguments here, both medical witnesses he presented testified that his condition was caused by stress. BR Burgett 13, 33; BR Koch 11, 16, 18. Moreover, both witnesses testified to essentially the same thing regarding the same condition. *E.g.* BR Burgett 33; BR Koch 18. Neither witness differentiated between PTSD caused by *trauma* and PTSD caused by *stress*, as Kimzey seeks to do now.

1. Kimzey's Witnesses Both Identified Stress as the Cause of His Condition

When Kimzey had the opportunity to differentiate "stress" and "trauma" with his witnesses, he did not do so. In fact, that stress was generally the cause of Kimzey's condition was assumed and accepted by both parties during the questioning of Kimzey's medical witnesses. Nurse 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, presumably in an attempt to distinguish any potential causes of Kimzey's condition other than "workplace stressors." BR Burgett 14. No events other than workplace stressors were identified. Nurse Burgett repeatedly and consistently testified that Kimzey's condition was caused by the accumulation of events at work over time. She explained how this

accumulation worked, and agreed that it was an accumulation of individual stressful events:

By Kimzey's counsel:

Q. For each one of those responses, does each one of the responses cause a sudden emotional stress?

A. Yes. And whether or not you are able to bury that, sublimate, is really dependent on the individual.

Q. And it's those individual stresses that you are talking about cumulating over time?

A. Yes.

BR Burgett 33. As this excerpt shows, Nurse Burgett did not make any distinction between "stress" and "trauma," and she used the words interchangeably when discussing the cause of Kimzey's PTSD.

Dr. Koch similarly testified that Kimzey's PTSD was caused by stress. BR Koch 16. For example, Dr. Koch had noted, during the July 2012 visit when he submitted Kimzey's claim for benefits to the Department, that Kimzey had decreased the amount of shifts he was working and was feeling poorly which, in Dr. Koch's opinion, "was all due to his emotional and mental distress." BR Koch 10-11; Ex. 1 (Report of Industrial Injury or Occupational Disease). "Distress" is the first definition provided for "stress" in the dictionary. *Webster's Third New International Dictionary* 2260 (2002). 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 characterized Kimzey's work as involving "stressful exposures." BR Koch 16. Dr. Koch was even asked outright, "Is it your opinion that the diagnosis [of PTSD] 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.[4]

Kimzey suggests that the Department was required to call a witness to rebut the opinions of Kimzey's medical witnesses. Resp't Br. 4, 19. As shown by their testimony here, Kimzey's medical witnesses both testified that Kimzey's condition was caused by exposure to stress over time, supporting the Department's determination in this case, so no additional witnesses were needed.

2. There Is No Medical or Other Distinction Between "Stress" and "Trauma" as the Cause of PTSD

Kimzey seeks to create a distinction between stress and trauma without any medical support. If he believed his appeal turned on this distinction, then he needed to provide medical evidence of the distinction when his case was before the Board.[5] He did not, and could not, because

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[4] Just as he had with Nurse Burgett, Kimzey's counsel also agreed to this word choice at the time Dr. Koch's testimony was taken. He later asked whether it was Dr. Koch's opinion "that the severe depression *was caused by the stresses of his employment*." BR Koch 19 (emphasis added). Dr. Koch testified that would be harder to prove but agreed that depression often accompanies PTSD. BR Koch 19.

[5] This illustrates the prejudice caused by allowing Kimzey to make an argument now that he did not make when the evidence was presented. If the Department had been put on notice of this argument, it could have questioned the witnesses as to this distinction, if one in fact exists.

none exists. In the world of mental health conditions, when the concern is on the effect of external events to the mental health of the patient, stress and trauma are generally the same thing.

According to the *Diagnostic and Statistical Manual of Mental Disorders IV-TR*, the "essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor." American Psychiatric Association, *DSM-IV-TR* 463 (2007).[6] This definition uses "traumatic" as a modifier of "stressor," consistent with the idea that any distinction between trauma and stress is one of degree, not kind. Both words, "stress" and "trauma," are used to describe something that acts upon a person's mental state. Trauma is defined as "a psychological or emotional *stress* or blow that may produce disordered feelings or behavior" and "the state or condition of mental or emotional shock produced by such a *stress*." *Webster's* at 2432 (emphasis added).[7] Just as the definition of trauma uses the word

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[6] Courts look to technical sources when addressing language in a technical field. *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002) *Webster's Third New International Dictionary* does not define PTSD. Merriam-Webster's online dictionary defines it as "a psychological reaction occurring after experiencing a highly stressing event (as wartime combat, physical violence, or a natural disaster) that is usually characterized by depression, anxiety, flashbacks, recurrent nightmares, and avoidance of reminders of the event." http://www.merriam-webster.com/dictionary/post-traumatic%20stress%20disorder, last visited March 20, 2015. (Note the DSM IV-TR was used at the time of the hearing, the DSM V has subsequently replaced it.)

[7] Trauma can also be physical in nature: "an injury or wound to a living body caused by the application of external force or violence." *Webster's* at 2432. There is no allegation or evidence that Kimzey's PTSD was caused by physical trauma experienced by Kimzey; rather, the physical aspect of the trauma would have been experienced by

stress, so too does the definition of stress include trauma: stress is defined as "distress" or "a physical, chemical, or emotional factor (as *trauma*, histamine, or fear) to which an individual fails to make a satisfactory adaptation, and which causes physiologic tensions that may be a contributory cause of disease." *Webster's* at 2260 (emphasis added).

Notably, the dictionary definition of "stress" closely parallels Nurse Burgett's description of the cause of Kimzey's PTSD. Nurse Burgett explained how the amygdala, a part of the brain, processes and stores life events, but there comes a point when "that part of the brain can no longer process or store the information and the coping mechanisms are no longer accessible or effective for him to deal with the trauma and stress in his life." BR Burgett 13. This inability to "deal with the trauma and stress" as described by Nurse Burgett is the "fail[ure] to make a satisfactory adaptation," to which the definition of "stress" alludes. *See Webster's* at 2260 (stress definition). Nurse Burgett testified that Kimzey's condition was caused by his lack of ability to deal with the traumatic, stressful exposures he experienced as a paramedic, and made no attempt to distinguish any "traumatic exposures" from any "stressful exposures" because she saw these exposures as the same thing.

Aside from ignoring Kimzey's evidence, accepting Kimzey's false dichotomy would result in absurdity. This Court would have to conclude

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Kimzey's patients, which then resulted in their need to call on emergency medical personnel such as Kimzey.

that PTSD is not a condition caused by stress, even though the diagnosis itself plainly characterizes it as a "stress disorder." No medical witness provided a scientific or medical basis for such a distinction and the DSM-IV-TR does not describe any such distinction. This Court would also have to distinguish *Rothwell*, *Boeing*, and *Snyder*, each of which found that the claimants' PTSD caused by events over time was indeed a mental condition caused by stress that was excluded from coverage by RCW 51.08.142. *Rothwell*, 149 Wn. App. at 779-80; *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000); *Snyder v. Med. Serv. Corp. of E. Wash.*, 98 Wn. App. 315, 321, 988 P.2d 1023 (1999); *discussed in* Appellant's Brief at 17-20. And, finally, this Court would need to provide guidance to claim administrators on how to tell the difference between mental conditions caused by stress and mental conditions caused by trauma, an impossible task since the two are not mutually exclusive. Rejecting Kimzey's false dichotomy and his claim for coverage, on the other hand, would be consistent with RCW 51.08.142 and its related case law.

D. Kimzey Does Not Deny That Attorney Fees Were Awarded for Work at the Department and the Board, Which Is Error

Even if Kimzey prevails in his appeal here, the superior court's attorney fee award is legally incorrect. As argued in its opening brief, the Department contests the fee award because Ron Meyers included time

spent at the Board and at the Department in his fee affidavit and the superior court accepted such hours. CP 143-49, 246; Appellant's Br. 33. The superior court's fee award necessarily encompasses hours for services that were not performed before a court, because it made an award to Meyers for 66 of his claimed 83.4 hours, and Meyers's own pleadings show that he spent far less than 66 hours in representing Kimzey in superior court. CP 143-49 (spreadsheet of fees claiming approximately 9 hours for superior court work); CP 246 (letter awarding fees). Kimzey does not deny that the claimed hours included time at the Board and at the Department, nor does he deny that the superior court included such hours in its fee award. *See* Resp't Br. 30-34. A party to an appeal who has an opportunity to respond to an opponent's factual claims and neglects to do so admits the accuracy of the opponent's factual claims. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992). Because Kimzey has admitted, as he must, that the letter opinion contains fees for work at the Department or the Board, the attorney award must be reversed.

To make an award of fees payable by the Department, a statute must provide that those fees are in fact payable by the Department. *Borenstein v. Dep't of Labor & Indus.*, 49 Wn.2d 674, 676, 306 P.2d 228 (1957) (noting Legislature made no provision for recovery of attorney fees payable by the Department for services rendered before the Board). A worker who prevails in a superior court appeal may only receive a fee

award for work performed before the superior court. RCW 51.52.130 provides that the attorney fee "for services *before the court only*. . . shall be payable out of the administrative fund of the department." (Emphasis added); *see also Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231 (2004) (holding that there is no provision for an award of attorney fees based on services performed before the Board). No statute makes fees payable by the Department for work performed before the Board of the Department. But here, the materials submitted by Kimzey included hours for services before the Department, Board, and superior court. If the decision on the merits by the superior court is sustained, then the matter needs to be remanded to the trial court to award fees for work before the superior court only.[8]

III. CONCLUSION

The superior court erred when it determined Kimzey's mental health condition was subject to coverage under the Industrial Insurance Act as an occupational disease. The Legislature excluded coverage of such conditions by statute. It was Kimzey's burden to show the statutory exclusion did not apply to him, but he did not carry this burden. Both of

[8] The superior court did not enter findings of facts and conclusions regarding the attorney fee issue, which provides an additional basis for remand. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999) (fee award must include findings and conclusions sufficient to allow review). The Department recognizes that some courts accept letter opinions in the absence of formal findings in some contexts. *See Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 365, 183 P.3d 334 (2008). Here, because the letter opinion does not address the issue of whether Ron Meyers' hours were before the trial court, the finding can also be considered insufficient on that basis, necessitating remand.

his witnesses testified that his mental health condition was caused by stress. His attempt to distinguish stress and trauma now should be rejected as he waived any such argument, and, even if it is entertained, neither the law nor any medical evidence supports it. The superior court's order should be reversed and Kimzey's claim should be rejected.

RESPECTFULLY SUBMITTED this 25th day of March, 2015.

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APPENDIX

RCW 51.08.142
"Occupational disease" — Exclusion of mental conditions caused by stress.

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.

[1988 c 161 § 16.]

WAC 296-14-300
Mental condition/mental disabilities.

(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.

[Statutory Authority: Chapters 51.08 and 51.32 RCW. WSR 88-14-011 (Order 88-13), § 296-14-300, filed 6/24/88.]

No. 72323-5-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CHARLES L. KIMZEY, Respondent, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Appellant.	DECLARATION OF MAILING King County Superior Court Cause No. 13-2-32765-1 SEA

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor & Industries Reply Brief and this Declaration of Mailing to the parties on record by placing it with ABC-Legal Messengers, Inc. addressed as follows:

Ron Meyers
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DATED this 25th day of March, 2015.

KAREN STRATFORD
Legal Assistant 3