NO. 98219-8

SUPREME COURT
STATE OF WASHINGTON

SHEILA M. LAROSE,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES and KING COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

This Court should deny review because the Court of Appeals applied black-letter law that an agency rule is valid if it is reasonably consistent with the authorizing statute. The Legislature directed the Department of Labor and Industries to adopt a rule precluding stress-based mental health conditions as occupational diseases. The Department responded in 1988 by adopting a rule that listed example causes of stress-based conditions that it will not consider as causing an occupational disease. Former WAC 296-14-300 (1988). In 2015, the Department amended the regulation to add repeated exposure to nonphysical traumatic events to the stressor list. WAC 296-14-300(2)(d). Although Sheila LaRose claims that this amendment exceeded the Department's statutory authority, the Court of Appeals correctly upheld the addition of another stressor to the list as reasonably consistent with the statute—after all, the Legislature directed the Department to adopt a rule about stress-based mental health conditions.

LaRose offers a generic reason for review: many workers have workers' compensation coverage. But she shows no significant public interest. She also points to cases that are consistent with this case. With no conflict, she shows no reason for review.

Review should be denied.

II. ISSUE

> In RCW 51.08.142, the Legislature gave the Department authority to adopt a rule 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." WAC 296-14-300(2)(d) adds "[r]epeated exposure to traumatic events" to the examples of excluded forms of stress. Did the Department exceed its statutory authority when it adopted this rule?

III. STATEMENT OF THE CASE

A. Overview of Applicable Industrial Insurance Law

When a worker is injured at work or sustains an occupational disease, the worker may file a claim for industrial insurance benefits. RCW 51.28.020. Industrial injuries result from a single traumatic event. RCW 51.08.100. Occupational diseases arise proximately and naturally out of employment over time and may include multiple exposures. RCW 51.08.140; *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 135, 814 P.2d 629 (1991). For a valid occupational disease claim, the distinctive conditions of employment must cause the disease. *Dennis v. Dep't of Labor & Indus*., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

In 1988, the Legislature enacted RCW 51.08.142 to address mental health conditions caused by stress at work. The statute directed the Department to adopt a rule excluding stress-based claims for mental health conditions and disabilities from coverage:

> 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.

Former RCW 51.08.142 (1988). The statute contemplates nonphysical work circumstances that cause mental health conditions, not physical ones.

In 1988, the Department acted under RCW 51.08.142 when it adopted former WAC 296-14-300 (1988): "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." Former WAC 296-14-300(1) (1988). In adopting the rule, the Department provided "examples of stress related mental conditions or mental disability situations." AR 113. The rule lists examples of claims based on stress that do not fall within the definition of occupational disease:

> 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.

WAC 296-14-300(1). The rule also clarifies that "[s]tress resulting from exposure to a single traumatic event" will be adjudicated as an industrial injury. WAC 296-14-300(2)(a).

In 2009, the Court of Appeals decided in *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, 780–81, 206 P.3d 347 (2009), that former WAC 296-14-300 (1988) excludes exposure to multiple traumatic experiences as a stress-based occupational disease claim. *Rothwell*'s analysis relied on former WAC 296-14-300, which provided that (1) the Department cannot allow mental health conditions caused by stress as an occupational disease, but (2) "[s]tress resulting from exposure to a *single traumatic event* will be adjudicated with reference to RCW 51.08.100." Former WAC 296-14-300 (1988) (emphasis added); *Rothwell*, 149 Wn. App. at 780.

The *Rothwell* court reasoned that, while the Industrial Insurance Act covers mental health conditions resulting from a *single* traumatic exposure, the Act does not cover mental health conditions resulting from *multiple* traumatic exposures. *Rothwell*, 149 Wn. App. at 782 ("Ms. Rothwell's PTSD did not result from a single traumatic event; rather, it

resulted from a series of incidents over a period of a few days" and so it was not an occupational disease because of the stress bar).

After the *Rothwell* opinion was issued, the Department amended WAC 296-14-300 in 2015 to add the "[r]epeated exposure to traumatic events" language in WAC 296-14-300(2)(d). Wash. St. Reg. 15-19-139. The provision provides:

> (d) Repeated exposure to traumatic events, none of which are a single traumatic event as defined in subsection (2)(b) and (c) of this section, is not an industrial injury (see RCW 51.08.100) or an occupational disease (see RCW 51.08.142). A single traumatic event as defined in subsection (2)(b) and (c) of this section that occurs within a series of exposures will be adjudicated as an industrial injury (see RCW 51.08.100).

WAC 296-14-300(2)(d).

B. The Department Denied LaRose's Stress-Based Claim, and the Board Affirmed Under RCW 51.08.142 and *Rothwell*

In 2013, a client began stalking LaRose, a public defender. AR 55. LaRose reported that "her condition became disabling in some capacity" in April 2013. AR 55.

In April 2016, LaRose applied for workers' compensation benefits. AR 54. In her application, she listed her condition as "psychological injury," explaining that she was stalked and harassed by an assigned client. AR 54. She alleged post-traumatic stress disorder (PTSD) and

major depressive disorder from several stalking incidents by the same perpetrator. AR 48.

The Department denied the claim because LaRose's condition did not constitute an occupational disease. AR 57. The order stated that RCW 51.08.142 and WAC 296-14-300 excluded her claim. AR 57. LaRose appealed to the Board of Industrial Insurance Appeals. *See* AR 3.

At the Board, LaRose moved for partial summary judgment. AR 48–52. The Department and King County cross-moved for summary judgment, arguing that RCW 51.08.142, WAC 296-14-300(2)(d), and *Rothwell* barred her claim. AR 77–84, 86–101.

The Board granted summary judgment to the Department and King County, concluding that LaRose did not have an occupational disease:

> Ms. LaRose's Application for Benefits for an occupational disease based on mental conditions resulting from repeated stressful events is not an occupational disease within the meaning of RCW 51.08.140, RCW 51.08.142, and *Rothwell v. Nine Mile Falls Sch. Dist*., 149 Wn. App. 771 (2009).

AR 4.

C. The Court of Appeals Reversed the Superior Court to Uphold the Department's Rule

LaRose appealed to superior court. CP 1–2. The superior court reversed the Board, concluding that the Department "exceeded its rulemaking authority under RCW 51.08.142 when it promulgated WAC

296-14-300(2)(d).” CP 74. The court remanded to the Board for “hearings on whether Ms. LaRose’s PTSD and major depressive disorder resulted from ‘stress’ or ‘trauma.’” CP 74.

The Department appealed to the Court of Appeals. CP 76–77. The Court of Appeals held that the Department did not exceed its rulemaking authority when amending WAC 296-14-300. *LaRose v. Dep’t of Labor & Indus.*, 456 P.3d 879 (Wash. Ct. App. 2020). It held that the phrase “mental conditions or mental disabilities caused by stress” is a medical term of art, and includes exposure to traumatic events as stress causing mental conditions. *LaRose*, 456 P.3d at 892.

IV. ARGUMENT

A. LaRose Shows No Basis for Review

LaRose argues that this Court should accept review based on substantial public interest for two reasons. First, she argues that “the Industrial Insurance Act protects the health and welfare of millions of Washingtonians who have been, or may be, injured on the job.” Pet. 5. Although it is true that Washingtonians have industrial insurance, this alone can hardly be a reason for review. Else, this Court would need to take review of the many industrial insurance appeals about which parties petition for review. Second, she argues that because the Court of Appeals has addressed issues related to repetitive trauma, the Court should accept

review. Pet. 5–6. But she points to no conflict with other appellate decisions, which could support review. Instead, these cases are consistent with *LaRose. See Rothwell*, 149 Wn. App. at 782 ("Ms. Rothwell's PTSD did not result from a single traumatic event; rather, it resulted from a series of incidents over a period of a few days" and so it was not an occupational disease because of the stress bar); *Kimzey v. Dep't of Labor & Indus.*, No. 72323-5-I, 2015 WL 7723006, *9 (Wash. Ct. App. Nov. 30, 2015) (unpublished) ("Because a mental condition caused by cumulative work-related stress is expressly excluded from coverage as an occupational disease, the superior court erred in reversing the decision and order of the Board denying Kimzey's PTSD claim for benefits as an occupational disease."). These consistent decisions show no reason for review.

B. LaRose's Quarrel with the Court of Appeals' Statutory Interpretation Forms No Basis for Review

With no factors showing the need for review under RAP 13.4, LaRose argues that the Court of Appeals incorrectly interpreted the requirement in RCW 51.08.142 that the Department adopt rules related to "mental conditions or mental disabilities caused by stress." Pet. 6–15. She is wrong.

In 1988, the Legislature excluded claims based on mental conditions or disabilities caused by stress from the definition of "occupational disease":

> 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.

Former RCW 51.08.142 (1988). Under this statute, if stress causes a mental condition, the condition is not an occupational disease.

Necessarily, the statute required the Department to define what "claims based" on stress constitute. The Legislature chose not to specify every form or example of a stress-based claim, delegating this task to the Department. In implementing the Legislature's direction to adopt a rule that identifies "claims based" on "stress," the Department identified common forms of stress in the workplace and excluded them from coverage. WAC 296-14-300(1), (2)(d). If a rule, as here, is "reasonably consistent with the controlling statute[s], an agency does not exceed its statutory authority." *Wash. Hosp. Ass'n v. Dep't of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (quoting *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013)).

In determining that the Department acted reasonably consistent with the statute, the Court of Appeals did not, as LaRose claims, find that

there were two reasonable interpretations of "mental conditions or mental disabilities caused by stress." Pet. 11. Instead, as part of ordinary statutory construction of plain language, the Court of Appeals viewed the term as a medical term of art, looking to the Diagnostic and Statistical Manual of Mental Disorders. Pet. 11; *LaRose*, 456 P.3d at 892; *see Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015) (using medical term of art to discern plain meaning).

LaRose questions the use of this manual. Pet. 12. But the only psychiatrist who provided a declaration explained that the working definition of stress "implies a psychological response to external pressure, commonly over time, typically pressure or strain on an individual emotionally or psychologically." AR 135. LaRose offers no counter medical definition.

The heart of LaRose's argument is that the Legislature only intended to target "general stress" or "ordinary workplace stressors" in RCW 51.08.142. Pet 13–14. But RCW 51.08.142 directs a Department rule targeting "claims based on mental conditions or mental disabilities caused by stress[, which] do not fall within the definition of occupational disease." The word "stress" was not qualified by the terms "general" or "ordinary," and courts do not add terms to statutes. *City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013).

The Legislature and courts have confirmed that excluding repetitive traumatic events from coverage as an occupational disease is valid. *See* Laws of 2018, ch. 264, § 2; *Rothwell*, 149 Wn. App. at 781–82. In 2018, the Legislature excluded post-traumatic stress disorder suffered by first responders from the stress bar in RCW 51.08.142. Laws of 2018, ch. 264, § 2. This amendment shows the Legislature's understanding that RCW 51.08.142 barred PTSD from multiple traumatic events from coverage—otherwise, there would be no need to exempt first responders from the stress bar. And courts presume that the Legislature does not engage in useless acts. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000).

LaRose argues that the Court should not consider this legislative understanding, citing a 1977 case. Pet. 14 (citing *Jepson v. Dep't of Labor & Indus.*, 89 Wn. 2d 394, 400, 573 P.2d 10 (1977)). But this Court in 1997 affirmed that it is appropriate to look to legislative acquiescence of Department rules. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003). The Court of Appeals properly considered this legislative action as indicative of legislative intent, and the opinion below presents no good reason for this Court's review.

V. CONCLUSION

The Court of Appeals' routine statutory construction provides no reason for review.

RESPECTFULLY SUBMITTED this 27th day of March 2020.

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SUPREME COURT OF THE STATE OF WASHINGTON

SHEILA M. LAROSE, Petitioner, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

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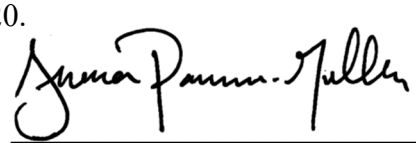

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