NO. 72323-5-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

CHARLES L. KIMZEY,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

BRIEF OF APPELLANT

ROBERT W. FERGUSON
Attorney General

KAYLYNN WHAT
Assistant Attorney General
WSBA No. 43442
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7719

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I. INTRODUCTION

The Legislature has decided that the type of workers' compensation claim that Charles Kimzey pursues "[does] not fall within" coverage of the Industrial Insurance Act. RCW 51.08.142. The Act provides two avenues for coverage: (1) for industrial injuries, which occur at a fixed point in time, and (2) for occupational diseases, which develop from workplace exposure over time. A mental health claim can be allowed as an industrial injury if the condition results from a single traumatic event, rather than from a series of events over a period of time. But, by statute, claims for mental health conditions caused by stress are specifically excluded from coverage as occupational diseases under the Act. RCW 51.08.142. This distinction is dispositive: mental health claims caused by one traumatic event may be allowed as industrial injuries but mental health claims caused by a series of stressful events over time may not be allowed as occupational diseases.

Here, claimant Charles Kimzey and his expert medical witnesses agree that his mental health condition, post-traumatic stress disorder (PTSD), was caused by an accumulation of stressful events over time through his work as a paramedic, not by any one, single, event. It therefore does not qualify for coverage under the Act as either an occupational disease or an industrial injury. The superior court expressly

found that Kimzey's PTSD was an occupational disease caused by an accumulation of events over the course of his career rather than the product of a single traumatic injury, and, therefore, it erred as a matter of law when it allowed Kimzey's claim. This Court should reverse.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in Finding of Fact 1.1, which determined that Kimzey sustained an occupational disease, namely, PTSD. CP 238.

2. The superior court erred in Finding of Fact 1.2, which determined that the findings and conclusions of the Board of Industrial Insurance Appeals were rebutted by a preponderance of the evidence. CP 238.

3. The superior court erred in Conclusion of Law 2.2, which determined that Kimzey's PTSD is an occupational disease. CP 238.

4. The superior court erred in Conclusion of Law 2.3, which determined Kimzey is entitled to coverage under the Industrial Insurance Act. CP 238.

5. The superior court erred in Conclusion of Law 2.4 which determined that the findings and conclusions of the Board of Industrial Insurance Appeals had been rebutted by Kimzey by a preponderance of the evidence. CP 238.

6. The superior court erred when it awarded attorney fees and costs to Kimzey. CP 239.

III. ISSUES

1. Did the superior court err in allowing Kimzey's PTSD as an occupational disease, when RCW 51.08.142 and WAC 296-14-300 exclude coverage of mental health

conditions caused by ongoing workplace exposure to stress as occupational diseases, and when the undisputed evidence shows that Kimzey's PTSD was caused by ongoing, stressful, workplace exposure?

2. Did the trial court err in awarding attorney fees for work at the Board of Industrial Insurance Appeals and the Department when RCW 51.52.130 provides attorney fees for court work only?

IV. STATEMENT OF THE CASE

A. Claims for Mental Health Conditions Caused by Stress Have Been Precluded as Occupational Diseases by Statute and Rule Since 1988

In 1988, the Legislature directed the Department to "adopt a rule pursuant to chapter 34.04 RCW that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational diseases in RCW 51.08.140." Laws of 1988, ch. 161, § 16. This direction was codified at RCW 51.08.142. The Department complied with this directive by adopting WAC 296-14-300, which was filed on June 24, 1988. WSR 88-14-011. The rule complies with the legislative directive: "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." WAC 296-14-300(1). The rule goes on to list examples of the causes of such mental conditions or disabilities 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 "stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100," as an industrial injury. WAC 296-14-300(2).

B. Relying on RCW 51.08.142, the Department Denied Kimzey's Claim for Coverage of His Mental Health Condition

Kimzey filed a claim for benefits that was dated July 5, 2012, by his doctor. BR Ex. 1 (Report of Industrial Injury or Occupational

Disease).[1] The diagnoses listed were post-traumatic stress disorder and major depression, probably caused by workplace exposure. BR Ex. 1. In his description of the injury or exposure, Kimzey wrote "Accumulative critical incident exposures." BR Ex. 1. No date of injury was provided. BR Ex. 1.

The Department sent Kimzey a questionnaire seeking further information regarding the nature of his claim. BR Ex. 2. Kimzey checked the box stating his injury occurred at a specific time and place, but, when providing the date of that specific injury, he wrote "During multiple critical incidents over 25 year career." BR Ex. 2. The body part injured was listed as "my psyche" and physical complaints were provided. BR Ex. 2. He checked a box stating that the symptoms came on gradually, and he listed as the cause of his symptoms, "[r]epeated exposure to some pretty horrific incidents," which occurred over his 25-year career. BR Ex. 2. The Department rejected Kimzey's claim, explaining that claims based on mental conditions caused by stress are specifically excluded from coverage by law. BR 30.

Kimzey appealed the denial of his claim to the Board of Industrial Insurance Appeals. Along with his own testimony, he presented the

[1] Citations to the Certified Appeal Board Record are provided as "BR" followed by the bates-stamped page number, or, if to testimony, by the name of the witness and page number of the relevant transcript.

testimony of various co-workers and two medical health professionals. Kimzey described some of the calls he had responded to, but never identified any specific event that was troubling him. *E.g.* BR Kimzey 107, 109 (no particular event was the triggering event of illness), 126-27 (describing concern over child with severe allergies but no specific instance identified), 129 (no recollection of specific fatalities while working on Vashon Island). His coworkers testified that Kimzey had some fear of managing airways, and identified an event where Kimzey performed an intubation poorly, but Kimzey did not recall this event. BR Warren 26, 31; BR Brownell 68, 73; BR Kimzey 108-09.[2]

Dr. Gary Koch, the doctor who signed the Report, testified that Kimzey's PTSD was caused by the accumulation of stressful events at work. BR Ex. 1, Koch 7-8, 18. He did not identify any one, particular, event as the cause of Kimzey's condition. BR Koch 12, 18-19. Rather, Dr. Koch assumed there were multiple events, and did not recall Kimzey ever going into detail about any specific events. BR Koch 12.

Rachel Burgett, an advanced registered nurse practitioner who is licensed to treat psychiatric issues and is Kimzey's treating provider for

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[2] Although Kimzey has not claimed this event was an industrial injury, the one-year statute of limitations for industrial injuries would preclude such a claim. RCW 51.28.050. This event took place more than one year before Kimzey's workers' compensation claim application. *See* BR Brownell 69-70, 91; BR Kimzey 121. This is discussed further in Part.VI.A.3.

these conditions, explained the basis for her diagnosis of Kimzey's PTSD and depressive disorder. BR Burgett 11-12, 21, 26. Like Dr. Koch, she also testified that Kimzey's mental health conditions were caused by the cumulative effects of his experiences at work. BR Burgett 11, 13, 14, 22, 29, 32, 33. Nurse Burgett repeatedly denied that there was a specific event that caused Kimzey's symptoms and frequently reiterated her opinion that his condition was caused by the buildup of events over time. BR Burgett 11-12, 13, 22, 29.

The hearing judge affirmed the Department's denial of Kimzey's claim, concluding that the evidence showed that Kimzey's claim could not be allowed under RCW 51.08.142 and WAC 296-14-300 because his own medical witnesses established that it was caused by cumulative exposure to stresses at work rather than a specific injurious event. BR 15. Kimzey sought review, but this was denied, so the hearing judge's determination became the decision of the Board. BR 1; RCW 51.52.106, .110.

C. After the Board Affirmed the Department's Order, Kimzey Appealed to Superior Court

Kimzey appealed to superior court and requested a jury. CP 19-20. The Department moved to strike the jury, which was eventually granted, because the case presents an issue of law, not fact. CP 108-09. After a bench trial, the trial court delivered an oral ruling, determining that

Kimzey sustained an occupational disease, PTSD. RP 5. It determined the condition was proximately caused by the cumulative effects of trauma in Kimzey's work as a paramedic. RP 6. The trial court said that Kimzey became symptomatic of a disease after "dealing with traumatic events, life and death situations that were stressful to him." RP 6. It believed that the disease would be "in the nature of a trauma." RP 6. And the trial court decided that Kimzey's condition represented an occupational disease that was not foreclosed by RCW 51.08.142. RP 7. In the trial court's opinion that statute, drafted in 1988, needed "to be looked at in light of all our experience here in the last 10 years . . . with regard to our Middle Eastern wars." RP 8. This oral ruling was distilled into the judgment on appeal here where the trial court found that "In the course of his work as a paramedic in dealing with traumatic incidents and the life and death situations that were stressful to him, Charles Kimzey became symptomatic of PTSD, a disease caused by trauma." CP 238.

Following the trial, Kimzey requested and was awarded attorney fees. The Department acknowledged that Kimzey would be entitled to some fees, pursuant to statute, when and if the medical aid fund is affected, for services performed before superior court. CP 150-62; RCW 51.52.130. The superior court trial was handled by attorney Tim Friedman, who requested payment for 34.4 hours of work. CP 128-49.

By letter, and without any findings of fact or conclusions of law, the court awarded him 34 hours. CP Supp. Ron Meyers, who handled the matter before it became a superior court proceeding, requested 84.30 hours, which includes work performed at the Board and the Department. CP Supp. The court allowed him 66 hours. CP Supp. The total award was for $36,600, payable when or if the medical aid fund is effected. CP Supp. The Department requested and was granted a stay on the judgment. Stay Order, September 8, 2014.

V. STANDARD OF REVIEW

In an industrial insurance case, it is the decision of the trial court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The ordinary standard of civil review applies to this Court's review of the superior court's decision. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *Rogers*, 151 Wn. App. at 179-81. Questions of law are reviewed de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012).

Rules are reviewed just as statutes are and the same rules of construction apply. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52, 239 P.3d 1095 (2010). An agency's interpretation of a statute is given great deference when that agency is charged with its

administration. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.2d 23 (2014) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004)).

The Department assigns error to two findings of fact because they are in fact conclusions of law. Assignments of Error 1 (finding Kimzey sustained an occupational disease), 2 (finding the Board's findings and conclusions were rebutted by a preponderance of the evidence). When a conclusion of law is mistakenly characterized as a finding of fact, it is subject to de novo review. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 244, 237 P.3d 944 (2010).

VI. ARGUMENT

A. Under RCW 51.08.142 and WAC 296-14-300, Occupational Disease Claims Based on Exposure to Stressful Workplace Conditions Are Excluded From Coverage as a Matter of Law

Under the plain language of RCW 51.08.142 and WAC 296-14-300, Kimzey's claim must be rejected as a matter of law because he seeks coverage for an occupational disease that resulted from ongoing exposure to stressful workplace conditions. While the Department does not dispute that Kimzey's working environment was intensely stressful, or that his exposure to that job stress caused him to develop PTSD, coverage for claims of that type does not exist under the Industrial Insurance Act.

For coverage under the Act, a claim must qualify as either an injury or an 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) A mental health claim may be accepted under the Act if it was caused by an injury, that is, a single traumatic event, but a mental health claim may not be accepted as an occupational disease if it is caused by exposure to stress and develops over time. WAC 296-14-300. Here, the evidence undisputedly shows, as the superior court found (CP 238), that Kimzey developed PTSD as a result of ongoing workplace exposure, not as a result of any one incident that constitutes an industrial injury, and, therefore, the superior court erred as a matter of law when it allowed Kimzey's claim as an occupational disease. This Court should reverse that decision.

1. RCW 51.08.142 Unambiguously Excludes Mental Conditions Caused by Cumulative Workplace Stress from Coverage as Occupational Diseases

Kimzey's claim for coverage of his PTSD as an occupational disease is foreclosed by statute. The Legislature gave the Department an unambiguous directive when it passed RCW 51.08.142: "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." (Emphasis added). Accordingly, the Department adopted WAC 296-14-300:

> (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.

(Emphasis added). Properly promulgated rules have the "force and effect of law." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (internal quotations omitted).

There is no ambiguity in either the statute or the related rule. 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.* If the plain language of the statute is unambiguous, as here, the court's inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013).

Here, the legislative intent is clear in the statute. The Legislature excluded mental conditions caused by stress from coverage as occupational diseases. RCW 51.08.142 ("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"). Thus, no claim can be allowed for a mental condition that is caused by stress unless that condition can be defined as an industrial injury. 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. An injury requires "some identifiable happening, event, cause or occurrence capable of being fixed at some point in time." *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 342-43, 725 P.2d 463 (1986). Occupational diseases, by contrast, are caused by the conditions of

employment over time. *Dennis v. Dep't of Labor & Indus.*, 109 Wn. 2d 467, 481, 745 P.2d 1295 (1987).

Kimzey's condition was caused over time; no identifiable event was identified as the cause. Nurse Burgett, Kimzey's attending provider, consistently testified that in her opinion, Kimzey's condition was caused by numerous events over time. When asked where the PTSD was coming from, she answered "Clearly from the cumulative effects of trauma in his work environment." BR Burgett 11. In discussing a study of PTSD in firefighters and paramedics, where 22 percent had a diagnosis of PTSD, Nurse Burgett testified that both the study and the general belief is that PTSD is caused by "a cumulation of events over a career. The longer the career, the more likely that it's going to happen." BR Burgett 27. When asked whether some of the specific events Kimzey described to her could be the cause of his PTSD, Nurse Burgett again stated "I don't think any one incident alone would be the cause. Again, I think it is the cumulation of events." BR Burgett 29. Dr. Koch, the doctor who submitted Kimzey's claim, also testified that Kimzey's condition was caused by the cumulative stresses of his employment. BR Koch 8, 18. Both testifying medical witnesses' opinions support the determination that Kimzey's PTSD was caused by exposure over time, rather than by a particular event.

Neither medical witness related the condition to one event as the cause. Nurse Burgett repeated numerous times that there was no identifiable event that caused Kimzey's condition. When asked if there were any specific events that were the trigger, she stated that "it was a buildup of triggers." BR Burgett 11-12. When asked for the "trigger that is the straw that breaks the camel's back," Nurse Burgett denied that as a proper characterization; instead, she stated the literature pointed to the duration of the time in the work environment. BR Burgett 14. She further stated "it isn't necessarily one event, but it just like builds up." BR Burgett 14. She was specifically asked "Is there any one incident or series of incidents that you can identify as triggers or the trigger leading up the actual diagnosis of the post-traumatic stress disorder?" BR Burgett 22. Nurse Burgett checked her notes and answered that her "impression of him was that it was over the last two years that there was more intensity of symptoms and then it was a cumulation of events." BR Burgett 22. Dr. Koch's opinion was the same as Nurse Burgett's: the PTSD was caused by the cumulative effects of Kimzey's employment rather than by any, one, specific event. BR Koch 18.

Given that both medical witnesses agreed that Kimzey's mental health condition was caused by stress over the course of his 25-year career, rather than due to one specific incident, his claim is precluded by

RCW 51.08.142 and WAC 296-14-300. Since his condition was not caused by a single traumatic event, the only other avenue for coverage is by showing it is an occupational disease. But as a condition caused by stress, Kimzey's condition cannot be an occupational disease. RCW 51.08.142, WAC 296-14-300.

Without finding any ambiguity or exception in either the applicable statute or the related rule, the superior court allowed Kimzey's PTSD as an occupational disease. CP 238; RP 5, 7. This was an error of law. PTSD is perhaps the quintessential mental health condition caused by stress: it is by its very name a stress disorder. As a mental health condition caused by stress, PTSD cannot be allowed as a compensable occupational disease. RCW 51.08.142; WAC 296-14-300(1).

Nor is there any room for liberal construction of the Industrial Insurance Act to allow Kimzey's claim. *See* RCW 51.12.010 (Industrial Insurance Act to be liberally construed). Courts do not construe statutes that are unambiguous, and no ambiguity has ever been alleged in this case. *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009) ("when the intent of the legislature is clear from a reading of a statute, there is no room for construction."); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012) (court does not under

the guise of liberal construction substitute its view for that of the Legislature), *review denied,* 176 Wn.2d 1024 (2013).

2. *Rothwell* and Other Decisions Compel Denial of Kimzey's Claim

Consistent with the plain language of the statutes, the courts have held that if PTSD is caused by a series of events rather than by a single incident, it is not compensable under the Act. *Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn. App. 771, 779-80, 206 P.3d 347 (2009). This is true even if the series of stressful events that caused the mental health condition to develop occurred over a short period of time, such as a few days, and even when those events can be related back to one incident. *Id.*

In *Rothwell*, a school janitor was ordered to clean up the scene of a student's suicide, including the area where a backpack bomb was detonated that she had previously handled, to search classrooms for bombs, and to remove daily memorials left for the student, whom she knew personally. *Id.* at 774-776. She sued the school, alleging physical and emotional distress caused by these events. The superior court dismissed her tort claim on a CR 12(b)(6) motion, concluding that the worker's exclusive remedy lay with the Industrial Insurance Act. *Id.*

On review, the Court of Appeals held that the superior court erred when it dismissed the worker's claim because the facts alleged showed her

condition was caused by a series of stressful events over time rather than by a single incident at work, and therefore it would not be barred by the exclusive remedy provision of the Act. *Id.* at 780-81. The Court reasoned that mental conditions that result from a sudden, tangible, and traumatic event that produces an immediate result can be compensable as an injury under RCW 51.08.100, while mental conditions caused by a series of traumatic events over time are specifically excluded by RCW 51.08.142. *Id.* at 779-80. It determined Rothwell's PTSD did not result from one traumatic event but instead resulted from a series of events. *Id.* at 782. The Court reversed the dismissal of Rothwell's tort claim and remanded the case to the superior court for further proceedings.[3]

Rothwell supports the rejection of Kimzey's claim. Under *Rothwell*, a mental health claim based on a single traumatic event is allowable under the Industrial Insurance Act, while a mental health claim based on a series of stressful events at work is not. The record establishes

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[3] On remand, the employer conducted a discovery deposition of Rothwell's treating psychiatrist, who testified that Rothwell's condition was proximately caused by a single incident at work, not by a series of stressful events. *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 295 P.3d 328 (2013). The employer moved for summary judgment and the superior court granted its motion. The Court of Appeals affirmed, noting the difference between review of a dismissal under CR 12(b)(6) and one under CR 56(c), and determined that the evidence before the trial court established Rothwell's PTSD resulted from a single traumatic event, and was therefore covered by the Industrial Insurance Act. *Id.* at 822. This, in turn, meant that she was barred from pursuing a tort claim. The two *Rothwell* decisions both follow the same legal rule: a mental health claim based on a series of stressful events is precluded from coverage under the Act, while a mental health claim based on a single traumatic event is covered by the Act.

that Kimzey's PTSD was caused by a series of events, not by a single injury. This is not only the opinion of his medical experts, as already discussed, but also Kimzey's own belief. BR Exs. 1, 2. Furthermore, the superior court's own findings also establish that Kimzey's PTSD was caused by an accumulation of events over the course of his work rather than by any single event. CP 238 (finding PTSD was proximately caused by the cumulative effects of traumatic incidents during career). Having made that finding, the superior court should have rejected Kimzey's claim, and it erred when it did otherwise. *See Rothwell*, 149 Wn. App. at 782.

Other courts have reached similar results. In *Boeing Co. v. Key*, a worker sought coverage for PTSD as an injury claim based on a perceived death threat made by a coworker. *Boeing Co. v. Key*, 101 Wn. App. 629, 631, 5 P.3d 16 (2000). A jury affirmed the rejection of her claim as an injury. *Id.* at 630. The evidence there included testimony that tension had been building between the worker and her colleagues for some time prior to the alleged death threat. *Id.* at 634. The employer's challenged jury instruction explained that benefits for a mental disability may only be allowed if the mental disability is "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," but no benefits could be provided for a mental disability "caused by stress resulting from

relationships with supervisors, co-workers, or the public." *Id.* at 632. The court reiterated the distinction between stress claims that constitute an industrial injury, which may be allowed, and claims that result from events that unfold over time, which may not be allowed, and held the instruction was a proper statement of the law. *Id.* at 633; *see also Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 321, 988 P.2d 1023 (1999) (denying employer immunity under the Industrial Insurance Act because worker's PTSD arose over time so it was not compensable as either an injury or an occupational disease). Applying *Rothwell*, *Key*, and *Snyder*, this Court should reverse the trial court's decision because the trial court wrongly decided that a condition caused by series of stressful events was an occupational disease subject to coverage under the Act.

3. No Evidence Supports Coverage of Kimzey's Claim as an Industrial Injury

No specific event was identified as the cause of Kimzey's PTSD to support an injury claim. The superior court found, consistent with the undisputed evidence, that Kimzey's condition was caused by workplace exposure over the course of his over 25-year long career, and did not identify any one incident that constituted an industrial injury. CP 238. An 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. The cause of the injury must be something "of some notoriety, fixed as to time and susceptible of investigation." *Lehtinen v. Weyerhaeuser* Co., 63 Wn.2d 456, 458, 387 P.2d 760 (1964). As in any appeal seeking medical benefits under the Act, Kimzey has the burden of establishing a causal relationship between the injury claimed and the benefits sought through medical testimony. *Garrett Freightlines, Inc.*, 45 Wn. App. at 342.

Neither medical witness provided the evidence necessary to show Kimzey suffers from an industrial injury. While Nurse Burgett could relay a few details of specific events, she did not believe there was one identifiable event that caused Kimzey's PTSD. BR Burgett 12, 13, 22, 29. Throughout her testimony she repeated her opinion that Kimzey's PTSD was caused by the cumulative effects of his employment, not by one event. BR Burgett 11, 13, 14, 22, 29, 32, 33. Dr. Koch similarly testified to his belief that Kimzey's condition was caused by the cumulative effects of his work. BR Koch 18. As medical testimony establishing causality is required to show entitlement to benefits, and such testimony was not provided, Kimzey has not shown that he has a compensable injury as defined by the Industrial Insurance Act.

Moreover, it is not possible to infer an injury occurred in this case. If the evidence is sufficient to support them, reasonable inferences may be made from the medical and lay testimony to support causation. *Garrett Freightlines, Inc.*, 45 Wn. App. at 343. But such is not the case here. Throughout his testimony, Kimzey consistently pointed to his fear regarding all of the children on Vashon Island, and even one child in particular. But he did not identify a particular troubling event with any of these children. BR Kimzey 107, 129. His coworkers suggested Kimzey may be suffering anxiety from a failed intubation. BR Warren 26, 31 (Sam Warren speculating about Kimzey's fear of managing airways); BR Brownell 68, 73 (Mark Brownell discussing an intubation and Kimzey's decision not to intubate victim of house fire). But none of this evidence can support an injury claim. Both medical witnesses denied that Kimzey's condition could be attributable to one event; it is therefore impossible to combine the medical and lay testimony together to reasonably infer that this incident is the cause of Kimzey's PTSD.

Further, even if one could reasonably infer that the failed intubation identified by Kimzey's coworkers was in fact the cause or triggering event of Kimzey's condition, his claim would be barred by the statute of limitations. Under the Act, claims for injuries must be filed within one year after the injury occurred. RCW 51.28.050. Kimzey filed

his claim on July 5, 2012. BR Ex 1. Brownell discussed the intubation event as occurring before Kimzey entered alcohol treatment. BR Brownell 69-70, 91. Kimzey testified that his sobriety date is June 26, 2010, so this problematic intubation occurred at some point prior to June 26, 2010. BR Kimzey 121. The claim, therefore, was not timely filed if this was the precipitating event of his condition. *See Elliott*, 151 Wn.App. 450 (summary judgment properly granted when claimant did not file claim within year of traumatic event that caused his mental conditions).

The court's discussion in *Rothwell* is also instructive in showing that Kimzey's condition is not an "injury" compensable under the Act. In *Rothwell*, the court reasoned that even if the worker's condition was caused by workplace exposure over a very short timeframe, such as just a few days, even this short time frame would preclude coverage of PTSD under the Industrial Insurance Act, because a mental health claim is only allowable if it is caused by a single event. *Rothwell,* 149 Wn. App. at 782. If PTSD is not coverable when it is caused by a series of events over the course of a few days, all of which stemmed from the suicide of a student who was known to the injured worker, then Kimzey's 25-year long career as a paramedic similarly cannot be described as an injury. Thus, there is neither evidence nor legal authority that would support finding Kimzey instead suffered a compensable industrial injury under the Act.

4. The Fact That Kimzey's Condition is a Mental Health Condition That Was Proximately Caused by Ongoing Stress Over Time, And Not By One Event, Is Dispositive, And It Is Irrelevant That Kimzey's Stressful Working Conditions Were Traumatic

It is irrelevant that the stress events that caused Kimzey's PTSD were traumatic because RCW 51.08.142 and WAC 296-14-300 bar any stress-related mental health condition caused by a series of events. Kimzey argued below that his condition was caused by "trauma" and seeks to distinguish his condition from those caused by "stress" and specifically excluded from coverage by RCW 51.08.142 and WAC 296-14-300. CP 98 (arguing conditions caused by "trauma. . . not merely stressful work as paramedic"). While it did not expressly adopt this theory, the superior court's findings and conclusions suggest that the court agreed that there is an exception to the statutory bar for occupational stress claims when the occupational stress is traumatic. *See* CP 238 (finding PTSD is a disease caused by trauma and concluding coverage exists). To the extent that the superior court adopted that rationale, it erred, as RCW 51.08.142 and WAC 296-14-300 bar acceptance of any occupational disease based on exposure to stress over time, regardless of whether the occupational stress was traumatic or not.

RCW 51.08.142 unambiguously directs the Department to adopt a rule that excludes any claim of an occupational disease from coverage

under the Industrial Insurance Act when it is "based on mental conditions or mental disabilities caused by stress." Through WAC 296-14-300, the Department adopted a rule that itself unambiguously precludes any such claim from coverage under the Act. Neither RCW 51.08.142 nor WAC 296-14-300 suggests that the exclusion of coverage of stress claims is partial, and they do not suggest that any distinction can be made based on whether the occupational stress that caused the mental condition or disability was traumatic. Under the plain language of that statute and that rule, if a mental condition was caused by job stress, it cannot be accepted as an occupational disease. Kimzey has a mental condition (PTSD) that was indisputably caused by job stress that he experienced over the course of his 25-year career as a paramedic. As such, his claim cannot be allowed.

Here, as noted, RCW 51.08.142 and WAC 296-14-300 unambiguously exclude coverage of any mental health condition as an occupational disease if the mental condition was caused by stress. Conversely, no statute or rule precludes coverage of a mental health condition that was caused by an industrial injury. Thus, when determining whether a claim based on a mental health condition is covered by the Industrial Insurance Act or not, the dispositive issue is not whether the worker experienced some form of trauma, but whether the worker's

mental condition was caused by one identifiable event or whether it was caused by ongoing exposure over time.

The fact that the word "traumatic" appears in the statutory definition of "injury" does not change the legal analysis here, because, as noted, it is undisputed that Kimzey's claim would be properly characterized as an occupational disease, that is, a condition caused by exposure over time, rather than an industrial injury. RCW 51.08.100 defines an "injury" as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and such physical conditions as result therefrom." Conversely, RCW 51.08.140 defines an occupational disease as "such disease or infection as arises naturally and proximately out of employment" that is covered under the Act. While Kimzey's exposure to stress at work was traumatic for him, his PTSD arose proximately out of his employment, and an accumulation of stress over the course of a 25-year career cannot be reasonably characterized as "a *sudden* and tangible happening" that produced "an *immediate* or *prompt* result." *See* RCW 51.08.100 (emphasis added). By any reasonable interpretation of the relevant statutory language, Kimzey's PTSD did not result from an injury, but arose naturally and proximately out of his employment, consistent with the definition of occupational disease. Since

RCW 51.08.142 precludes coverage of any occupational disease claim based on stress, whether it is traumatic or not, his claim cannot be allowed.

Indeed, the superior court expressly found that Kimzey's claim should be accepted as an occupational disease, not an industrial injury. CP 238 (concluding "PTSD arose naturally and proximately out of distinctive conditions of his employment"). Therefore, there was no legal basis for the court's decision to accept Kimzey's PTSD, because such occupational disease claims are precluded by statute and rule.

It should also be noted that in the context of determining whether a worker suffered an industrial injury, the requirement that the injury be "traumatic" is in essence simply a requirement that a workplace incident produces harm to the worker. It is not necessary for a worker to establish that a workplace injury was traumatic, in the sense of it being life-threatening or catastrophic, in order for it to be allowable as an injury. *See, e.g., Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 585, 588-89, 628 P.2d 456 (1981) (holding that worker who suffered a back strain as a result of a routine physical movement suffered an injury covered by the Act, because the action was performed in the course of employment and proximately caused his back strain). Rather, a workplace incident is traumatic if it is a proximate cause of harm to the worker. *See id.*

While the statutory definition of an occupational disease does not use the word traumatic, a worker must suffer *harm* as a result of the worker's distinctive conditions of employment in order for the worker to have a compensable occupational disease claim. *See, e.g., Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 311-15, 289 P.3d 727 (2012) (holding that worker who was exposed to various chemicals over the course of her employment had not established an occupational disease, because the worker did not prove that that exposure proximately caused her to develop the disease she complained of), *review denied*, 177 Wn.2d 1017 (2013).

Thus, as a practical matter, the law does not distinguish between industrial injury claims and occupational disease claims based on the degree of trauma that must be established in order for either type of claim to be compensable. Rather, so long as a workplace injury or injurious occupational exposure produces harm to a worker, the worker has a compensable claim, unless a statute or other legal authority precludes coverage of it. Here, Kimzey would otherwise have a compensable claim except that a statute, RCW 51.08.142, precludes coverage of it.

B. The Superior Court's Award of Attorney Fees to Kimzey Should Be Vacated

Kimzey should not prevail in this appeal, and, therefore, this Court should vacate the superior court's award of attorney fees to him. However, even if this Court concludes that Kimzey should prevail on appeal, this Court should nonetheless vacate the fee award and remand so the superior court can make findings that establish the appropriate calculation of a fee award. Furthermore, the superior court appears to have awarded Kimzey attorney fees based on the work that his attorneys performed before the Board, which is contrary to the plain language of RCW 51.52.130, as that statute only allows fees based on work that was performed before a court. Therefore, regardless of how this Court rules regarding the merits of this case, the award of attorney fees must be vacated.

1. The Superior Court's Attorney Fee Award Must Be Vacated Because the Superior Court Failed To Make Any Findings That Explain the Basis for the Calculation of the Award

Even assuming that this Court concludes that Kimzey should prevail on appeal, the superior court's attorney fee award is legally incorrect and must be set aside for further consideration and entry of appropriate findings and conclusions. Where attorney fees are appropriate under RCW 51.52.130, the worker shall receive a reasonable attorney fee

award based on the work that is performed before a court. *Borenstein v. Dep't of Labor & Indus.*, 49 Wn.2d 674, 676, 306 P.2d 228 (1957). A reasonable fee award is set using the "lodestar" method, where a court determines the number of hours that were reasonably spent in litigation and sets a reasonable hourly rate for that work. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 666, 989 P.2d 1111 (1999).

An appellate court will remand a superior court's fee award if the superior court fails to make any findings of fact or conclusions of law that allow the appellate court to review the reasonableness of the award. *Brand*, 139 Wn.2d at 674; *see also Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715-16, 9 P.3d 898 (2000) (vacating award and remanding for findings and conclusions). Here, the superior court did not make any factual findings or legal conclusions regarding its decision to award fees to Kimzey, and, therefore, it is not possible for this Court to conduct a meaningful review of that fee award. *See* CP Supp.; *Brand*, 139 Wn.2d at 674; *Coy*, 102 Wn. App. at 715.

Rather than issuing a formal order with findings and conclusions, the superior court awarded Kimzey attorney fees by a letter sent to counsel. CP Supp. In that letter, the court awarded fees to two of Kimzey's attorneys. It awarded Meyers, the attorney who represented Kimzey at the Board, 66 hours (out of the 83.4 that he claimed) and set an

hourly rate for him of $400.[4] CP Supp. It also awarded Friedman, the attorney who took the lead in representing Kimzey at superior court, 34 hours (out of the 34.4 that he claimed) and set an hourly rate for him of $300. CP Supp. Critically, the letter provides no explanation whatsoever as to how the court determined that those hourly rates and those numbers of hours were reasonable under the circumstances of this case. *See* CP Supp. For that reason alone, the superior court's fee award must be vacated and remanded for appropriate findings and conclusions that explain the basis for the fee award. *Coy*, 102 Wn. App. at 715-16.

2. The Superior Court Erred When It Awarded Fees to Kimzey for Representation Before the Department or the Board

By statute, a worker who prevails in a superior court appeal may only receive a fee award for work performed before the superior court.[5] 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." While other statutes provide that a court may set the *rate* that an attorney may charge an injured worker for the work performed

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[4] According to a spreadsheet that Meyers submitted to the superior court, he spent approximately 9 hours representing Kimzey at superior court, far less than the 66 hours that the superior court awarded to Meyers. CP 143-49.

[5] A worker may also receive an award of attorney fees based on work performed before an appellate court. RCW 51.52.130. However, Kimzey should not prevail before this Court and should not receive an award based on his attorney's work before this Court.

before the Board or the Department, a court may only *award* fees to a worker based on work that was performed before a court. *See* RCW 51.52.120 (director may set reasonable fee for services performed before Department, Board may set fee for work before Board and review amount set by director); RCW 51.52.130 (court may review fees fixed by director or Board if inadequate); *Borenstein*, 49 Wn.2d at 676 (noting Legislature made no provision for recovery of attorney fees *payable* by the Department for services rendered before the Board).

Furthermore, case law confirms that fees are not available for work performed before the Board. The sole issue in *Piper* was just that: whether fees could be awarded for services before the Board. . The statute, RCW 51.52.130, allows for an attorney fee, "fixed by the court, for services before the court only." The *Piper* Court reiterated that there is no provision for an award of attorney fees based on services performed before the Board. *Id.* (quoting *Borenstein*, 49 Wn.2d at 676). As the *Piper* Court concluded, "It is error for a superior court to award such fees." *Id.* The remedy for such an error is to reverse and remand for a recalculation of the award in order to exclude the work performed before the Board from that calculation. *Id.* at 892.

In this case, 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 Supp. Although Meyers devoted a significant number of hours to representing Kimzey before the Board and the Department, Kimzey cannot receive an award of fees for such work as a matter of law. RCW 51.52.130; *Piper*, 120 Wn. App. 886; CP 143-49 (spreadsheet of fees). If fees for work before the Board was in error in *Piper*, then surely fees for work before the Department is also in error. *See Piper*, 120 Wn. App. at 889; *see also Brand*, 139 Wn.2d at 675 n.1 (concurring opinion noting successful claimant cannot recover fees before the Department or Board). As discussed above, this Court should hold that Kimzey's condition is not an occupational disease and therefore reverse the superior court and its fee award. But, if the superior court is affirmed on the merits, the Court should remand the case to enter findings and conclusions that reduce the award by any hours not spent before the superior court.

VII. CONCLUSION

Claims under the Industrial Insurance Act may be allowed as either an injury, resulting from a sudden, tangible event, or else as an occupational disease, resulting from workplace exposure over time. But

the Legislature specifically excluded from the definition of occupational disease any mental health condition caused by stress. The undisputed evidence here shows Kimzey's condition was caused by workplace exposure to stress over time. The superior court therefore erred when it determined that Kimzey's PTSD, a condition caused by the cumulative stress he experienced over the course of his career as a paramedic, was an occupational disease subject to coverage under the Act. No precipitating incident was identified to support a claim for injury. Because no evidence supports finding Kimzey instead suffered an injury, there is no alternative basis to affirm the superior court's ruling. It must be reversed as a matter of law.

RESPECTFULLY SUBMITTED this 19th day of December, 2014.

ROBERT W. FERGUSON
Attorney General

KAYLYNN WHAT
Assistant Attorney General
WSBA No. 43442
Office Id. No. 91022
P.O. Box 40121
7141 Cleanwater Dr. SW
Olympia, WA 98504-0121
(360) 586-7719

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 Brief of Appellant and this Declaration of Mailing to the parties on record by placing it with ABC-Legal Messengers, Inc. addressed as follows:

Ron Meyers
Ron Meyers & Associates, PLLC
8765 Tallon Lane NE, Suite A
Lacey, WA 98516

DATED this 19th day of December, 2014.

KAREN STRATFORD
Legal Assistant 2