

64804-7

64804-7

No. 64804-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

RECEIVED  
JUL 27 PM 1:30

---

Christiana Njoku,  
*Appellant,*

v.

Seattle School District No. 1,  
*Respondent.*

---

Brief of Respondent Seattle School District No. 1

---

Michael P. Graham  
WSBA #37391  
EIMS & FLYNN, P.S.  
Grand Central on the Park  
216 First Ave. S., Ste. 310  
Seattle, WA 98104  
(206) 521-4944

TABLE OF CONTENTS

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

    A. FACTS ..... 1

    B. PROCEDURAL HISTORY..... 10

III. ARGUMENT ..... 11

    A. STANDARDS OF REVIEW ..... 11

    B. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE  
    JURY ..... 13

        i. Occupational Disease..... 14

        ii. Appellant Agreed to Occupational Disease Instructions ..... 16

        iii. Objective Conditions of Employment ..... 17

        iv. Refusal to Instruct on Subjective Complaints..... 20

        v. No Special Consideration ..... 21

    C. APPELLANT WAS JURSDICTIONALLY BARRED FROM  
    SEEKING ACCEPTANCE OF POST-TRAUMATIC STRESS  
    DISORDER UNDER THIS CLAIM ..... 26

IV. CONCLUSION..... 26

## TABLE OF AUTHORITIES

<i>Belnap v. Boeing</i> , 64 Wn. App. 212, 217, 823 P.2d 528, 532 (1992).....	11
<i>Boeing Co. v. Harker-Lott</i> , 93 Wn.App. 181, 968 P.2d (1998)...	22, 23, 24, 25
<i>Boeing Co. v. Key</i> , 101 Wn. App. 629, 5 P.3d 16 (2001).....	14, 15
<i>Dennis v. Department of Labor &amp; Industries</i> , 109 Wn.2d 467, 477, 745 P.2d 1295, 1301 (1987).....	20
<i>Favor v. Department of Labor &amp; Industries</i> , 53 Wn.2d 698, 704-705, 278 P.2d 382, 386 (1959).....	18, 20
<i>Frazier v. Department of Labor and Industries</i> , 101 Wn. App. 411, 418- 419, 3 P.3d 221, 225-226 (2000).....	11
<i>Grimes v. Lakeside Industries</i> , 78 Wn. App. 554, 560, 897 P.2d 431, 434 (1995).....	11
<i>Hamilton v. Department of Labor &amp; Industries</i> , 111 Wn.2d 569, 761 P.2d 618 (1988).....	23
<i>Herndon v. City of Seattle</i> , 11 Wn.2d 88, 99, 118 P.2d 421, 427 (1941) .	13
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 249, 44 P.3d. 845, 852 (2002) .....	12
<i>Kiemle v. Bryan</i> , 3 Wn.App. 449, 452, 476 P.2d 141, 143 (1970).....	12
<i>Leeper v. Department of Labor &amp; Industries</i> , 123 Wn.2d 803, 809, 872. P.2d 507, 511 (1994).....	12
<i>Littlejohn Const. Co. v. Department of Labor and Industries</i> , 74 Wn. App. 420, 423, 873 P.2d 583, 584 (1994).....	12
<i>Marley v. Department of Labor &amp; Industries</i> , 125 Wn.2d 533, 538, 886 P.2d, 189, 192 (1994).....	12, 26
<i>McClelland v. ITT Rayonier, Inc.</i> , 65 Wn. App. 386, 390, 828 P.2d 1138, 1140 (1992).....	11, 20, 24
<i>Price v. Department of Labor &amp; Industries</i> , 101 Wn. 520, 682 P.2d 307 (1984).....	passim
<i>State v. Michielli</i> , 132. Wn.2d 229, 240, 937 P.2d 587, 593 (1997)...	13, 22
<i>Stiley v. Block</i> , 130 Wn.2d 486, 498, 925 P.2d 194, 200-201 (1996).	13, 22
<i>Webley v. Adams Tractor Co.</i> , 1 Wn. App. 948, 949-950, 465 P.2d 429, 430 (1970).....	13

## I. ISSUES

Respondent accepts the issues as presented by Appellant, with the following inclusion.

Does the doctrine of Res Judicata jurisdictionally bar Appellant from seeking acceptance of Post Traumatic Stress Disorder under her claim because she did not protest or appeal the Department of Labor and Industries' December 17, 2002 order that included specific language denying responsibility for the conditions alleged as psychosis/stress, the conditions for which Appellant initially filed her claim?

## II. STATEMENT OF THE CASE

### A. FACTS

On February 13, 2002, Appellant, Christiana Njoku, filed an application for benefits under claim W757616 for alleged injuries that occurred during the course of her employment as a teacher at Garfield High School in Seattle. CABR 72. The Department of Labor and Industries accepted Ms. Njoku's claim only for contusion of the left ear, contusion of the left eye, and cervical strain, while specifically denying responsibility for the conditions Ms. Njoku alleged as psychosis and stress. CABR 72.

Ms. Njoku left work and went home on November 29, 2001 because she was "hurt and ill." CABR, Njoku Tr. 1/18/07, p.23. She first

had her neck examined by a doctor 10 days later, when Dr. Dinicicii first examined her. CABR 70. Ms. Njoku told of different students in her class throwing objects at her left eye and trying to blind her. CABR 70. She claimed that she had between 18-22 students in her class on a regular basis. Dep. Njoku Tr. 9/27/07 p.55 (hereinafter Njoku Tr. 9/27/07). She also claimed that she had behaviorally disturbed (Level 4) students in her class. Njoku Tr. 9/27/07 p.60.

Frances Sobers was the assistant principal at Garfield. CABR, Sobers Tr. 10/25/07 p.6 at 24-25 (hereinafter Sobers Tr.). She was Ms. Njoku's direct supervisor. Sobers Tr. p.9 at 3-5. Ms. Sobers observed Ms. Njoku's class on an unannounced basis at least once a week and often a couple of times a week. Sobers Tr. p.14 at 13-19. She never saw more than three to five students in Ms. Njoku's class. Sobers Tr. p.11 at 5-8.

Ms. Njoku told Ms. Sobers that she was hit by a pencil thrown by a student sometime between September 2001 and November 2001. Sobers Tr. p. 15 at 26-p.16 at 1-3. Ms. Sobers investigated the incident and she recalled Ms. Njoku having a small pencil mark high up on her cheekbone that did not break the skin. Sobers Tr. p.16 at 9-15. There were no other injuries to Ms. Njoku as a result of any disciplinary issues with students. Sobers Tr. p.16 at 16-21. During her formal and informal observations of

Ms. Njoku's classroom, Ms. Sobers did not see a single student behave in a disruptive or violent manner toward Ms. Njoku. Sobers Tr. p.29 at 2-13.

Ms. Njoku never informed Ms. Sobers that her students ganged up on her and attacked her, whether on November 29, 2001 or any other date, nor did Ms. Njoku inform her that any student had ever threatened her. Sobers Tr. p.30 at 1-26. The school had a communication system made up of both a phone and panic button intended for emergency and security response in every classroom, including Ms. Njoku's, but Ms. Njoku never utilized this system. Sobers Tr. p.31 at 1-14. Any assaultive student would have been suspended and there would have been police reports filed and administrative hearings, but this did not occur during Ms. Njoku's tenure at Garfield. Sobers Tr. p.73 at 5-11.

Ms. Sobers testified about a number of disciplinary referrals from Ms. Njoku. Sobers Tr. p.34-73. She questioned the validity of the referrals as there was no indication that Ms. Njoku actually submitted them to the school administration. Id. In one case, Ms. Njoku dated a referral after she had stopped working at Garfield. Sobers. Tr. p.71 at 9-12.

According to Susan Dersey, the Garfield principal in 2001, Ms. Njoku did not have a single behaviorally disturbed (Level 4) student in her class. CABR, Dersey Tr. 10/25/07 p.77. at 25-p.78 at 1-8 (hereinafter

Dersey Tr.). Ms. Dersey never saw more than six students in Ms. Njoku's class during the 2 ½ months Ms. Njoku taught at Garfield. Dersey Tr. p.79 at 6-12. While investigating Ms. Njoku's allegation that a student stabbed her with a pencil, she saw a pencil mark on the bridge of Ms. Njoku's nose but no blood or swelling. Dersey Tr. p.85 at 23-p.86 at 1-13. Ms. Dersey could not substantiate a claim that a student shot staples at Ms. Njoku with a staple gun. Dersey Tr. p.86 at 20-p.87. 1. Ms. Njoku never informed Ms. Dersey that students allegedly attacked her. Dersey Tr. p.88 at 12-17. If such attacks had occurred, the school would have coordinated a high priority administrative and security investigation. Dersey Tr. p.88 at 18-p.89 at 1. Ms. Dersey never saw students acting in an abusive or threatening manner toward Ms. Njoku, and she did not see evidence of violence. Dersey Tr. p.94 at 1-16.

Garfield assistant principal Lenora Lee observed Ms. Njoku's class several times during Ms. Njoku's 2 ½ month tenure and never saw more than two to three students in the classroom. CABR, Lee Tr. 10/25/07 p.113 at 20-25 (hereinafter Lee Tr.). Ms. Lee never saw students behave in an abusive or threatening manner. Lee Tr. p.114 at 1-2. She never observed any physical injuries to Ms. Njoku; Ms. Njoku never reported any physical injuries to her. Lee. Tr. p.114 at 19-p.115 at 1.

Bruce Bradley, MD is a Board Certified orthopedic surgeon who first examined Ms. Njoku on October 30, 2002. CABR, Dep. Bradley Tr. 10/03/07 p. 7 at 5-7, p. 8 at 10 (hereinafter Bradley Tr.). He diagnosed a cervical strain with good recovery, left orbital contusion and laceration, and left ear contusion. Bradley Tr. p.25 at 19-23. There were no objective findings he could relate to the events Ms. Njoku alleged to have occurred in the fall of 2001. Bradley Tr. p.29 at 3-6. He felt that Ms. Njoku could work without restriction and had no ratable permanent partial disability as a result of the industrial injury claim. Bradley Tr. p.29 at 13-21. He saw her again on September 9, 2003. His conclusions about employment, medical fixity, restrictions, and permanent partial disability were the same as when he previously saw her. Bradley Tr. p.33-34.

John Hamm, MD is a Board Certified psychiatrist. CABR, Dep. Hamm Tr. 11/08/07 p. 7 at 1-7 (hereinafter Hamm Tr.). He first evaluated Ms. Njoku on October 31, 2002, at which time he interviewed her and conducted a thorough review of her medical records. Hamm Tr. p.11. Ms. Njoku claimed that she had post-traumatic stress disorder ("PTSD"). Hamm Tr. p.13 at 8-9. She spoke in generalities about trauma and pain. Hamm. Tr. p.15 at 12-13. She was angry, but did not present as someone who had been through trauma and she did not describe the specific incidents that she later claimed occurred. Hamm. Tr. p.17 at 2-17. She

told him that her parents' marriage was the most successful marriage in the land, a statement Dr. Hamm thought was bizarre and emphasized that there were no problems in life. He never heard anyone say that in 27 years of practice. Hamm Tr. p.22 at 17-p.23 at 1. She victimized herself and consciously edited her history to the point where it was difficult to ascertain what happened because her perception was distorted. Hamm. Tr. p.25.

Dr. Hamm testified that the specific criteria for diagnosing PTSD required a life threatening or serious, chronic, and traumatic event, something that causes an extreme fear based upon real events. Hamm Tr. p.26-27. He felt that Ms. Njoku had a non-specific, evolving psychotic disorder and delusional ideas. She did not fit the criteria for PTSD, or have psychiatric condition due to her employment at Garfield. The condition he diagnosed was not acquired but genetic and would have occurred regardless of her employment. Hamm Tr. p.28 at 14-p.30 at 1-9.

Dr. Hamm saw Ms. Njoku for a second evaluation on December 6, 2006. Hamm Tr. p.31 at 1. When he asked about her medical complaints she told him she had PTSD and major depression related to her industrial injury. He found her statement unusual because people do not generally tell him about their diagnoses, let alone that the diagnoses are causally

related to an injury for which a claim is made. Hamm Tr. p.34 at 20-p.35 at 1-15.

The information Ms. Njoku provided during Dr. Hamm's 2006 exam was inconsistent with what she had told him in 2002. Hamm Tr. p.41 at 4-9. In 2002, Ms. Njoku told Dr. Hamm about very minor things – a little lesion, a student throwing a pencil and eraser, a verbal exchange with students. Hamm Tr. p.41 at 24-p.42 at 1-9. In 2006, she claimed that students hit her on the head with a phone, pulled a gas knob off a heater and threatened to start a fire, and beat her up every day. Hamm. Tr. p.41 at 14-21.

Dr. Hamm testified that those types of events are typically described and complained about earlier on, closer to an alleged date of injury or manifestation, if they actually occurred. Hamm. Tr. p.41 at 22-24. Ms. Njoku's 2006 reports were dramatically different than what she told Dr. Hamm in 2002, nothing severe like the undocumented incidents she alleged in 2006. Hamm Tr. p. 41 at 24-p.42 at 1-9. She minimized problems and told him that her teacher evaluations were excellent, superior, and outstanding, which was also dramatically different from what Dr. Hamm noted in the actual school records he reviewed. Hamm Tr. p.42 at 23-p.43 at 1-3. After the 2006 exam, Ms. Njoku sent Dr. Hamm a letter thanking him for an excellent psychiatric evaluation.

Hamm Tr. p.58 at 20-24. She also wrote that she forgot to tell him about an alleged incident where students climbed and jumped on her van, causing damage to it. Hamm Tr. p.59 at 1-16. Dr. Hamm had not previously heard of that, nor had he seen any documentation about it. Hamm Tr. p.60 at 15-19.

Dr. Hamm felt that Ms. Njoku attributed her problems to external sources and had very little psychological insight and understanding. Hamm Tr. p.49 at 12-20. He concluded that she did not experience a documented incident sufficient to cause PTSD and did not demonstrate consistent signs of PTSD. Hamm Tr. p.52 at 11-14. He felt that she was motivated to pursue a diagnosis of PTSD because it fit with her distorted perception, self-suggesting beliefs, and false memories. Hamm Tr. p.52 at 19-22. She was an unreliable historian who changed her history to make it more dramatic; she told dramatic stories of severe events for which there were no documentation or proof that they ever occurred. Hamm. Tr. p.55 at 14-23. Based on his evaluation and interviews of Ms. Njoku, and upon his thorough review and understanding of her claim-related medical and school records, Dr. Hamm did not believe that Ms. Njoku had any mental health or psychiatric conditions that were proximately caused or aggravated by her employment with the Seattle School District between

September and November 2001 or to a specific injury on November 29, 2001.

Richard Coder, Ph.D, identified PTSD simply because Ms. Njoku told him that that she had been diagnosed with the condition. CABR, Dep. Coder Tr. 09/06/07 p.50 at 26-p.51 at 1-5 (hereinafter Coder Tr.). Dr. Coder took Ms. Njoku at face value and did not review any records or otherwise conduct an independent investigation to assess the veracity of what she told him, and he purposefully did not review her school personnel records. Coder Tr. p.50 at 2-3; p.57; p.74 at 20-p.75 at 5. He did not know what conditions Ms. Njoku treated for after filing her claim or even what her initial symptoms were. Coder Tr. p.58 at 5-p.59 at 1. He told her that if he testified in her appeal he would not and could not be objective. Coder Tr. p.48 at 12-24. He conceded that if anything Ms. Njoku told him was inaccurate or did not occur it would affect his underlying opinion. Coder Tr. p.57 at 7-10.

Despite Dr. Coder's exclusive reliance on Ms. Njoku to formulate his opinion about what happened at Garfield in 2001 and his diagnosis, he testified that when a person tells him she has PTSD he should not simply independently make or confirm the diagnosis – he would have to make a differential diagnosis by verifying her claims and checking with fellow psychologists and psychiatrists involved in the case. Coder Tr. p.14 at 22-

p.15 at 1-11. Dr. Coder did not do that, and he did not even know what, if anything, happened on November 29, 2001. Coder Tr. p.52 at 23-p.56.

Mary Bartels, MD is a psychiatrist who first saw Ms. Njoku on June 7, 2006. CABR, Dep. Bartels Tr. 09/27/07 p.8 at 16 (hereinafter Bartels Tr.). She felt that “the assault” on Ms. Njoku was overwhelming and triggered PTSD. Bartels Tr. p.30 at 1-23. Despite freely relating PTSD to employment at Garfield, Dr. Bartels did not actually know what, if anything, happened on November 29, 2001, did not attempt to elicit any information about what, if anything, happened, did not review any school personnel records, did not review or know about any prior medical records associated with the claim, and knew absolutely nothing about the alleged incidents and assaults other than what Ms. Njoku told her.

#### B. PROCEDURAL HISTORY

Respondent accepts and agrees with the Procedural History outlined in Appellant’s brief, with the inclusion of the following jurisdictional fact:

Ms. Njoku did not protest or appeal the December 17, 2002 Department order, which corrected the March 19, 2002 order, and allowed her claim for conditions of contusion/laceration of the left ear, contusion of the left eye, and cervical strain, and denied responsibility for psychosis/stress.

### III. ARGUMENT

#### A. STANDARDS OF REVIEW

The findings and decision of the Board of Industrial Insurance Appeals are considered prima facie correct, and hearing in Superior Court on review is de novo, but is based on the same evidence and testimony before the Board. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138, 1140 (1992). A claimant challenging the findings of the Board of Industrial Insurance Appeals has the burden to prove that the Board's findings are incorrect by a preponderance of the evidence. *Frazier v. Department of Labor and Industries*, 101 Wn. App. 411, 418-419, 3 P.3d 221, 225-226 (2000); *Belnap v. Boeing*, 64 Wn. App. 212, 217, 823 P.2d 528, 532 (1992).

In reviewing the Superior Court's decision on review of a determination by the Board of Industrial Insurance Appeals, the role of the Court of Appeals is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431, 434 (1995). The Court of Appeals reviews the interpretation of the Industrial Insurance Act by the Board of Industrial Insurance Appeals de novo under the "error of law" standard and may substitute its judgment for that of the Board, although the Court must

accord substantial weight to the agency's interpretation. *Littlejohn Const. Co. v. Department of Labor and Industries*, 74 Wn. App. 420, 423, 873 P.2d 583, 584 (1994).

The doctrine of claim preclusion applies to a final judgment by the Department of Labor & Industries as to an unappealed order of a trial court. The failure to appeal an order turns the order into a final adjudication, precluding any reargument of the same claim. *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 538, 886 P.2d, 189, 192 (1994).

Jury instructions are sufficient when they allow a party to argue its theory of the case, are not misleading, and properly inform the trier of fact on the applicable law. No more is required. *Leeper v. Department of Labor & Industries*, 123 Wn.2d 803, 809, 872 P.2d 507, 511 (1994). Each party in a trial is entitled to have his theory of the case presented to the jury by proper instructions where there is evidence to support them. *Kiemle v. Bryan*, 3 Wn.App. 449, 452, 476 P.2d 141, 143 (1970). The verdict will not be reversed unless prejudice is shown. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845, 852 (2002).

Instructions are to be read and accepted as a whole and where they, as a whole, fairly state the law, there is no prejudicial error. It is not necessary that each instruction contain a complete exposition of the law

applying to the point in controversy. No one particular instruction is to be selected and undue emphasis placed thereon. *Herndon v. City of Seattle*, 11 Wn.2d 88, 99, 118 P.2d 421, 427 (1941). A questioned portion of instruction should not be considered as an isolated sentence or paragraph but should be considered together with instructions as a whole. *Webley v. Adams Tractor Co.*, 1 Wn. App. 948, 949-950, 465 P.2d 429, 430 (1970).

The trial court has discretion over whether to give a particular jury instruction and its refusal to give a requested instruction is reviewed only for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194, 200-201 (1996). A trial court does not abuse its discretion unless its decision was manifestly unreasonable or given based upon untenable grounds or reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587, 593 (1997).

**B. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY**

The trial court's Instruction No. 9 states:

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 60.

Instruction No. 10 states:

Job conditions which a worker contends proximately caused an occupational disease must be objective in character. An objective condition is one which can be observed and described by someone other than the worker. Perceptions of employment conditions which are peculiar to the worker are subjective and not sufficient. CP 61.

Based upon substantial evidence in the record, these instructions were necessary to allow Respondent to argue its theory of the case. Instruction Nos. 9 and 10 correctly state the law governing occupational disease and claims for mental health conditions allegedly caused by stress. The jury instructions, when considered as a whole, permitted Appellant to argue her theory of the case that she suffered PTSD as a proximate result of a November 29, 2001 industrial injury. There is no harmful or prejudicial error.

i. Occupational Disease

The Board ruled that any PTSD Ms. Njoku may have was not proximately caused by the November 29, 2001 industrial injury and that it did not arise naturally and proximately out of distinctive conditions of employment as an occupational disease. CABR 4. Since a Superior Court jury hears the same evidence presented at the Board, a reasonable jury could have reached a decision under either theory.

*Boeing Co. v. Key*, 101 Wn. App. 629, 5 P.3d 16 (2001) supports the necessity of Instruction Nos. 9 and 10. In *Key*, the trial court

instructed that claims for occupational diseases arising from mental stress are barred, but that claims for mental disability resulting from a specific industrial injury producing an immediate prompt result could be allowed. On appeal, Division I held that the instructions did not prevent Ms. Key from arguing that her condition resulted from a sudden, tangible, traumatic event. Additionally, this court held that:

Many witnesses, including Key, testified that the tension at the PDO and between Key and Spence had been building up for quite some time prior to Spence's alleged death threats. Therefore, the jury could reasonably have found that Key's claim did not meet the definition of an industrial injury because her emotional distress manifested over a period of time rather than from a sudden, tangible, traumatic incident that produced an immediate result. The instruction's reference to exclusions for certain types of stress-related claims has no bearing on this point.

*Boeing Co. v. Key*, 101 Wn. App. 629, 634, 5 P.3d 16, 18-19 (2001).

Likewise, every witness in the instant case, including Ms. Njoku, testified that she claimed to have developed a mental health condition as a result of stressful events that allegedly occurred over a period of time between September 2001 and November 2001. Additionally, Instruction Nos. 9 and 10 do not state that Appellant cannot receive benefits for an alleged psychiatric condition caused by stress under any circumstance or that such claims are not at all covered by the Industrial Insurance Act.

Instead, they accurately describe circumstances under which such claims are and are not allowable.

Ms. Njoku filed her claim for psychosis allegedly caused by stress in the workplace between September 2001 and November 2001. Her testimony, as well as that of her medical witnesses, advanced a theory that she developed PTSD as a result of stressful, frightening incidents that allegedly occurred over that period of time, not solely resulting from exposure to a single traumatic event to be adjudicated with reference to RCW 51.08.100.

This view of the evidence flowed from Ms. Njoku's and her expert witness' testimony. It is acknowledged in the Board order on appeal. It necessitated an instruction defining the applicable law in claims for mental health conditions arising from distinctive conditions of employment.

ii. Appellant Agreed to Occupational Disease Instructions

Appellant acknowledged that she did not object to Respondent's theory of occupational disease so long as she was not prevented from making her argument that PTSD was related as an industrial injury. RP I. at p.5. After some debate over the parties' respective theories of the case, Appellant further agreed to inclusion of both occupational disease and industrial injury theories when she stipulated to the following first question for the verdict form:

Was the Board of Industrial Insurance Appeals correct in finding that Ms. Njoku did not suffer from post-traumatic stress disorder proximately caused by either the industrial injury of November 29, 2001 or her employment conditions with the Seattle School District during the fall of 2001?

RP I. at p. 11. 13-24.

While Appellant alleges harmful error regarding occupational disease instructions, the truth is that omitting those instructions would have been confusing and misleading. In her testimony, Appellant claimed that numerous incidents allegedly occurred between September 2001 and November 2001 and caused PTSD, thus naturally implicating occupational disease as a theory of her case, no matter how she later sought to present it.

iii. Objective Conditions of Employment

Appellant's reliance on *Price v. Department of Labor & Industries*, 101 Wn. 520, 682 P.2d 307 (1984) is misplaced. Instruction Nos. 9 and 10 are not inconsistent with *Price* because the instructions do not state that a physician must base his opinion regarding psychiatric disability, at least in part, on objective findings. Instead, they accurately state applicable law that claims for conditions allegedly caused by a worker's subjective perceptions of work events cannot constitute a compensable claim. The actual incidents giving rise to the claim must be objective and not merely

the fabric of a worker's subjective perceptions. *Favor v. Department of Labor & Industries*, 53 Wn.2d 698, 704-705, 278 P.2d 382, 386 (1959).

This case is readily distinguishable from *Price*. Ms. Price filed an application to reopen her claim eight years after her original injury due to worsening of conditions, including a psychiatric condition that had already been allowed as causally related to her industrial injury. *Price v. Department of Labor & Industries*, 101 Wn. 520, 522, 682 P.2d 307, 308 (1984). The primary issue was whether, in order for aggravation of mental health conditions to be allowed, the condition must be proven by expert testimony based at least in part on objective medical findings. *Id.* The trial court instructed the jury that a physician cannot rely solely on a worker's subjective symptoms, but must base his opinion of psychiatric disability at least in part on objective findings of disability that can be seen, felt, or measured by psychological observation. *Id.* at 524. In reversing the trial court, the Supreme Court held that the instruction sent a mixed message to the jury – that a physician's conversations with a patient both could and could not form the basis for his diagnosis that the psychiatric disability previously accepted under the claim had become aggravated.

In the instant case, Appellant sought acceptance of a mental health condition related to either some allegedly specific, yet foggily identified

injury that occurred on November 29, 2001, or to a series of incidents that allegedly occurred between September 2001 and November 2001. Unlike *Price*, she was not seeking additional disability for a previously accepted psychiatric condition due to purely subjective reports of increased symptoms. Appellant's medical experts were allowed to testify to opinions they formed based exclusively on her subjectively reported symptoms. Dr. Hamm's opinions were also formed based on Appellant's subjective reports.

Instruction Nos. 9 and 10 do not require that Appellant's medical experts must have based their diagnoses at least in part on objective medical findings. The instructions did not require objective medical findings to support the PTSD diagnosis. They appropriately addressed that Appellant's purely subjective response to her work conditions is not compensable unless some objective, external event occurred to cause her subjective response. RP I. at 15.

The issue regarding subjectivity relates to a physician's basis for his diagnosis, not to whether work events did or did not occur. The fact that a physician can diagnose a mental health condition based on subjective symptoms does not change longstanding law that objective proof is required of the relationship between the employment and the injury or disease – that a worker shall prove more probably than not that

diagnosed conditions were the result of an injury or otherwise arose naturally or proximately out of distinctive conditions of employment and not merely a subjective and unrealistic view of work events due to some unrelated psychosis or other unrelated paranoid condition. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 393-394, 828 P.2d 1138, 1142 (1992); *Favor v. Department of Labor & Industries*, 53 Wn.2d 698, 704-705, 336 P.2d 382, 385-386 (1959); *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 477, 745 P.2d 1295, 1301 (1987).

Based on the foregoing, the trial court's Instruction Nos. 9 and 10 allowed both parties to argue their theories of the case, were not misleading, and properly defined applicable law. There is no harmful error.

iv. Refusal to Instruct on Subjective Complaints

The trial court correctly declined to give a proposed instruction that a medical expert's opinion regarding a psychological condition may be based solely on the worker's subjective complaints. Again, Appellant argues that the *Price* holding controls because psychiatric symptoms are subjective in nature.

The same argument detailed with regard to Instruction Nos. 9 and 10 above applies here. Since there was no objection to Appellant's medical expert testimony about her conditions, she was able to argue her

theory that she was diagnosed with PTSD and that her medical experts reached their opinions based on her subjective complaints. The trial court correctly concluded that the instruction would confuse the burden of proof requirement because Appellant still had to show that the diagnosed condition was either proximately caused by an industrial injury or distinctive conditions of her employment. RP I. at p.29. *Price* contemplates testimony regarding wholly subjective symptoms, not wholly subjective causes of those symptoms. Therefore, absent any motion to preclude Dr. Coder's and Dr. Bartels' testimony, the trial court did not err in declining the instruction because the testimony was admitted and went to the weight of the evidence.

v. No Special Consideration

The trial court properly refused to give Appellant's proposed Instruction No. 13 regarding special consideration to testimony given by an attending physician.

At trial, the parties debated Appellant's proposed special consideration instruction, WPI 155.13.01. Appellant contended that both Dr. Coder and Dr. Bartels were attending physicians and that the trial court was required to provide a special consideration instruction. RP I at p.26-28. On appeal, Appellant only contends that Dr. Bartels was an

attending physician and that her testimony should be given special consideration.

Refusal to give a requested instruction is reviewed only for abuse of discretion and only a manifestly unreasonable or untenable decision constitutes abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194, 200-201 (1996); *State v. Michielli*, 132. Wn.2d 229, 240, 937 P.2d 587, 593 (1997).

To support her argument, Appellant notes that *Boeing Co. v. Harker-Lott*, 93 Wn.App. 181, 968 P.2d (1998) upheld a trial court's refusal to provide a special consideration instruction because the testimony of that claimant's attending physicians was in conflict. She further states that no such conflict is present in this case and that *Harker-Lott* therefore does not support the trial court's refusal to give Appellant's Proposed Instruction 13. Her argument rests upon an incomplete reading of *Harker-Lott*.

The *Harker-Lott* court's refusal to give a special consideration instruction was not solely because of conflicting testimony among possible attending physicians. The instruction was not necessary for the jury to understand claimant's theory of the case, and the refusal was not manifestly unreasonable. *Id.* at 183, 186. *Harker-Lott* distinguished *Hamilton v. Department of Labor & Industries*, 111 Wn.2d 569, 761 P.2d

618 (1988), pointing out that the *Hamilton* court did not hold that a special consideration instruction is mandatory, but instead only held that the instruction was not a comment on the evidence. The court also added that no case has specifically held that such an instruction must be given. *Boeing v. Harker-Lott*, 93. Wn.App. 181, 186, 968 P.2d 14, 16 (1998).

Additionally, the *Harker-Lott* court stated that one of the court's general instructions told the jury it could "*take into account the opportunity and ability of the witness to observe any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.*" That instruction allowed the claimant's attorney to argue in closing that her favorable treating witnesses should be given special consideration because their goal was to treat her. *Id.* at 186, 17.

Moreover, the *Harker-Lott* court pointed out that, even if refusing the instruction was an error, it was unlikely that it would have changed the outcome of the case. *Id.* at 188, 17-18. While the instruction advises the jury "*to give special consideration to testimony of attending physicians, it also would have advised the jury that it is not required to give greater weight or credibility to that testimony, or to believe the testimony.*" The

instruction only meant that the jury should give the testimony careful thought. *Id.*

In *McClelland v. ITT Rayonier, Inc.*, 65 Wn.App. 386, 394, 828 P.2d 1138, 1143 (1992), the court questioned the special consideration instruction. Special consideration “*does not require a jury to give more weight or credibility to the attending physician’s testimony but to give it careful thought. We assume that the jury gives careful thought to every witness’s testimony. If the attending physician’s testimony does not carry any more weight or credibility with the jury, how then does the jury give it special consideration.*” *Id.*

On the whole, the *Harker-Lott* instructions, which included a general instruction about a witness’s special training, education, and the type of things the jury may consider when evaluating each witness’s testimony, did not prevent the claimant from arguing her theory of the case, or even from arguing for special consideration in closing argument. Accordingly, the court found no manifestly unreasonable error or abuse of discretion that warranted a reversal.

In the instant case, *Harker-Lott* fully supports the trial court’s refusal to give a special consideration instruction. Both parties proposed, and neither objected to, expert testimony pattern instruction WPI 5<sup>th</sup> 2.10,

which was the court's Instruction No. 3. RP I. p.13 at 9. That instruction states:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors given to you for evaluating the testimony of any other witness.

As in *Harker-Lott*, the instructions, when read as a whole, allowed Appellant to argue her theory of the case. The key issue in this case did not involve a theory that was not likely to be understood by a lay jury without specific explanation by the judge. The jury only had to determine whether Appellant suffered PTSD as a result of either an industrial injury that occurred on November 29, 2001 or due to the distinctive conditions of employment and events that allegedly occurred between September and November 2001. A special consideration instruction would not have led to a different conclusion. Appellant was permitted to argue her theory through other instructions and in closing argument. Appellant's proposed Instruction No. 13 was not necessary for the jury to understand her theory of the case.

Accordingly, the trial court did not abuse its discretion in refusing to give a special consideration instruction. There is no reversible error.

C. APPELLANT WAS JURISDICTIONALLY BARRED FROM SEEKING ACCEPTANCE OF POST-TRAUMATIC STRESS DISORDER UNDER THIS CLAIM

On December 17, 2002, the Department issued an order that denied responsibility for psychosis and stress, the alleged mental health conditions for which Ms. Njoku originally filed her claim. CABR 68, 72. The order was not protested or appealed and therefore became final and binding. *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 538, 886 P.2d, 189, 192 (1994). Even assuming, for the sake of argument, that Ms. Njoku did have PTSD, there was no testimony that the December 17, 2002 order does not encompass PTSD as a “stress” condition. CABR 68. There is also no evidence to suggest that the doctrine of res judicata should not have applied in this case to preclude arguing for the acceptance of PTSD under this claim. CABR 69.

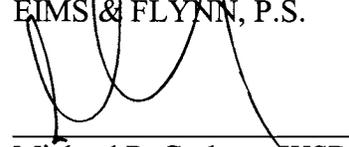
IV. CONCLUSION

The trial court did not commit error in giving Instruction Nos. 9 and 10 or in declining to give Appellant’s Proposed Instruction 13. The trial court did not err in declining to give Appellant’s proposed instruction regarding a medical expert basing a diagnosis upon subjective symptoms.

Accordingly, there is no reversible error and the verdict and agreed judgment and order must be affirmed.

Respectfully Submitted,

EIMS & FLYNN, P.S.

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

Michael P. Graham, WSBA#37391  
Attorney for Respondent

Lisa M. Nelson, under penalty of perjury under the laws of the State of Washington, declares:

1. I am over the age of eighteen years and am competent to testify to the matters contained herein.

2. I am employed by the law offices of EIMS & FLYNN, P.S. On the date last shown below, I sent by first-class mail, postage prepaid, a copy of the Brief of Respondent to the following:

Christopher M. Constantine  
PO Box 7125  
Tacoma, WA 98417-0125

DATED this 27<sup>th</sup> day of July, 2010, at Seattle, Washington.

EIMS & FLYNN, P.S.

By   
\_\_\_\_\_  
Lisa M. Nelson, Paralegal