

64804-7

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No. 64804-7-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTIANA NJOKU,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT NO. 1,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,
THE HONORABLE STEVEN C. GONZALEZ, PRESIDING

APPELLANT'S REPLY BRIEF

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III. ARGUMENT

A. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

Respondent misplaces reliance upon *Boeing Co v. Key*, 101 Wn. App. 629, 5 P. 3d 16, *review denied*, 142 Wash.2d 1017 (2001) in support of Instruction No. 9. BR at 14-16. In *Boeing Co. v. Key*, the court upheld submission of the following instruction in a claim for PTSD arising out of a hostile work environment:

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

101 Wn. App. 632.

The instruction in *Boeing Co. v. Key* contrasts significantly with the trial court's Instruction No. 9:

As a matter of law, claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease. A psychiatric condition caused by the objective conditions of work events can constitute a compensable claim. A psychiatric condition caused by a worker's subjective perception of work events cannot cause a compensable claim.
CP 61.

Unlike Instruction 9, the instruction in *Boeing Co. v. Key* allowed the claimant to argue to the jury a stress-related disability claim arising out

of a sudden and traumatic event. Moreover, in *Boeing Co. v. Key*, the behavior of the claimant's co-employees, while offensive, pales in comparison to the repeated assaults by her students that appellant was forced to endure. Thus, *Boeing Co. v. Key* does not support the trial court's Instruction No. 9.

Respondent is correct that appellant did not object in general to respondent's theory of occupational disease so long as she was not prohibited from arguing that PTSD was related to an industrial injury. BR at 16. Respondent overlooks that appellant made specific objections to Instruction No. 9. Appellant objected to the instruction as misleading in that it addressed stress, whereas appellant's claim was for PTSD. RP I at p. 17 l. 5-8; p. 21 l. 23-p. 22 l. 2. Appellant also objected to the third sentence of the instruction, that a worker's subjective perceptions of work events cannot cause a compensable claim, as inappropriate in a PTSD claim. RP I at 17 l. 8-12. Appellant thereby adequately preserved the objection for appeal. CR 51 (f); *Zwink v. Burlington Northern R. Co.*, 13 Wn. App. 560, 567-68, 536 P. 2d 13(1975); *Franks v. Department of Labor & Industries*, 35 Wn. 2d 763, 768-69, 215 P. 2d 416 (1975).

Respondent argues that by relying upon numerous incidents between September 2001 and November 2001 to support her PTSD claim, appellant naturally implicated occupational disease as a theory of her case.

BR at 17. By failing to support its argument with any authority, respondent's argument should therefore not be considered. RAP 10.3 (a) (6). ("The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... The argument in support of the issues presented for review, together with citations to legal authority..."); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P. 3d 232, review denied, 155 Wn. 2d 1015 (2005).

Contrary to respondent's argument, Instructions Nos. 9 and 10 do conflict with *Price v. Department of Labor & Industries*, 101 Wn. 2d 520, 682 P. 2d 307 (1984). BR at 17-20. The third sentence of Instruction No. 9 states an absolute, unqualified proscription of a claimant's subjective perception of work events as a cause for a psychiatric condition. CP 61. *Price* recognizes that symptoms of psychiatric injury are necessarily subjective in nature. 101 Wn. 2d 528. Thus, Instruction No. 9 cannot be reconciled with *Price*.

Respondent attempts to evade *Price* by limiting it to claims of aggravation of a pre-existing injury. BR at 18-19. Respondent offers neither reason nor authority to so limit *Price*. Instead, the standard set by *Price* for proof of psychiatric injury with subjective symptoms applies equally to a direct appeal such as this.

Respondent misplaces reliance upon *Dennis v. Department of Labor & Industries*, 109 Wn. 2d 467, 745 P. 2d 1295 (1987) in support of Instruction 9. BR at 20. In *Dennis*, the issue was whether osteoarthritis was an occupational disease that arose naturally and proximately out of the worker's employment. Here, in contrast, the issue is whether appellant's PTSD was a proximate result of an industrial injury. Nor did *Dennis* address whether a psychiatric condition can be established by subjective complaints from the claimant. Thus, the facts and the issues in *Dennis* bear no resemblance to this case.

Equally misplaced is respondent's reliance upon *Favor v. Department of Labor & Industries*, 53 Wn. 2d 698, 336 P. 2d 382 (1959). *Favor* does not address whether PTSD resulting from a traumatic work injury is compensable, or whether PTSD can be established by the claimant's subjective complaints. *Favor* is therefore inapplicable here. In *Favor*, the court carefully distinguished the distinction between injury and occupational disease as it relates to heart cases, noting that a worker with a preexisting heart condition may suffer, as the result of unusual exertion, a compensable injury. 53 Wn. 2d 705. That distinction continues to be drawn today, as evidenced by WAC 296-14-300 (2).

Respondent also misplaces reliance upon *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 828 P. 2d 1138 (1992). BR at 20.

McClelland involved a claim that work-related stress exacerbated the claimant's pre-existing psychological condition. In *McClelland*, it was undisputed that the claimant's job was not particularly stressful. Here, in contrast, there is no evidence that appellant suffered from a pre-existing psychological condition. Moreover the multiple traumatic assaults perpetrated by appellant's students upon her finds no parallel in *McClelland*.

Instruction 10 repeated the same objective-subjective distinction that was held improper in a case involving psychiatric disability by *Price, supra*. CP 62. Thus, Instruction 10 impermissibly instructed the jury on the objective-subjective distinction in a case involving PTSD, thereby preventing appellant from arguing her theory of the case.

Regarding the trial court's refusal to give appellant's Proposed Instruction 13, respondent opts to ignore the wealth of Washington cases supporting the long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician. *See Brief of Appellant, p. 21, and cases cited*. Instead, respondent continues to adhere to *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 188 n. 12, 968 P. 2d 14, *review denied*, 137 Wash.2d 1034 (1999). BR at 22-25.

In *Harker-Lott*, the court gave, as reasons supporting the trial court's refusal to give WPI 155.13.01, the fact that convincing the jury to give greater weight to the claimant's attending physicians was not key to her case, the conflict in the testimony of the attending physicians, and the conflict in that testimony made it unlikely that the outcome of the trial would have been different if the requested instruction had been given. 93 Wn. App. 187-189.

None of those considerations are present here. Unlike *Harker-Lott*, convincing the jury to give greater weight to the testimony of Dr. Mary Bartels was central to appellant's case, as Dr. Bartels diagnosed Ms. Njoku with post traumatic stress disorder and depression. Dep. M Bartels 092707 p. 16 l. 7-p. 17 l. 16. Unlike *Harker-Lott*, the testimony of appellant's attending physicians was not in conflict. Unlike *Harker-Lott*, the absence of such conflicting medical testimony did not make it unlikely that the outcome would have been different had appellant's proposed Instruction No. 13 been given. *Harker-Lott* is therefore distinguishable from the facts of this case

Respondent points out that in *Harker-Lott*, another general instruction allowed the jury to take into account the opportunity and ability of the witness to observe, any bias or prejudice the witness may have, the reasonableness of the witness' testimony considered in light of

all the evidence. BR at 23. Thus, in *Harker-Lott*, where the claimant was not entitled to a special consideration instruction, such a general instruction was adequate. In contrast here, appellant's right to proposed Instruction No. 13 is supported by substantial evidence, and therefore is not affected by the fact that the law was covered in a general way by the instructions given. *Kiemele v. Bryan*, 3 Wn. App. 449, 452, 476 P. 2d 141 (1970); *Wendt v. Department of Labor & Industries*, 18 Wn. App. 674, 679, 571 P. 2d 229 (1977).

B. APPELLANT WAS NOT JURISDICTIONALLY BARRED FROM SEEKING ACCEPTANCE OF POST-TRAUMATIC STRESS DISORDER UNDER THIS CLAIM.

Respondent's argument that appellant is jurisdictionally barred from seeking acceptance of PTSD under this claim lacks merit. Respondent fails to explain why, if that were the case, did it stipulate to the submission to the jury the issue whether appellant suffered from PTSD proximately caused by the industrial injury of November 29, 2001, or her employment conditions with the Seattle School District during the fall of 2001? RP 11 l. 13-24.

C. APPELLANT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.

Appellant renews her request for an award of attorney fees in accordance with the arguments and authorities in paragraph VI D of the Brief of Appellant.

IV. CONCLUSION

The verdict and agreed judgment and order should be reversed, and the matter remanded to the trial court for a new trial. Appellant's request for attorney fees should be granted.

Respectfully submitted,

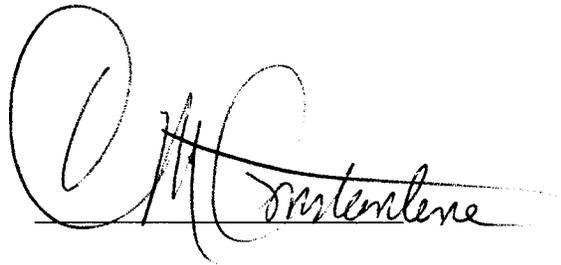
A handwritten signature in black ink, appearing to read "Christopher M. Constantine", is written over a faint circular stamp.

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V. CERTIFICATE OF MAILING

I, Christopher M. Constantine, do hereby certify under the Law of the State of Washington in the County of Pierce that on the 25th day of August, 2010, I deposited in the United States mail, first class postage prepaid, the Appellant's Reply Brief and this Certificate addressed to the following:

Michael P. Graham
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A handwritten signature in black ink, appearing to read "C. M. Constantine", written over a horizontal line.