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Supreme Court No.

Court of Appeals No. 72323-5-I

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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CHARLES L. KIMZEY

Petitioner,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE  
STATE OF WASHINGTON  
Respondent.

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PETITIONER CHARLES L. KIMZEY'S PETITION FOR REVIEW

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## **I. IDENTITY OF PETITIONER**

The Petitioner is Charles L. Kimzey, claimant, through his counsel Ron Meyers, Matthew Johnson and Tim Friedman of Ron Meyers & Associates PLLC.

## **II. COURT OF APPEALS' DECISION**

The Petitioner Charles L. Kimzey seeks review of the Court of Appeals, Division I's decision in *Kimzey v. Dept. of Labor and Industries*, No. 72323 5 I, 2015 WL 7723006 (2015).

## **III. ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err in determining that Kimzey's PTSD was caused by "intense psychological stress"?
2. Did the Court of Appeals err when it did not consider multiple proximate causes of Kimzey's PTSD, including trauma?
3. Did the Court of Appeal err when it determined that the administrative record did not support Kimzey's argument that his PTSD was caused by trauma?

## **IV. STATEMENT OF THE CASE**

In the course of and as part of Mr. Kimzey's employment as a paramedic with Vashon Island Fire and Rescue, he was exposed to dead children, nursing home fatalities, child anaphylaxis, advanced life support calls, the very sick, and cardiac patients -- including calls that necessitated airlifting patients. CP 104:12-24; 121:22-23; 107:23-25; 109:14-26; 110:1-4;

110: 8-12; CABR Testimony Burgett 12-13; 23:3-10; 23:18-24. For Mr. Kimzey, the **trauma** of **each** of them, and of all of them, was too much for him to bear. He developed occupationally related PTSD.

Mr. Kimzey filed a timely claim with the Department of Labor and Industries seeking benefits for industrial injury and occupational disease. CABR Ex. 1 Report of Industrial Injury or Occupational Disease. The Department denied his claim on August 3, 2012. CABR Proposed Decision and Order 15-24

Mr. Kimzey appealed to the Board of Industrial Insurance Appeals. CABR Notice of Appeal of Dep't of Labor and Industries Decision dated on or about 8/3/2012. The Department does not challenge that paramedic Kimzey's PTSD was caused by his employment. CP 32:21-22; AB (appellant brief) 10 - See also CP 50:17-18 ("He developed post-traumatic stress disorder and depression due to his work as a paramedic. . . .") and CP 50:22-23 ("The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . . .") and CP 50:18-19 ("Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment . . .") The Department did not present any testimony in its case-in-chief to rebut mental health expert Rachell Burgett, who testified in Mr.



Kimzey's case-in-chief. Mental Health expert Burgett's testimony clearly established that Mr. Kimzey's PTSD was **caused by the cumulative effects of workplace trauma**. CABR Depositions Burgett 11:18-22; 12:2; 12:4-9; 12:10-18; 12:25-13:2; 23:6-8; 23:11-17. The testimony from the only mental health expert in this case, Rachell Burgett, clearly established that Mr. Kimzey's PTSD was caused by workplace **trauma**. CABR Depositions Burgett at 11:18-22; 12:4- 18; 23:6-8; 23:11-17; 12:25-13:2; 26:8-14. The record supported objective physical reactions by Mr. Kimzey from his workplace **trauma**. See for example CABR Transcripts Kimzey 116, 123; CABR Depositions Burgett 12: 15-18; 15: 8-16.

The hearing judge affirmed the Department's denial of Mr. Kimzey's claim. Mr. Kimzey appealed to the King County Superior Court. After a bench trial based upon the record before the Board, where there was not a single witness or expert by the Department to rebut Mr. Kimzey's witness testimony, the trial court found that Mr. Kimzey's disease was caused by the cumulative effects of **workplace trauma**. CP 238. Accordingly, the trial court concluded that Mr. Kimzey's condition of PTSD is an occupational disease. *Id.* The Department appealed to the Court of Appeals who issued an opinion on November 30, 2015, reversing the trial court and affirming the order and decision of the Board.

## V. ARGUMENT

**The construction and administration of the Industrial Insurance Act is of significant public importance, likely to recur, and an authoritative determination by the Supreme Court giving guidance is desirable.**

The Washington Supreme Court should grant review because of the substantial public interest involved in the construction and administration of the Industrial Insurance Act (“Act”).

“In deciding whether case presents issues of continuing and substantial public interest,[t]hree factors in particular are determinative: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur”. A fourth factor may also play a role: the “level of genuine adverseness and the quality of advocacy of the issues”. Lastly, the court may consider “the likelihood that the issue will escape review because the facts of the controversy are short-lived”” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wash. 2d 781, 796, 225 P.3d 213,(2009).. Citing *In re Marriage of Horner*, 151 Wash.2d 884, 892, 93 P.3d 124 (2004)(citations omitted) (quoting *Westerman*, 125 Wash.2d at 286–87, 892 P.2d 1067).

Each and every injured Washington worker, including Mr. Kimzey, are entitled to the strong public policy favoring injured workers set forth in case law and the Act, which requires liberal construction. This policy must be applied at all levels in the injured worker’s fight for benefits. It must be adhered to by all government entitles, including the Department, the Attorney General, the Board and the lower Courts.

The legislature mandated that the Act, that is, Title 51,

“shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010.

The above policy was echoed by the Washington Supreme Court,

“It has been repeatedly stated by this court that the Workmen's Compensation Act is highly remedial in character and, as such, is to be liberally construed with a view to the accomplishment of its beneficent purposes.” *Hastings v. Dep't of Labor & Indus.*, 24 Wash. 2d 1, 12, 163 P.2d 142 (1945). Citing *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.2d 865; *Campbell v. Department of Labor and Industries*, 2 Wash.2d 173, 97 P.2d 642; *Nelson v. Department of Labor and Industries*, 9 Wash.2d 621, 115 P.2d 1014; *Berry v. Department of Labor and Industries*, 11 Wash.2d 154, 118 P.2d 785, 140 A.L.R. 392.

This Court has furthered this strong public policy favoring injured workers by holding that when construing the Act, all doubts be resolved in favor of the injured worker.

“To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and **is to be liberally construed** in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.” *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 470, 745 P.2d 1295 (1987). [emphasis added].

The administration and construction of the Act by the Department, Board and lower courts affects thousands of Washington's injured workers

annually. The construction and administration of the Act is of a public nature. Injured workers must be ensured that the adjudicators of their claims construe and administer the Act, the evidence and court rules in a way that upholds the purpose, goals and overriding public policy of: promoting just determinations of actions; eliminating unjustified expense and delay; ensuring that the economic loss and suffering of injured workers is kept to a minimum; and ensuring that all doubts in construing the Act are determined in the injured worker's favor.

“The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, see, e.g., *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 54, 615 P.2d 440 (1980); the validity and interpretation of statutes and regulations, see, e.g., *In re Wilson*, 94 Wash.2d 885, 887, 621 P.2d 151 (1980); . . .” *Hart v. Dep't of Soc. & Health Servs.*, 111 Wash. 2d 445, 449, 759 P.2d 1206, 1208 (1988).

In *In re Marriage of Horner*, the issue concerned the interpretation of a statute. The Washington State Supreme Court stated,

“This issue is of a public nature because it concerns the interpretation of RCW 26.09.520 and because the Court of Appeals opinion was not limited to the Horner facts, but contained an interpretation of the statute.” *In re Marriage of Horner*, 151 Wash. 2d 884, 892, 93 P.3d 124, 129 (2004).

The present case involves the construction of the Act (Title 51), which governs the processing of all injured workers in the State. The policy of the Act demands that the Board and the Courts construe the Act liberally.

The legislature chose “liberally.” Its meaning should not get lost or glossed-over by the Board and lower courts at the expense of a fair and just hearing for the injured worker.

The Washington Supreme Court in *Dennis v. Dept. of Labor and Industries* discussed the genesis of Act,

*“In Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590–91, 158 P. 256 (1916), this court explained the genesis of this state's workers' compensation scheme: The Industrial Insurance Act (Act), RCW Title 51, was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it. Industrial injuries were viewed as a cost of production.

RCW 51.04.010 embodies these principles, and declares, among other things, that **“sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy.”** To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that **the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”** *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 469-70, 745 P.2d 1295 (1987).[emphasis added].

In the present case, the testimony of Mr. Kimzey's medical experts pertained to the cause of his PTSD from the industrial injury as the

cumulative effects of trauma. The Department's counsel admitted that Mr. Kimzey's PTSD was caused by his employment. That testimony conformed to the standards of any perpetuation deposition or trial testimony.

A liberal construction of the Act with all doubts in favor of the injured worker is the guiding principal in construction of the Act. Washington's injured workers are powerless against the Department, Attorney General's office, Board of Industrial Insurance Appeals, and even the court system, if those entities misconstrue or fail to uphold the public policy in favor of injured workers borne out of the Act and case law.

Guidance to those entities against whom an injured worker is pitted must be given on how to construe the Act when processing and adjudicating a worker's compensation claim caused by trauma. This issue has bearing on all workers, especially first responders, whose occupational disease was caused by the cumulative effects of trauma.

- A. Trauma was the cause of career paramedic Kimzey's Post-Traumatic Stress Disorder. The Court of Appeal's attempt to label the cause as stress, at the exclusion of trauma, is not supported by the record, nor by the law that there can be more than one proximate cause of a disease.**

The Court of Appeals' in its decision states that "[t]he undisputed testimony establishes that Kimzey's PTSD was caused by 'intense psychological stress' **and** traumatic incidents over the course of a 25-year

career as a paramedic.” *Kimzey v. Dept of Labor and Industries*, Court of Appeals, Division I, No. 72323-5.

Claims based on mental conditions or mental disabilities caused by the accumulation of workplace **trauma** are not excluded from the definition of “occupational disease” by WAC 296-14-300, as it was written when Mr. Kimzey filed his claim for benefits. WAC 296-14-300(1) also only applies to mental conditions or disabilities “caused by stress” – not trauma. WAC 296-14-300(2) refers to stress, Mr. Kimzey had PTSD resulting from the *cumulative effects of trauma*. CABR Depositions Burgett 11:18-22; 12:2; 12:4-9; 12:10-18; 12:25-13:2; 23:6-8; 23:11-17.

Further, even if stress was a cause of a claim based on mental conditions or mental disabilities, the mental condition or disability is not excluded from the definition of “occupational disease” if **trauma** was also a cause.

**There may be one or more proximate causes of a condition.** For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. **The law does not require that the work conditions be the sole proximate cause of such condition.** *WPI 155.06.01 - Proximate Cause - Rejected Claim.* [emphasis added]

Even if the disease was caused by the combined effects of trauma and stress it is error not to give an instruction on multiple proximate causes when there

is evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions. *Wendt v. Department of Labor and Industries*, 18 Wn. App. 674, 571 P.2d 229 (1977).

Further, whether or not paramedic Kimzey's PTSD was caused by a single workplace trauma or an accumulation of workplace trauma, both fit within the definition of occupational *disease* and are not excluded by WAC 296-14-300, as it was written at the time Mr. Kimzey filed his claim.

An occupational *disease* need only arise naturally and proximately out of employment. RCW 51.08.140 Mental conditions or disabilities where **trauma** was **a** cause, are occupational diseases regardless of whether they were from a single event or an accumulation of traumatic events, so long as the disease arises naturally and proximately out of employment.

In this case, by the Department's own admission, paramedic Kimzey developed post-traumatic stress disorder and depression caused by his work as paramedic with Vashon Fire & Rescue. CP 32. (Dept's Trial Brief).

Further, the Department admitted that:

**“He developed post-traumatic stress disorder and depression due to his work as a paramedic. Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment. . . The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . .”** CP 50. [emphasis added].



The Superior Court found, correctly, that paramedic Kimzey's post-traumatic stress disorder was an occupational disease. The Court of Appeals' decision hinges on its insistence that "workplace stress" caused paramedic Kimzey's PTSD. The record before the Board shows that paramedic Kimzey's mental disease was caused by accumulation of workplace **trauma**.

This Court has furthered this strong public policy favoring injured workers by holding that when construing the Act, **all doubts be resolved in favor of the injured worker**. This liberal interpretation also applies to regulations in effect at the time the trauma occurred.

It is *the Department* that attempts to create ambiguity in the law, by claiming that a mental disease caused by accumulation of workplace trauma fits within the exclusion of WAC 296-14-300. It does not. WAC 296-14-300, as it was written at the time Mr. Kimzey filed his claim, does not exclude mental conditions or diseases caused by accumulation of workplace trauma. WAC 296-14-300(1) only refers to diseases caused by stress. Even if stress was a symptom, it would be a symptom *of the disease*, but the *disease* itself is the result of ***the cumulative effects of workplace trauma***. Regardless, when defining PTSD, expert Burgett outlined the cluster of symptoms included in PTSD, and stress was not even listed:

Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from**

**specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. And **the cluster of symptoms includes avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflex, inability to face situations similar to the trauma.**  
CABR Depositions Burgett 26:10-18.

The Department attempts to avoid the mandate to construe the Act liberally with all doubts in favor of the injured worker by arguing that the law is unambiguous. This is an unsustainable position. Any argument that the law is unambiguous would fall *in favor of Mr. Kimzey*. In this case, the evidence established that Mr. Kimzey's mental disease was caused by the cumulative effects of workplace trauma, each of which traumas was a single traumatic event.

If there is ambiguity in RCW 51.08.142 and WAC 296-14-300, the Act is to be construed liberally, and this Court has directed that any doubt is to be ruled in the injured worker's favor.

**B. Causes of occupational mental conditions or disabilities other than stress are not only relevant but dispositive in favor of the injured worker.**

The Department, under the auspices of RCW 51.08.142 and WAC 986-14-300, alleges that there is an exclusion for traumatically-caused mental diseases if those traumas are also stressful. This is a contortion of the law and inconsistent with the public policy of the Industrial Insurance Act that is

liberally construed with all doubts in favor of the injured worker.

The Department argues that “it is irrelevant that 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.” AB 24. This is wordsmithing, but not an accurate recitation of the law. The Department fails to accept what the Court found, and what the record supported – that paramedic Kimzey’s PTSD was caused by the cumulative effects of workplace **trauma**. CP 238 ; see also the mental-health expert testimony supra.

By arguing that RCW 51.08.142 and WAC 296-14-300 apply to this case, the Department advances an interpretation that not only runs contrary to the public policy for construing the Act with all doubts in favor of the injured worker, but it also runs contrary to the long-standing canon of statutory construction that:

Whenever possible, we must read statutes in harmony and give each effect.” *State v. Flowers*, 154 Wash. App. 462, 466, 225 P.3d 476 (2010).

It is well settled law that:

**There may be one or more proximate causes of a condition.** For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. The law does not require that the work conditions be the sole proximate cause of such

condition. *WPI 155.06.01 - Proximate Cause - Rejected Claim.*

RCW 51.08.142 and WAC 296-14-300 (as written when Mr. Kimzey filed his claim) do not have exclusions for a mental condition or disability **caused by the accumulation of workplace trauma**. Interpreting RCW 51.08.142 and WAC 296-14-300 to exclude mental conditions caused by the accumulation of workplace trauma simply because stress may also exist in a traumatic event is inconsistent – rather than harmonious – with the law upon which WPI 155.06.01 is based.

Courts cannot add words or clauses to unambiguous statutes when the legislature has chosen not to include that language. *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318 (2003). Moreover, the Washington Supreme Court avoids readings that produce absurd results. “. . . in construing a statute, ‘a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.’” *Id.*

“When deciding an appeal from a decision of the Board of Industrial Insurance Appeals, the superior court conducts a *de novo* review of the board's decision but **relies exclusively on the certified board record**”. *Cantu v. Dep't of Labor & Indus.*, 168 Wash. App. 14, 20, 277 P.3d 685, 689 (2012). [emphasis added]. What the Court of Appeals must acknowledge, but did not, is the substantial traumas in the record, at the Board hearing and

before the Superior Court. The Superior Court heard the un-rebutted testimony in paramedic Kimzey's case-in-chief, which unequivocally established the cause of his PTSD as the cumulative effects of workplace **trauma.**

The Department does not challenge that paramedic Kimzey's condition was occupational (arises naturally and proximately out of employment). CP 32:21-22; AB 10 - See also CP 50:17-18 "He developed post-traumatic stress disorder and depression due to his work as a paramedic. . . ." and CP 50:22-23 "The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . ." and CP 50:18-19 "Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment . . ."

**C. The Record in This Case Establishes the Cause of Mr. Kimzey's workplace PTSD as Trauma.**

The hearing in the superior court shall be *de novo*. *Gorre v. City of Tacoma*, 180 Wash. App. 729, 754, 324 P.3d 716 (2014), as amended on reconsideration in part (July 8, 2014), as amended (July 15, 2014), reversed on other grounds. Having heard Mr. Kimzey's evidence, and with no evidence presented by the Department, the Court was correct in finding Mr. Kimzey's PTSD to be an occupational disease because the record showed that

Mr. Kimzey's workplace PTSD was caused by the cumulative effects of workplace trauma.

The Superior Court correctly found that paramedic Kimzey's PTSD was an occupational *disease* – *as it was* caused by the cumulative effects of workplace *trauma*. (opposed to an occupational injury or a disease caused by stress). This ruling was consistent with the record. Superior Court Judge Mertel stated:

. . . it's a conclusion of this Court based on this record and the medical testimony, that - now I'm looking at nurse Burgett's testimony specifically, that this condition, the occupational disease we've defined as PTSD, arose, was caused by, **proximately caused by the cumulative affects of trauma** in his very unique work environment . . . VRP 5-6.

. . . the court would have to find – does find that Mr. Kimzey, over his career in dealing with **traumatic events**, life and death situations that were stressful to him, at some point in the process became symptomatic of a disease, which the Court would find, would hold, **to be in the nature of a trauma**. VRP 6.

Paramedic Kimzey's work experiences were not the "workplace stress" contemplated by the examples given by the legislature in WAC 296-14-300 (i.e. change of employment duties, conflict with a supervisor, ... personnel decisions etc. . .) Rather, paramedic Kimzey was repeatedly exposed to life-and-death emergency situations of a **traumatic nature**.

RCW 51.08.142 and WAC 296-14-300 (as written at the time of

claim filing) do not exclude mental conditions or disabilities caused by accumulation of workplace trauma— and in this case paramedic Kimzey’s disease was caused by the accumulation of workplace trauma.

The record showed the objective and highly compelling affects to paramedic Kimzey from his traumatic workplace conditions.

The Department did not present any testimony in its case-in-chief to rebut mental health expert Burgett’s testimony that paramedic Kimzey’s PTSD was caused by caused by trauma. Expert Burgett testified that for paramedic Kimzey, the most troubling events involved children. CABR Depositions Burgett 12:2. She then testified:

Q: And is it unusual for firefighter paramedics to have issues dealing with sick or dying children?

A: It is not unusual. In fact, there has been a body of research that shows that EMTs and paramedics and firefighters dealing with children is one of the more significant **traumatic** events in their career. CABR Depositions Burgett 12:4-9. [emphasis added]

She further testified: “He had some significant gastrointestinal complaints, such as nausea, vomiting, diarrhea, generally precipitating thoughts of going to work or reminders of **traumatic** events that he had experienced.” CABR Depositions Burgett 12:10-18. Referring to paramedic Kimzey, expert Burgett testified:

The majority of events which involved any kind of **trauma** or death, dismemberment, would have been a factor in the

buildup of his symptoms. . . CABR Depositions Burgett 23:6-8. [emphasis added]

He has had multiple incidents of **trauma** at work involving death and dismemberment and other emotionally charged events. CABR Depositions Burgett 12:25-13:2. [emphasis added]

Even when describing the disorder itself, mental health expert Burgett cited trauma as the cause:

Q: Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. . . . CABR Depositions Burgett 26:8-14. [emphasis added]

It was undisputed by the Department that Kimzey's PTSD was caused by traumas experienced during his employment. AB 10; CP 32:21-22; 50:17-18; 50:22-23; 50:18-19. The Superior Court correctly found that paramedic Kimzey's PTSD was an occupational *disease* caused by *trauma*. (opposed to an occupational injury or a disease caused by stress). This was entirely consistent with the record before the Superior Court, which was the record before the Board of Industrial Insurance Appeals.

The logic is simple: If Mr. Kimzey does not experience his workplace trauma, then he does not get PTSD. It is not "stress" that caused his disease, but trauma that caused his disease. Even if stress was a symptom, it would be a symptom *of the disease*, but the disease itself is the result of workplace



trauma. Regardless, when defining PTSD, expert Burgett outlined the cluster of symptoms included in PTSD, and stress was not even listed. CABR Depositions Burgett 26:10-18, *supra*.

There is no exclusion in the Act for mental diseases caused by accumulation of workplace trauma. RCW 51.08.142 and WAC 296-14-300, as written at the time of claim filing, are clear on their face, that is, they have no exclusion for cumulative-trauma-caused mental disorders. Even if they were ambiguous, all doubts in construing the Act must be in favor of the injured worker.

**D. RCW 51.52.130. Attorney and witness fees**

(1) If, on appeal to the superior or appellate court *from the decision and order of the board*, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, . . . [emphasis added].

The longstanding public policy of the Industrial Insurance Act mandates “sure and certain relief for workers” as set forth in RCW 51.04.010 favors the injured worker. *See e.g., Flanigan v. Department of Labor and Industries*, 123 Wash.2d 418, 869 P.2d 14 (1994).

“The very purpose of allowing an attorney’s fee in industrial accident cases primarily was designed to guarantee the injured workman adequate

legal representation in presenting his claim on appeal without the *incurring of legal expense or the diminution of his award . . .*” [bold italic emphasis added] *Harbor Plywood Corp. v. Dept. of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Dept. of Labor & Indus.*, 26 Wn.2d 51, 57, 173 P.2d 164 (1946)).


## VI. CONCLUSION

Based upon the foregoing, and the record before this Court, Mr. Kimzey respectfully requests this Court accept review, reverse the Appellate Court’s decision and affirm the Superior Court’s findings, conclusions and judgment. This court should also award attorney fees and costs for all work before the Department, the Board, the Superior Court, the Court of Appeals and this Court.

DATED: December 24<sup>th</sup>, 2015.

RON MEYERS & ASSOCIATES PLLC

By:

  
\_\_\_\_\_  
Ron Meyers, WSBA No. 13169  
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# APPENDIX A

2015 WL 7723006

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,  
SEE WA R GEN GR 14.1

Court of Appeals of Washington,  
Division 1.

Charles L. KIMZEY, Respondent,

v.

DEPARTMENT OF LABOR  
AND INDUSTRIES, Appellant.

No. 72323-5-I. | Nov. 30, 2015.

Appeal from King County Superior Court; Hon. Charles W. Mertel, J.

#### Attorneys and Law Firms

Ronald Gene Meyers, Matthew G. Johnson, Tim Jeffrey Friedman, Ron Meyers & Associates PLLC, Lacey, WA, for Respondent.

Kaylynn What, Attorney General, Torts, Seattle, WA, for Appellant.

#### UNPUBLISHED OPINION

SCHINDLER, J.

\*1 The Industrial Insurance Act (IIA), Title 51 RCW, expressly excludes claims for an occupational disease “based on mental conditions or mental disabilities caused by stress.”<sup>1</sup> Here, the undisputed record established the claim for post-traumatic stress disorder was caused by the cumulative effects of working as a paramedic. We reverse the superior court and affirm the decision of the Department of Labor and Industries to deny the claim for benefits.

#### *Claim for Benefits*

After serving as a paramedic in the military, Charles L. Kimzey worked as a paramedic for Evergreen Medic One. Beginning in 2002, Kimzey worked as a paramedic for Vashon Island Fire and Rescue.

In June 2012, mental health advanced registered nurse practitioner (ARNP) Rachel Burgett diagnosed Kimzey with post-traumatic stress disorder (PTSD). Burgett prescribed a number of medications including an antidepressant. In July, Vashon Health Center family physician Dr. Gary Koch diagnosed Kimzey with PTSD and severe depression.

On July 11, 2012, Kimzey filed a claim for benefits with the Department of Labor and Industries for an “Industrial Injury or Occupational Disease.” Kimzey stated his PTSD and depression were caused by “[r]epeated exposure to some pretty horrific incidents ... over a 25 year career in the Fire Service and with Medic One.” Kimzey described the “most troublesome” incidents as involving “people I knew and cared about.” Kimzey states he suffered from “massive, debilitating panic attacks requiring ongoing mental health therapy and medications.”

The Department denied Kimzey's claim for benefits as an industrial injury or an occupational disease. The “Notice of Decision” states, in pertinent part:

This claim for benefits filed on 7/11/2012 while working for VASHON ISLAND FIRE & RESCUE is hereby rejected as an industrial injury or occupational disease for the following reasons:

Claims based on mental conditions or mental disabilities caused by stress are specifically excluded from coverage by law.

Kimzey appealed the decision to the Board of Industrial Insurance Appeals. A number of witnesses testified at the hearing before the Industrial Appeals Judge (IAJ) including Vashon Island Fire and Rescue paramedic and firefighter William Buchanan and Vashon Island Fire and Rescue Battalion Chief Mark Brownell. Kimzey also presented the deposition testimony of ARNP Rachel Burgett and Dr. Gary Koch. The Department did not call any witnesses.

Buchanan testified that Kimzey was “a good paramedic” who “thoroughly enjoyed” his job. However, by February 2012, “it was clear ... something had affected [Kimzey's] ability” to function at work. Buchanan testified that Kimzey did not “identify the triggers for that anxiety.... [T]he identification really was having to deal ... with life-threatening emergencies, kids in general.”

Battalion Chief Brownell testified that after Kimzey began experiencing symptoms of PTSD and depression, the “contrast there ... was pretty drastic.”

\*2 Kimzey testified about a number of incidents including a failed intubation, airlifting his sixth grade Sunday school teacher after a heart attack, and “see[ing] someone in the grocery store after you’ve just tried and failed to resuscitate a family member.”

Kimzey also described emergency calls involving child fatalities, the death of a mother and her children in a fiery car accident, and the death of a family in a landslide. Kimzey testified about “[h]orrible, horrible thoughts” when he responded to a call involving a child with allergies such as imagining “he was going to be dead” or that the child’s airway would close and the rescue effort would be “beyond my skill.”

Kimzey described the symptoms he suffered from as follows:

It starts out with a low-level anxiety, gastrointestinal discomfort, followed by diarrhea. And then I get projectile vomiting.

And then it really cascades, because I can’t stop. And then I have these everything is going to—everyone I care about is going to die a horrible death, and I’m going to be standing there, and there’s not a darn thing I can do about it.

....

... I could find no joy.

Everything was a catastrophe. Everything I loved and cared about was going to be ripped from me violently and bloodily, and I couldn’t stop it.

In her deposition, Burgett testified that on June 18, 2012, Kimzey “presented with symptoms consistent with” PTSD and a major depressive disorder. Burgett testified PTSD is “an anxiety disorder” that manifests in “a cluster of symptoms” such as “avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflect, [and] inability to face situations similar to the trauma.” Burgett said Kimzey was having nightmares “where he was unable to leave the station, where he felt trapped there and felt anxious when he woke up,” and “[d]reams of death and injury happening to children, not being able to help children on calls, things like that.”

Burgett described the “research that shows that [emergency medical technicians] and paramedics and firefighters dealing

with children is one of the more significant traumatic events in their career.” Burgett testified that Kimzey’s PTSD was “[c]learly from the cumulative effects of trauma in his work environment.” Burgett described the PTSD Kimzey suffered from as “a buildup of triggers, and I think ... the most troubling events involved children.” But Burgett testified that although Kimzey referred to incidents with children several times, his PTSD was “a cumulation of incidents that occurred over his work career.” According to Burgett, “[m]ore-probably-than-not” Kimzey’s PTSD and depressive disorder were “work related.”

Dr. Koch is a family physician at Vashon Health Center. Kimzey saw Dr. Koch on July 5, 2012. Kimzey told Dr. Koch that he had not been to work since February. Dr. Koch testified that Kimzey suffered from severe depression. “On the PHQ-9 [ 2 ] depression score [Kimzey] scored 22 points, which is in a severe depression range.” Dr. Koch believed Kimzey also “met the criteria” for PTSD with a bipolar component.

\*3 Dr. Koch testified that Kimzey was “severely depressed, and I didn’t think he should return to work.... I didn’t think he was fit for duty.”

In response to whether Kimzey’s PTSD was the result of a single event or cumulative events, Dr. Koch testified that in his opinion, PTSD “could be either; you can have one particular bad exposure or you can have cumulative ones.” Dr. Koch testified that Kimzey suffered from “a cumulative memory of many severe traumatic images.” Dr. Koch did not recall Kimzey “going into any individual detail about specific cases.” Dr. Koch said Kimzey exhibited “classic symptoms” of cumulative events that resulted in PTSD “caused by the stresses of his employment.” When asked about Kimzey’s ability to return to work as a paramedic in the future, Dr. Koch said that depended on whether the work would trigger “stressful stuff if he went back and were placed in a stressful situation of a paramedic role.”

The Department did not dispute Kimzey suffered from PTSD and depression. The Department argued that as a matter of law, Kimzey’s PTSD and depression did not qualify as an occupational disease or as an industrial injury caused by a sudden and traumatic event. Kimzey argued his PTSD and depression was caused by separate and distinct traumatic events and the cumulative effect of those events.

The IAJ issued a proposed decision and order. The IAJ affirmed the Department's decision to deny Kimzey's claim for benefits as an industrial injury or an occupational disease. The IAJ concluded Kimzey was not entitled to benefits for an industrial injury because the record did not support finding that he "sustained a sudden and traumatic event during the course of his employment." The IAJ concluded Kimzey was not entitled to benefits for an occupational disease for PTSD because "the law is clear that the type of stress claim raised ... is not compensable under RCW 51.08.142." The proposed decision and order states, in pertinent part:

The claimant's attorney did a yeomen's job of trying to show that Mr. Kimzey has separate distinct instances of sudden and traumatic events that culminated in his PTSD and depression. The record simply does not support that assertion because the treating experts were very clear that Mr. Kimzey's mental health conditions resulted from the accumulation of years of working as a paramedic....

... Mr. Kimzey has worked more than 25 years as a paramedic and suffers from PTSD and depression resulting from the accumulation of his stress and experiences. Nonetheless, the legislature has spoken, and conditions caused by stress are not compensable under the Industrial Insurance Act as occupational disease.

Kimzey appealed the proposed decision and order to the Board. Kimzey argued the testimony of Burgett and Dr. Koch established he was entitled to benefits for an industrial injury and an occupational disease. Kimzey argued, in pertinent part:

By its very definition, PTSD is caused by an event or events that are traumatic in nature, which results in an injury or injuries to the mind; a psychological response to intense fear, helplessness or horror. In other words, Mr. Kimzey's diagnosis of PTSD, as supported by both Gary Koch, M.D., and Rachel Burgett, RN, ARNP, requires that there be an initiating event of an extreme traumatic stressor involving direct personal experience.

\*4 ....

... [B]oth of Mr. Kimzey's experts testified that any *one* of the instances described in his testimony could have resulted in his mental condition, but his diagnosis was based on the culmination of several events, due in part by the sheer number of traumatic events Mr. Kimzey had witnessed. Any one of these events, or each of these events, resulted in an immediate mental change which soon thereafter

manifested through severe gastrointestinal and weight loss issues. [ 3 ]

The Board denied the appeal. The Board adopted the proposed decision and order as the final decision.

### *Superior Court Appeal*

Kimzey filed an appeal of the Board decision in superior court. Kimzey filed a jury demand. The Department filed a motion to strike the jury demand. The Department conceded Kimzey had PTSD and depression caused by his work as a paramedic. However, because the administrative record was undisputed, the Department argued the only question was whether as a matter of law, Kimzey was entitled to benefits for his PTSD and depression as an industrial injury or an occupational disease. The court agreed and granted the motion to strike the jury demand. The "Order Striking Jury Demand" states, in pertinent part:

Based on the Board of Industrial Insurance Appeals record, the pleadings, and Declarations, the court finds that there are no facts in dispute. The question of whether RCW 51.08.100 or RCW 51.08.140 applies to the factual situation presented here is a question of law for this Court to decide. The Department's Motion to Strike the Jury Demand should, therefore, be granted.

In his trial brief, Kimzey argued the evidence established he was entitled to benefits for PTSD and severe depression as both an occupational disease and an industrial injury.

The evidence establishes that Mr. Kimzey's mental illness, diagnosed as PTSD and severe depression, arose naturally and proximately out of his employment as a paramedic at VIFR [ (Vashon Island Fire and Rescue) ], in the sense that there are no other intervening independent and sufficient causes for the mental illness and that Mr. Kimzey would not have suffered such illness when he did but for the conditions of his employment at VIFR. The stress Mr. Kimzey experienced has been objectively corroborated by

co-workers and supervisors, all of whom highlighted the fact that the stress Mr. Kimzey experienced in the line of duty was unusual and not experienced in everyday life.

The Department asserted the undisputed evidence established Kimzey was not entitled to benefits for PTSD and depression caused by working as a paramedic. The Department argued the Industrial Insurance Act (IIA), Title 51 RCW, excludes benefits for an occupational disease or industrial injury caused by stress.

Kimzey ... is seeking allowance of his mental health condition, post-traumatic stress disorder (PTSD) and related depression. The Department does not dispute that he has these conditions, or that they were caused by his employment. Mr. Kimzey's claim was rejected because mental health conditions caused by stress are specifically and completely foreclosed by statute as occupational diseases. The other possible avenue of coverage is lacking because Mr. Kimzey does not have an industrial injury: no discrete event has been identified or causally linked to his mental health condition; rather, he and his attending providers have presented this condition as one arising out of the cumulative effects of his 25-year-long career as a paramedic. The undisputed facts show that Mr. Kimzey does not have a compensable condition under the Industrial Insurance Act.

\*5 ...

... Here, there is no medical testimony suggesting that Mr. Kimzey's PTSD or depression were caused by a specific event, let alone that this is more probable than not true. All the medical testimony proved that Mr. Kimzey is suffering from the cumulative effects of a stressful career, which unfortunately is not compensable under the Act.

The court ruled Kimzey was entitled to benefits for PTSD as an occupational disease and reversed the decision and order of the Board. The court entered findings of fact and conclusions of law and awarded Kimzey attorney fees. The findings of fact and conclusions of law state:

## I. FINDINGS OF FACT

1.1 Charles Kimzey sustained an occupational disease, to wit, PTSD.

1.2 The findings and conclusions of the Board of Industrial Insurance Appeals have been rebutted by Mr. Kimzey by a preponderance of the evidence.

1.3 Charles Kimzey's PTSD arose naturally and proximately out of distinctive conditions of his employment as a paramedic for Vashon Fire and Rescue.

1.4 Charles Kimzey's PTSD arose naturally out of and was proximately caused by the cumulative effects of traumatic incidents during his job as a paramedic during his career.

1.5 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.

## II. CONCLUSIONS OF LAW

2.1 The Findings and Conclusions of the Board of Industrial Insurance Appeals are in error.

2.2 Charles Kimzey's condition of PTSD is an occupational disease.

2.3 Charles Kimzey's PTSD arose naturally and proximately out of distinctive conditions of his employment as a paramedic for Vashon Fire & Rescue, and he is entitled to coverage under the Industrial Insurance Act.

2.4 The findings and conclusions of the Board of Industrial Insurance Appeals have been rebutted by Mr. Kimzey by a preponderance of the evidence.

The Department appeals the superior court order reversing the decision of the Board.

### *Standard of Review*

In an appeal from the Board, the superior court acts in an appellate capacity and reviews the decision de novo "based solely on the evidence and testimony presented to the Board." *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn.App. 672, 677, 279 P.3d 515 (2012); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The Board's decision is prima facie correct and the burden of proof is on the party

challenging the decision. RCW 51.52.115; *Ruse*, 138 Wn.2d at 5.

RCW 51.52.115 states, in pertinent part:

The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110.... In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified.

\*6 In an industrial insurance case, we review the decision of the superior court, not the decision of the Board. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn.App. 174, 179–81, 210 P.3d 355 (2009). Our review of the superior court's decision is governed by RCW 51.52.140. RCW 51.52.140 states that an “[a]ppeal shall lie from the judgment of the superior court as in other civil cases.” Accordingly, the statutory scheme results in a different role for this court than is typical for appeals from administrative decisions. *Rogers*, 151 Wn.App. at 180. We review “ ‘whether substantial evidence supports the trial court’s factual findings and then review, de novo, whether the trial court’s conclusions of law flow from the findings.’ ” *Rogers*, 151 Wn.App. at 180 (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006)). Where, as here, the facts the Board found are undisputed, we treat the facts as verities. *Roller v. Dep't of Labor & Indus.*, 128 Wn.App. 922, 927, 117 P.3d 385 (2005).

Preliminarily, the Department contends the finding of fact that states Kimzey “sustained an occupational disease, to wit, PTSD;” and the finding of fact that states the decision of the Board was “rebutted by Mr. Kimzey by a preponderance of the evidence” are conclusions of law subject to de novo review. We agree. We also note the conclusions of law repeat

these two findings. Conclusion of law 2.2 states, “Kimzey's condition of PTSD is an occupational disease.” Conclusion of law 2.4 states the decision of the Board has “been rebutted by Mr. Kimzey by a preponderance of the evidence .”

The Department does not challenge the findings of fact that state Kimzey's PTSD “arose naturally and proximately out of distinctive conditions of his employment as a paramedic for Vashon Fire and Rescue;” that his PTSD was “caused by the cumulative effects of traumatic incidents during his job as a paramedic during his career;” or that he dealt with “traumatic incidents and the life and death situations ... were stressful to him” and he “became symptomatic of PTSD, a disease caused by trauma.”

The Department contends that because the legislature categorically excluded benefits for PTSD as an occupational disease, the court erred in concluding Kimzey was entitled to benefits as an occupational disease.

Statutory construction is a question of law we review de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Our primary objective is to ascertain and give effect to legislative intent. *Cockle*, 142 Wn.2d at 807. If the language of a statute is plain and unambiguous, we must give effect to the plain meaning as the expression of legislative intent. *Cockle*, 142 Wn.2d at 807. We review Washington Administrative Code regulations under the same rules of statutory interpretation. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51–52, 239 P.3d 1095 (2010).

#### **Occupational Disease**

\*7 Under the IIA, a worker is entitled to disability benefits for an industrial injury or an occupational disease. RCW 51.32.010, .180. 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.<sup>4</sup> An occupational disease is “such disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140.

In 1988, the legislature directed the Department to adopt rules excluding claims for mental conditions or disabilities caused by stress from the definition of occupational disease. Laws of 1988, ch. 161, § 16. RCW 51.08.142 states, “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.”

In accord with the directive of the legislature, the Department adopted WAC 296–14–300.<sup>5</sup> WAC 296–14–300(1) expressly states that 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.” See *Boeing Co. v. Key*, 101 Wn.App. 629, 634, 5 P.3d 16 (2000) (A mental condition caused by stress that results from “events that unfolded gradually over a period of time,” or even “from a series of incidents over a period of a few days,” is not compensable as an occupational disease.). However, WAC 296–14–300(2) states that a mental condition or disability caused by stress that results from “exposure to a single traumatic event” is compensable as an industrial injury.

WAC 296–14–300 states, in pertinent part:

(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;

(1) 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.

\*8 Accordingly, a mental condition or disease that is caused by stress from the “[o]bjective or subjective stresses of employment” is not compensable as an occupational disease. WAC 296–14–300(1)(j). But a claim for work-related stress caused by a sudden, tangible, external traumatic event that produces an immediate result is compensable as an industrial injury under RCW 51.08.100. WAC 296–14–300(2); *Boeing*, 101 Wn.App. at 634.

The plain and unambiguous language of RCW 51.08.142 and WAC 296–14–300(1) exclude mental conditions and disabilities caused by stress that is not the result of a single traumatic event from the definition of occupational disease. Because the undisputed testimony establishes Kimzey’s PTSD and depression was the result of traumatic and stressful events over time while working as a paramedic, we hold the superior court erred in reversing the Department’s denial of benefits as an occupational disease.

*Rothwell v. Nine Mile Falls School District*, 149 Wn.App. 771, 206 P.3d 347 (2009), supports our analysis. In *Rothwell*, the court addressed whether the plaintiff’s lawsuit for intentional and negligent infliction of emotional distress was barred by the IIA. *Rothwell*, 149 Wn.App. at 776–77. The plaintiff argued her action was not barred by the IIA because her claim for PTSD “does not arise out of an industrial injury or occupational disease.” *Rothwell*, 149 Wn.App. at 777. The court held the lawsuit was not barred by the IIA because her “PTSD is not an injury or occupational disease under the [IIA].” *Rothwell*, 149 Wn.App. at 782. The court concluded that because the plaintiff’s “mental condition was not the result of exposure to a single traumatic event,” her PTSD did not meet the definition for a compensable injury under the IIA. *Rothwell*, 149 Wn.App. at 781. The court concluded that because the plaintiff’s PTSD was the result of “a series of incidents over a period of a few days,” her mental condition did not meet the definition for an occupational disease. *Rothwell*, 149 Wn.App. at 782.

While Kimzey argues on appeal that the medical testimony establishes “trauma” not “stress” caused his PTSD, he did not

make this argument at the administrative hearing before the Board.

Under RCW 51.52.104, a party waives an argument “not specifically set forth” in the petition for review. *Leuluaialii*, 169 Wn.App. at 684; *Allan v. Dep’t of Labor & Indus.*, 66 Wn.App. 415, 422, 832 P.2d 489 (1992). RCW 51.52.104 states, in pertinent part:

[A]ny party may file with the board a written petition for review ... [that] shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

In the notice of appeal to the Board, Kimzey states the cause of “his psychological or psychiatric condition” is “on-the-job stress.” In his petition for review, Kimzey asserts his PTSD was caused by “an initiating event of an extreme traumatic stressor” and the “mental stress to which Mr. Kimzey was exposed and to which he was continually subjected over the period of his career.”

\*9 In any event, the administrative record does not support Kimzey’s argument that his PTSD was caused by only trauma.

Under the IIA, a worker who claims rights is held “to strict proof of their right to receive the benefits provided by the act.” *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).<sup>6</sup> Kimzey did not present any expert testimony that draws a distinction between trauma and stress as it relates to PTSD. Burgett and Dr. Koch testified that during his career as a paramedic, Kimzey experienced traumatic events that resulted in debilitating stress and his PTSD was caused by stress. The undisputed testimony establishes that Kimzey’s PTSD was caused by “intense psychological stress” and traumatic incidents over the course of a 25-year career as a paramedic.

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. We reverse the superior court decision and the award of fees. We affirm the decision and order of the Board.

#### All Citations

Not Reported in P.3d, 2015 WL 7723006

#### Footnotes

1 RCW 51.08.142.

2 Patient health questionnaire.

3 Emphasis in original.

4 On appeal, Kimzey does not claim that his PTSD is an industrial injury.

5 We refer to the WAC in effect at the time of Kimzey’s claim throughout the opinion. However, we note that the WAC was recently amended. As amended, WAC 296–14–300(2) states:

(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury. See RCW 51.08.100.

(b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.

(c) These exposures must occur in one of the following ways:

(i) Directly experiencing the traumatic event;

(ii) Witnessing, in person, the event as it occurred to others; or

(iii) Extreme exposure to aversive details of the traumatic event.

(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).

6 Kimzey filed a motion asking this court to take judicial notice of two nonconsecutive pages of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM–5) as “the universal authority for psychiatric diagnosis.” In response, the Department submitted a copy of the DSM–5. The Department does not object provided the court take judicial notice of the entire

DSM-5. But appellate review of industrial insurance cases is "based solely on the evidence and testimony presented to the Board." *Leuluaialii*. 169 Wn.App. at 677. We decline to take judicial notice of the DSM-5 because it was not submitted below or part of the administrative record.

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# APPENDIX B

**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)(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury. See RCW 51.08.100.

(b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.

(c) These exposures must occur in one of the following ways:

- (i) Directly experiencing the traumatic event;
- (ii) Witnessing, in person, the event as it occurred to others; or
- (iii) Extreme exposure to aversive details of the traumatic event.

(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).

(3) Mental conditions or mental disabilities that specify pain primarily as a psychiatric symptom (e.g., somatic symptom disorder, with predominant pain), or that are characterized by excessive or abnormal thoughts, feelings, behaviors or neurological symptoms (e.g., conversion disorder, factitious disorder) are not clinically related to occupational exposure.

[Statutory Authority: RCW 51.04.020, 51.04.030, and 51.08.142. WSR 15-19-139, § 296-14-300, filed 9/22/15, effective 10/23/15. Statutory Authority: Chapters 51.08 and 51.32 RCW. WSR 88-14-011 (Order 88-13), § 296-14-300, filed 6/24/88.]