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I. INTRODUCTION

On March 14, 2007, Appellant Nancy Buchanan's employer departed for an extended mission in Ecuador. (CABR, N. Buchanan Test., p. 37.) Prior to leaving, Ms. Buchanan's employer charged her with the responsibility of collecting \$15,000.00 of accounts receivable and to deposit the money in the bank in order to pay office overhead. (CABR, N. Buchanan Test., p. 39.) One day after being given this burden, Ms. Buchanan found herself sitting on the floor of her employer's office, surrounded by the files, and feeling hopeless. (CABR, Revay Dep., p. 11.) In the days that followed, Ms. Buchanan was seen engaging in bizarre, psychotic behavior which eventually led to her hospitalization. (CABR, Linda Hughes Test., p. 27-29.)

The Department of Labor and Industries (DLI) asserts that substantial evidence supports the decision of the Superior Court that Ms. Buchanan's mental health condition had been developing for years, and "arose gradually from long-standing stressful conditions at work."¹

This position actually ignores the evidence. In the end, the overwhelming evidence shows that Ms. Buchanan

¹ Brief of Respondent, p. 1.

experienced no disability whatsoever prior to suffering a traumatic, mental health injury in March of 2007.

II. RESPONSE TO COUNTERSTATEMENT OF THE CASE

A. Lay Witnesses. Beginning on page 3 of its brief, DLI presents snippets of testimony extracted from the record which suggests Ms. Buchanan was subjected to stressful work conditions prior to 2007. These include reduced support staff at Dr. Elloway's office, increased workload, lack of vacation time, and working evenings.²

On page 6 of its brief, DLI states: "This is not the first time Ms. Buchanan had experienced an abnormal mental health condition." No expert testimony supports this statement. DLI cites only to Ms. Buchanan's own statements that 15 years previously she thought she was "going nuts." Where is the substantial evidence to support the statement that she was suffering an "abnormal mental health condition?" By Ms. Buchanan's own estimation, on a scale of 1 to 10, this was probably 1/8th. (CABR, N. Buchanan Test., p. 38.) Dr. Elloway treated her with B-12 for her "condition." (CABR, N. Buchanan Test., p. 38.) She did not miss any work, she was not medicated, she was not hospitalized,

² Brief of Respondent, p. 3-5.

and there is no evidence that any professional diagnosed her as having an abnormal mental condition. (CABR, N. Buchanan Test., p. 38.)

The DLI argument fails to mention the overwhelming contrary testimony from Ms. Buchanan's family and friends. These witnesses all confirmed that her peculiar, unhealthy behavior and statements were never seen prior to March 15, 2007. (CABR, L. Hughes Test., p. 28-29; CABR, W. Hughes Test., p. 32-33; CABR, J. Buchanan Test., p. 8-9, 20.)

Why would DLI emphasize a minor incident from 15 years previously, that lead to no diagnosed condition or treatment? Because, without some incident prior to 2007, there is no possible way the evidence can constitute an occupational disease, as defined by RCW 51.08.140:

'Occupational Disease' means such disease or infection as arises naturally and proximally out of employment under the mandatory or elective provisions of this Title.

This means, that in order to establish an occupational disease, a worker must show that the abnormal condition came about as a matter of course, as a natural consequence or incident of the distinctive conditions of his or her particular employment. A

proximate cause link must be established by the testimony of at least one medical expert. Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987). There is no substantial evidence that Ms. Buchanan suffered an ongoing health disorder related to her employment prior to March of 2007. DLI argues an occupational disease existed in order to avoid the conclusion that Ms. Buchanan suffered an industrial injury. DLI has not explained any examples of how Ms. Buchanan's stressful work environment, with no diagnosis or treatment, can constitute a foundation for an ongoing occupational disease.

B. Medical Evidence. With the exception of Dr. Stephen Lykins, all of the medical experts agreed that Ms. Buchanan suffered a diagnosable mental health disorder related to her employment.³ Beginning on page 8 of its brief, DLI relies heavily upon the opinions of Dr. Lykins. Dr. Lykins could not connect Ms. Buchanan's work with her mental health disorder. Rather, he felt that she was genetically predisposed to have major depression occur in her life. (CABR, Lykins Dep., p. 26—27.) Dr. Lykins lacked any knowledge of Ms. Buchanan's circumstances in March of 2007. He had no idea what the triggering event of her

³ CABR, Moore Dep., p. 10; CABR, Revay Dep., p. 15-16; CABR, Crabbe Dep., p. 14.

breakdown was. He testified, “It remained a puzzle to me.”

(CABR, Lykins Dep., p. 36.)

T.F. Moore, M.A., diagnosed Ms. Buchanan as suffering from psychosis, and he attributed the condition to Dr. Elloway’s departure and Ms. Buchanan’s workload during March of 2007. (CABR, Moore Dep., p. 10-12.)

Jeanette Revay, ARNP, Ms. Buchanan’s psychiatric nurse, diagnosed Ms. Buchanan with major depressive disorder with anxiety and post-traumatic stress disorder, related specifically to the departure of Dr. Elloway and the specific instructions given by Dr. Elloway to Ms. Buchanan upon his departure, which Ms. Buchanan regarded as a threat. (CABR, Revay Dep., p. 13—14.)

Richard A. Crabbe, M.D., the psychiatrist who treated Ms. Buchanan, diagnosed her with a psychotic disorder and post-traumatic disorder. Dr. Crabbe felt that the trigger for these diagnoses was Dr. Elloway’s departure in March of 2007. (CABR, Crabbe Dep., p. 13, 16—17.)

Is there substantial medical evidence that supports the trial court’s conclusion that this mental health disorder was a long-standing occupational disease that naturally and proximally resulted from the long exposure to the stress Ms. Buchanan

experienced in her work for Dr. Elloway? Is evidence of long-standing stress without an actual disease or abnormality sufficient? The answers must be in the negative, based on the statutory and common law involving occupational diseases in our state.

C. Manifestation Is Necessary to Constitute an Occupational Disease. DLI has never argued that Ms. Buchanan did not suffer a work-related mental health disorder in March of 2007. Rather, DLI's entire strategy has been to assert that the condition was a long-standing occupational disease, in order to reject the claim using the bar contained in RCW 51.08.142. DLI's position is that mere exposure to stress without a diagnosed disease constitutes an occupational disease.⁴ This flies in the face of the guiding principle in construing provisions of the Industrial Insurance Act. Appellate courts have repeatedly held 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, *supra*, at p. 470.

In adopting RCW 51.08.142, the Legislature was excluding from coverage mental health disorders of a long-standing

⁴ Brief of Respondent, p. 30-31.

nature. Disorders involving stress from a single traumatic event remain the within the Act's coverage. RCW 41.08.142; WAC 296-14-300(2).

The unique nature of occupational diseases led to the adoption of RCW 51.32.180, recognizing that compensation for occupational diseases is to be tied to the date the disease required medical treatment or became totally or partially disabling. This is known as the date of manifestation. See Cena v. Dept. of Labor and Industries, 121 Wn. App. 915, 922, 91 P.3rd 903 (2004).

D. Recent Appellate Decisions Support the Appellant's Theory. The very nature of occupational diseases is that they are not caused by a single traumatic event, but by a more progressive process, related to the workplace. In Ms. Buchanan's situation, the first symptoms were contemporaneous with the first treatment. The court below embraced DLI's theory that Ms. Buchanan suffered a slowly progressing mental health disorder for years. What would have happened if she had sought mental health treatment prior to March of 2007, when she had no symptoms? What if she had filed an industrial insurance claim? Undoubtedly, a physician would have no actual diagnosis and DLI would have rejected her claim.

This issue was recently addressed in a Washington State Supreme Court decision dealing with hearing loss, perhaps the most common form of an occupational disease in our worker's compensation system. In Harry v. Buse Timber & Sales,⁵ the Supreme Court held that occupational hearing loss may result from either an industrial accident or continuous exposure to hazardous levels of noise. The Court distinguished between occupational diseases and injuries, stating:

We attempt no scientifically exact discrimination between accident and disease, or between disease and injury. None, perhaps, is possible, for the two concepts are not always exclusive, the one or the other, but often overlap.

Harry v. Buse Timber & Sales, Slip Opinion, Section 4.

In the State of Washington, workers are accepted as they are at the time of the industrial injury, even if they are in a weakened state. Work conditions need not be the sole source of an occupational disease or industrial injury. For purposes of disability assessment, a worker is taken as he or she is, with all pre-existing weaknesses and infirmities. Dennis, *supra*, at p. 471;

⁵ S. Ct. Docket No. 79613-1, decided February 26, 2009.

Wendt v. Department of Labor and Industries, 18 Wn. App. 467, 482-483 (1977), 571 P.2d 229 (1977).

A very recent case, from Division III of the Washington State Court of Appeals, supports Appellant's position that the claim should be allowed as an industrial injury. In the case of Rothwell v. Nine Mile Falls School District,⁶ Ms. Rothwell appealed the dismissal of her lawsuit against her employer. Among the reasons for the dismissal was that since she was in the course of employment, the Industrial Insurance Act provided her exclusive remedy for the disabilities sustained. RCW 51.32.010. Ms. Rothwell suffered mental health disorders when she was ordered to clean up a scene at a school following a student's suicide. She contended that her condition should not be covered as an occupational disease because of the bar contained within RCW 51.08.142. The court observed:

[A] mental condition can qualify as an industrial injury under RCW 51.08.100, and therefore fall within the coverage of the Act, if the condition resulted from a sudden, tangible, and traumatic event that produced an immediate result.

Rothwell, *supra*, at p. ___.

⁶ No. 26876-4-III, decided April 21, 2009.

Division III found, ultimately, that Ms. Rothwell's circumstances did not constitute an industrial injury, as follows:

Here, the emotionally traumatic experiences suffered by Ms. Rothwell after the suicide did not occur suddenly or have an immediate result. Ms. Rothwell was given a series of orders by various supervisors, including the school vice principal, principal, and district superintendent. Ms. Rothwell performed those duties not only on the day of the incident and the following morning, but for several days thereafter.

Moreover, Ms. Rothwell's mental condition is not the result of any one particular or identifiable task ordered by the District. Her condition could have resulted from the stress of cleaning up the suicide scene, searching for bombs, or discovering that a bag she had handled might have contained an explosive device. Ms. Rothwell also indicates that being ordered to clean up items left by students at the scene of the suicide each night for several days after the event was 'extremely emotionally disturbing' to her.

Over the next few weeks, Ms. Rothwell began to exhibit anxiety, sleeplessness, recurring nightmares, frequent crying, and was ultimately diagnosed with PTSD. Under these facts, Ms. Rothwell's mental condition was not the result of exposure to a single traumatic event or a sudden and tangible happening of a traumatic nature. Nor did the trauma produce an immediate and prompt result. ...

... Ms. Rothwell's PTSD did not result from a single traumatic event; rather, it resulted from a series of incidents over a period of a few days. Furthermore, the trauma did not immediately result in Ms. Rothwell's PTSD. Therefore, we conclude that Ms. Rothwell's PTSD is not an injury or occupational disease under the ACT and her claims against the

District are not barred by the Act's exclusive remedy provision.

Rothwell, *supra*, at p. ___.

Ms. Buchanan's circumstances reflect a factual difference that the Rothwell court clearly recognized. There was a single threat, or traumatic event, identified with a specific date. An immediate result occurred.

Compare Ms. Buchanan's mental health condition to a back condition. Assume that Mr. X starts off working, and that the work is fairly light, and he does not have to lift very much. Fifteen years before the industrial injury, he has a flare-up of back pain, which settled down and was handled by a couple of steroid injections. His work gets harder over the years, and he has to carry more weight. Although there are normally two workers, during the last three months, Mr. X has to do the work of two people, and the lifting requirements were greater. Finally, he is told he has to move all the files in a limited time. He begins trying to do the work, and something in his back snaps, and he finds himself sitting on the floor, with all the files he is trying to move scattered about him. He has to go in for treatment.

Clearly, DLI would allow Mr. X's claim as an industrial injury. It is identical to Ms. Buchanan's situation, although hers involved her mind rather than her back.

Ms. Buchanan sat on her employer's floor on March 15, 2007, surrounded by files, feeling threatened and hopeless, and she suffered a mental health disorder that she had never previously experienced.

To allow rejection of this condition requires a strained and exaggerated characterization of it as a long-standing occupational disease. This would tear away the guarantees contained within RCW 51.04.010. In 1911, our Legislature stated:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of

every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

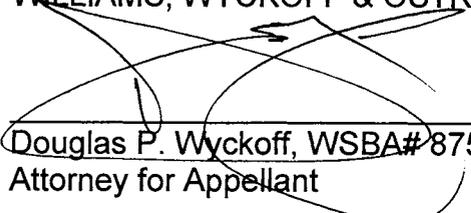
RCW 51.04 010.

III. CONCLUSION

Nancy Buchanan requests the Court issue an Order reversing the decision of the Superior Court and directing that her industrial insurance claim be allowed. Nancy Buchanan also requests that the Court award attorney's fees and costs in accordance with RCW 51.52.130.

DATED this 30th day of April, 2009.

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DECLARATION OF MAILING

I, Anne Heins, hereby declare, under the penalties of perjury of the State of Washington, that a true and correct copy of this Brief of Appellant was mailed on this 30th day of April, 2009, to each of the following:

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