

COA #39370-1

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NO. 81351-5

SUPREME COURT OF THE STATE OF WASHINGTON

RODOLFO M. APOSTOL,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This workers' compensation appeal brought by claimant Rodolfo Apostol arises under the Industrial Insurance Act, RCW 51. The Act provides for just two types of claims: "injury" (RCW 51.08.100) and "occupational disease" (RCW 51.08.140; 51.08.142). The Act, together with an administrative rule (WAC 296-14-300), precludes workers' compensation coverage as "occupational disease" for mental conditions caused by work stress. Stress-related mental conditions are covered only where (1) an isolated traumatic event meets the narrow definition of "industrial injury," and (2) that injury proximately causes the stress-related medical condition. RCW 51.08.142; WAC 296-14-300.

It is undisputed that Mr. Apostol's claim for industrial insurance coverage is for his mental condition and is based exclusively on job stress. RCW 51.08.100 defines "industrial injury" as "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." The Superior Court found as fact, based on the evidence presented at the Board of Industrial Insurance Appeals (Board), that Mr. Apostol had incurred no single traumatic event qualifying as an industrial injury.

Accordingly, because Mr. Apostol's stress claim for his mental condition does not qualify as an "industrial injury" under RCW 51.08.100, and because such a claim is barred from coverage as an "occupational disease" by RCW 51.08.142 and WAC 296-14-300, the Superior Court affirmed the decisions of the Board and Department of Labor and Industries (Department) rejecting Mr. Apostol's claim. This Court should affirm the Superior Court decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. Mr. Apostol argues that his experience during a September 21, 2005 meeting between himself and his supervisors constituted a sudden and tangible happening of a traumatic nature producing an immediate result and therefore qualifies as an "injury" as defined by RCW 51.08.100. None of the witnesses at hearing testified that there was any yelling, shouting, physical contact, or other threatening behavior at that meeting. The only medical witness testified that Mr. Apostol's mental health condition was caused by several years of stress. That medical expert did not testify that the condition was proximately caused by any single traumatic event. The Superior Court found that Mr. Apostol did not incur an industrial injury on September 21, 2005.

Does substantial evidence support the Superior Court's finding that Mr. Apostol did not incur an industrial injury in the course of his employment with Ronald Wastewater District?

2. It is undisputed, as well as indisputable on the record, that Mr. Apostol's claim for his mental condition is based on job stress.

Does Mr. Apostol's claim qualify as an occupational disease in light of the RCW 51.08.142 and WAC 296-14-300 bar against allowance of stress-caused mental claims as occupational diseases?

III. COUNTERSTATEMENT OF THE CASE

A. Department action on Mr. Apostol's claim.

The Department rejected Mr. Apostol's claim for Industrial Insurance Act benefits by an order dated February 24, 2006. CABR 9.¹ In that order, the Department rejected Mr. Apostol's claim because (1) there was no proof of a specific injury at a definite time and place in the course of his employment with Ronald Wastewater District (the District), which ended in the fall of 2005, and (2) that his condition was not the result of an occupational disease. CABR 9. Mr. Apostol appealed that order to the Board. CABR 17, 19.

¹ Documents in the Certified Appeal Board Record are referenced as "CABR" followed by the stamped number in the lower right corner of the document; testimony of witnesses is referenced as "CABR" followed by the witness' last name and the pertinent page number in the transcript for that witness.

B. Board proceedings on Mr. Apostol's appeal from the Department's November 22, 2005 order.

At a pre-hearing scheduling conference, the parties identified the issue on appeal as:

Whether the Department of Labor and Industries was correct in rejecting the claim for the reasons that there is no specific injury at a definite time and place in the course of employment and the condition is not the result of an occupational disease.

CABR 39.

At the Board hearings, Mr. Apostol presented his own lay testimony and the lay testimony of Brent Proffitt (one of his former co-workers at the District) and Michael U. Derrick (the general manager at the District). He also presented the testimony of the sole expert medical witness to testify: Dr. David M. Dixon. Dr. Dixon is a psychologist who first interviewed and evaluated Mr. Apostol after the lay witnesses presented their testimonies to the Board. CABR Dixon 9-10. Neither the Department nor the employer presented any lay or expert testimony.

Mr. Apostol alleged that for several years leading up to his quitting at the District in the fall of 2005, his work environment involved ongoing harassment from co-workers, which management allowed to go on. CABR Apostol 55; Dixon 9-10. He also alleges during that time management took unwarranted disciplinary actions against him. CABR Apostol 52-54; Dixon 10. On September 21, 2005, at 4:25 p.m.,

Mr. Apostol was called into the general manager's office for a meeting in which management gave him a letter calling for improvement of his work performance. CABR Apostol 51-52; Derrick 27-28. Neither Mr. Apostol nor any other witnesses testified that there was any yelling, shouting, physical contact, or other threatening behavior at the meeting.

Mr. Apostol became upset, however, and ultimately was allowed to prematurely leave the meeting, with the manager's admonition that they would continue the meeting first thing in the morning. CABR Apostol 54. At the Board hearing, Mr. Apostol attempted to characterize the events of September 21, 2005, as a single traumatic event constituting an industrial injury. *See, e.g.*, CABR Apostol 56; Dixon 6. But, on the other hand, throughout his testimony and pleadings, he maintained that his mental health condition was the result of long-term and repeated abuse, hostility, harassment, and retaliation. CABR Apostol 53, 55.²

Mr. Apostol saw Dr. David M. Dixon, a Ph.D. clinical psychologist, in January of 2007. CABR Dixon 5, 10. Dr. Dixon opined that Mr. Apostol had an obsessive-compulsive personality, among other things. CABR Dixon 15. Dr. Dixon diagnosed Mr. Apostol's then-current conditions as depression, anxiety, and affective disorder that, due in part to stress at work over the several years leading up to Mr. Apostol's

² Mr. Apostol's Brief of Appellant similarly describes a pattern of long-term harassment on the job. *See, e.g.* AB 11-13.

quitting his job in September of 2005, had developed into a form of post-traumatic stress disorder. CABR Dixon 15.

Dr. Dixon's opinion was that the meeting of September 21, 2005, was not a single, discrete traumatic event, but was part of a long-term process. CABR Dixon 15, 21. Dr. Dixon explained that the September meeting "exacerbated" Mr. Apostol's already-disabling mental condition. CABR Dixon 18, 21. Rather, the meeting and Mr. Apostol's reaction to it were merely the culmination of a series of stressors at work over a several-year period leading up to the meeting. CABR Dixon 15, 18, 21, 29, 32. Dr. Dixon clarified his opinion that Mr. Apostol's mental condition was a culmination of events by explaining that the September 2005 meeting "exacerbated a mental health condition." CABR Dixon 21. Further, Dr. Dixon testified that Mr. Apostol suffered anxiety prior to the September 21, 2005 meeting and that "more recently, with continued experiences over the last two to five years, I think that anxiety disorder has taken – or developed the form of a post-traumatic stress disorder." CABR Dixon 15.

The IAJ ultimately issued a Proposed Decision and Order. The IAJ explained in the proposed decision that "[i]n order to prevail in this appeal, Mr. Apostol was required to demonstrate that a single traumatic event occurred on September 21, 2005, resulting in his mental health

condition.” CABR 11. The IAJ further explained as to the disciplinary meeting that occurred on September 21, 2005: “By itself, the meeting of September 21, 2005, was nothing more than a permitted disciplinary action by Mr. Apostol’s management; the conversation was verbal, nonviolent, and not vulgar or abusive; and when Mr. Apostol insisted he needed to leave, he was permitted to do so with the understanding the meeting would continue the next morning.” CABR 12.

The IAJ’s proposed decision made the following key findings of fact:

2. The September 21, 2005 meeting between Rodolfo M. Apostol, Michael U. Derrick, and George Dicks, was a verbal exchange that was not violent, vulgar, abusive, or constituted a physical threat to Mr. Apostol’s safety or well-being. This meeting was held to present Mr. Apostol with a letter requesting improvement in his work performance and management’s desire for Mr. Apostol to improve his work performance.

3. On September 21, 2005, Rodolfo M. Apostol did not experience a sudden and tangible happening of a traumatic nature, which produced an immediate result in the course of his employment with Ronald Wastewater District. Mr. Apostol’s stress-related mental health condition is not the result of the alleged September 21, 2005 meeting.

4. Rodolfo M. Apostol’s mental health condition diagnosed after September 21, 2005, was a culmination of a series of events that Mr. Apostol considered traumatic, exacerbating an underlying anxiety disorder, which then became more flagrant, more pronounced, and more disabling to Mr. Apostol.

CABR 12-13.

The IAJ's Proposed Decision and Order recommended that the Board affirm the Department's February 24, 2006 order in all respects, thus directing rejection of Mr. Apostol's claim for both an industrial injury and occupational disease. CABR 14.

Mr. Apostol petitioned the three-member Board for review of the IAJ's Proposed Decision and Order. CABR 3-4. The Board denied his petition, adopting the IAJ's Proposed Decision and Order as the final Decision and Order of the Board. CABR 2; *see* RCW 51.52.106. Mr. Apostol appealed to Thurston County Superior Court. CP 6-14.

C. Superior Court's review of the Board's decision.

The Superior Court reviewed the Board decision in a bench trial. CP 113-16. The Superior Court reviewed the Board record de novo, though with a presumption of correctness of the Board's findings as required by RCW 51.52.115. The Superior Court affirmed the Board's decision, adopting verbatim and fully incorporating the findings and conclusions contained in the final Board Order. CP 113-16. Mr. Apostol petitioned for direct review to this Court.

IV. STANDARD OF REVIEW

In an appeal from a Board decision to Superior Court, an injured worker challenging the findings of the Board has the burden, under a preponderance of evidence standard, of overcoming a presumption of correctness of the Board's findings. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). On review of a Superior Court decision in a workers' compensation case, this Court applies the ordinary civil review standard, reviewing the findings of the Superior Court to determine whether those findings are supported by substantial evidence, and determining whether the conclusions of law flow from those findings of fact. RCW 51.52.140; *Ruse*, 138 Wn.2d at 5-6.

"A party seeking to reverse a trial court's findings of fact must meet a difficult standard. A reviewing court is constitutionally limited to determining whether there is 'substantial evidence' to support the trial court's findings." *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986); *see also Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d at 5. Evidence is substantial when its character would convince an unprejudiced, reasoning person as to the factual proposition at issue. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595-97, 206 P.2d 787 (1949). This settled standard defers to the

trial judge. *Thorndike*, 54 Wn.2d 570 at 575. The standard mandates appellate deference to the trial court's decision even if the appellate court would have resolved a factual dispute in another way. *Id.* Mr. Apostol's Brief of Appellant may, at least in conclusory fashion, raise questions of statutory interpretation or other questions of law. To the extent that he is raising questions of law, review of that aspect of the decision below is *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3 583 (2001).

V. SUMMARY OF ARGUMENT

Mr. Apostol's arguments to this Court primarily question the factual determinations made by the Superior Court in the bench trial below. Mr. Apostol's appeal thus triggers the substantial evidence review standard.

Under RAP 10.3(g), however, because Mr. Apostol has failed to assign error to any of the Superior Court's findings of fact, the Superior Court's findings are verities on appeal and conclusive in this matter. This Court need not determine whether there is substantial evidence to support those findings. This Court need determine only whether the Superior Court's conclusions of law flow from the findings of fact.

Because the Superior Court's conclusions of law flow from the findings, this court must reject his appeal.

In any event, even if this Court does not deem Mr. Apostol's failure to assign error to any of the trial court's findings fatal to his challenges to that court's factual determinations, the expert testimony of Dr. Dixon, along with all of the lay testimony is substantial evidence supporting the trial court's findings that Mr. Apostol did not incur an industrial injury as defined by the Industrial Insurance Act.

The testimony of Dr. Dixon that he recorded no statement from Mr. Apostol that there was any threatening behavior, pushing, hitting, or shoving during the September 21, 2005 meeting is substantial evidence that Mr. Apostol did not incur an industrial injury as contemplated by the Industrial Insurance Act. CABR Dixon 27-28. Moreover, Dr. Dixon's testimony that the September 2005 meeting exacerbated Mr. Apostol's mental condition, making it "more flagrant, more pronounced, and more disabling", CABR Dixon 18, is substantial evidence on its own that Mr. Apostol did not incur an industrial injury since his mental condition was not the immediate or prompt result of any singular sudden and traumatic incident that may have occurred during the September 21, 2005 meeting.

Mental conditions caused by stress are expressly excluded from coverage under the Industrial Insurance Act. RCW 51.08.142; WAC 296-14-300. Mr. Apostol does not and cannot dispute that his claim is for a

mental condition that he alleges was caused exclusively by job stress. Accordingly, he cannot pursue an “occupational disease” theory.

Furthermore, Mr. Apostol’s reliance on a “lighting up” theory is misplaced. The “lighting up” theory is not relevant unless a worker incurs an injury or develops an occupational disease. Mr. Apostol cannot invoke the theory because he incurred no industrial injury, and because he cannot pursue an occupational disease theory on his stress claim.

Mr. Apostol raises a number of other issues for the first time on appeal to this Court. These issues include: whether the IAJ erred by failing to better instruct Mr. Apostol on the law and on how to argue his case; whether Mr. Apostol’s constitutional rights are violated by the statutory scheme defining and limiting claims for injury and occupational disease; whether he has a cause of action under Chapter 49.60 RCW; and whether Mr. Apostol should be allowed to raise a tort claim against the State of Washington. Mr. Apostol does not support any of these new issues with any argument or authority, nor does Mr. Apostol assign error to the Superior Court decision in reference to any of these issues. Accordingly, this Court should decline to consider Mr. Apostol’s presentation of these issues for review.

VI. ARGUMENT

A. **Mr. Apostol's failure to assign error to the trial court's findings of facts makes them verities on appeal**

Mr. Apostol fails to expressly assign error to any of the Superior Court's findings of fact anywhere in his brief. "A separate assignment of error for each finding of fact a party contends was improperly made must be included with any reference to the finding *by number*." RAP 10.3(g) (emphasis added). Where no error is assigned to findings of fact, those findings are verities on appeal. *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995).

Accordingly, because Mr. Apostol has failed to assign error to any of the Superior Court's findings of fact, this Court need not determine whether there is substantial evidence to support those findings; they are verities on appeal and conclusive in this matter. RAP 10.3(g); *Moreman*, 126 Wn.2d at 39. Thus, this Court need determine only whether the Superior Court's conclusions of law flow from the findings of fact. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996). And, because the Superior Court's conclusions of law flow from the findings on the central question in this case — whether Mr. Apostol incurred an "injury" on September 21, 2005 — this Court must reject his appeal.

B. Substantial evidence supports the Superior Court's findings that Mr. Apostol did not incur an industrial injury on September 21, 2005.

A worker seeking to make a prima facie case for an industrial injury under the Industrial Insurance Act must meet the Act's definition of injury:

“Injury” means 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.

Although, as discussed *infra* Part VI.C, RCW 51.08.142 and WAC 296-14-300 exclude stress-caused mental conditions from coverage as occupational disease, a worker's claim for a stress-caused mental condition may be adjudicated as an injury claim if the stress arose from a *single* traumatic event. WAC 296-14-300(2) (emphasis added); *see Boeing v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000) (Court approves the following jury instruction: “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.”).

Mr. Apostol's Brief of Appellant is difficult to understand, but it appears that, among other things, he may be challenging the Superior Court's finding that on September 21, 2005, he did not experience a sudden and tangible happening of a traumatic nature producing an immediate result in the course of his employment, and that his stress-related mental health condition is not the result of the September 21, 2005 meeting. AB 8. Substantial evidence, however, supports the Superior Court's finding that Mr. Apostol did not show these required elements of an industrial injury.

Workers seeking benefits under the Industrial Insurance Act must show "strict proof of their right to receive the benefits provided by the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038, 1040 (1955), quoting *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949); *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884-85, 729 P.2d 63 (1986). It is the worker's burden to show with credible medical testimony that benefits are due and owing. *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945); *Zipp v. Seattle Sch. Dist.*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984).

The only condition that Mr. Apostol seeks Industrial Insurance Act coverage for is his mental condition, diagnosed by his expert, Dr. Dixon,

as post traumatic stress disorder (PTSD). CABR Dixon 15. Substantial evidence supports the Superior Court's finding that Mr. Apostol did not incur any industrial injury. Dr. Dixon, the only expert medical witness to testify, is a psychologist who examined Mr. Apostol after the September 21, 2005 meeting. Dr. Dixon testified that Mr. Apostol's mental condition is the result of a series of experiences over a two- to five-year period. CABR Dixon 15, 29, 32.

Dr. Dixon specifically testified that the September 21, 2005 meeting "exacerbated the underlying anxiety disorder that [Mr. Apostol] struggled with to a point where it became more flagrant, more pronounced, and more disabling." CABR Dixon 18. This substantial evidence supports the Superior Court's finding that Mr. Apostol's mental condition was not an immediate or prompt result of a single event. It developed over a period of time spanning multiple years. Accordingly, substantial evidence supports the Superior Court's finding that Mr. Apostol did not meet his burden of proving he incurred an industrial injury.

Moreover, substantial evidence supports the Superior Court's finding that Mr. Apostol did not meet the "traumatic nature" element of the Industrial Insurance Act's injury definition. Dr. Dixon testified that during his conversations with Mr. Apostol, he made no notes of any report

by Mr. Apostol of threatening behavior, pushing, hitting, or shoving occurring during the September 21, 2005 meeting. CABR Dixon 28. Likewise, none of the lay witnesses, including Mr. Apostol, testified that there was any threatening behavior, pushing, hitting, shoving, or other physical contact during that September 2005 meeting. Thus substantial evidence supports the Superior Court's finding that Mr. Apostol did not experience any sudden and tangible "traumatic" happening during the September 21, 2005 meeting.

In summary, the Superior Court's finding that Mr. Apostol did not incur an injury as defined and covered by the Industrial Insurance Act is supported by substantial evidence. This Court should affirm the Superior Court's decision that Mr. Apostol did not incur an injury as defined by the Industrial Insurance Act in the course of his employment with Ronald Wastewater District.

C. Under RCW 51.08.142 and WAC 296-14-300, Mr. Apostol's stress-caused mental condition is not an occupational disease.

Under RCW 51.08.142 and WAC 296-14-300, stress-caused mental conditions are not allowable as occupational diseases. Mr. Apostol does not dispute that his claim is for a mental condition and is based on job stress. The Department is unable to determine from Mr. Apostol's

Brief of Appellant the basis for his apparent suggestion at AB 6-7 that he nonetheless may have an allowable occupational disease.³

The Superior Court correctly determined as a matter of law that Mr. Apostol's mental condition is the result of years of stress and therefore is not an occupational disease due to the operation of RCW 51.08.142 and WAC 296-14-300. CP 115 (incorporating Board's conclusion of law 3 at CABR 13). In 1988, the Legislature expressly directed the Department to adopt a rule excluding stress-caused mental conditions from the definition of "occupational disease" as defined by the Industrial Insurance Act. RCW 51.08.142 (adopted under section 16, chapter 161, Laws of 1988). The statutory directive 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.

RCW 51.08.142.

³ Even if WAC 296-14-300 did not bar Mr. Apostol's stress claim from occupational disease status, his claim for stress due to strained relations with co-workers and management could not meet the distinctive-conditions-of-employment test that derives from the "arising naturally" element of RCW 51.08.140's definition of "occupational disease." *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 566-68, 880 P.2d 29 (1994), *reversed in part on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994) (mental condition caused by workplace relations with or harassment by co-workers or supervisors not occupational disease because workplace conditions are not distinctive but instead are unfortunate, coincidental occurrences of everyday life and employment generally); *Gast v. Dep't of Labor & Indus.*, 70 Wn. App. 239, 243-44, 852 P.2d 319, *review denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993) (same); *Witherspoon v. Dep't of Labor & Indus.*, 72 Wn. App. 847, 850-51, 866 P.2d 78 (1994) (workplace exposure of meatpacking line worker to meningitis bacteria was not distinctive condition of employment but only coincidental exposure that could also occur in everyday life or employment generally).

In compliance with the Legislature's direct mandate, the Department enacted the following rule:

(1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140.

Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from:

- (a) Change of employment duties;
- (b) Conflicts with a supervisor;
- (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;
- (d) Relationships with supervisors, coworkers, or the public;
- (e) Specific or general job dissatisfaction;
- (f) Work load pressures;
- (g) Subjective perceptions of employment conditions or environment;
- (h) Loss of job or demotion for whatever reason;
- (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;
- (j) Objective or subjective stresses of employment;
- (k) Personnel decisions;
- (l) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers.

(2) Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.

WAC 296-14-300.

As explained above, even though WAC 296-14-300(2) directs that stress from exposure to a *single* traumatic event may be covered by the

Industrial Insurance Act as an “injury,” substantial evidence supports the Superior Court’s finding that Mr. Apostol’s mental condition is the result of many years of stressful events and that nothing that occurred during the September 21, 2005 meeting was a traumatic event that qualified as an “injury” under the definition at RCW 51.08.100.

All of the job complaints that Mr. Apostol raised at his Board hearing fall within one of the categories of stress-related complaints that are excluded from coverage as an occupational disease by WAC 296-14-300. Mr. Apostol does not contend otherwise. Specifically, the September 21, 2005 meeting involved at most a threat of disciplinary action and possibly a perception by Mr. Apostol of a threat of loss of job. Both of these conditions are specifically excluded from serving as the basis for a mental stress occupational disease claim. WAC 296-14-300(1)(c).

Likewise, any mental stress Mr. Apostol experienced as a result of being demoted at work is expressly excluded as a basis for an occupational disease. WAC 296-14-300(1)(h) and (k). Moreover, Mr. Apostol's testimony that repeated harassment by his co-workers contributed to his mental stress condition regards relationships with coworkers, which is also expressly excluded as the basis for a mental stress occupational disease claim. WAC 296-14-300(1)(d). Furthermore, any stress Mr. Apostol

experienced during the September 21, 2005 meeting with his supervisors cannot serve as the basis for an occupational disease claim because stress arising from conflicts with supervisors is an excluded basis for proving an occupational disease. WAC 296-14-300(1)(b) and (d).⁴

Dr. Dixon's testimony supports the Superior Court's determination that Mr. Apostol's mental condition is a stress claim excluded under WAC 296-14-300. Dr. Dixon also testified that Mr. Apostol has "suffered an anxiety disorder for some time" and that that pre-existing disorder "played into" Mr. Apostol's response to environmental occupational conditions. CABR Dixon 14. Ultimately, Dr. Dixon concluded that stressful events at work over the years prior to September 2005 caused Mr. Apostol's anxiety disorder to develop into post-traumatic stress disorder:

My impression is, is that currently you suffer a twofold affective disorder, with both anxiety and depressive components to it. That historically you've struggled with depression and generalized anxiety. More recently, with continued experiences over the last two to five years, I think that anxiety disorder has taken—or developed the form of a post-traumatic stress disorder.

⁴ Without any supporting argument or explanation, Mr. Apostol cites a 1959 Washington Supreme Court decision and quotes from a 1990 Board decision addressing the definition of occupational disease. AB 6-7 (citing *Favor v. Dep't of Labor & Indus.*, 53 Wn.2d 698, 336 P.2d 382 (1959) and *Ann Woolnough*, BIIA Dec., 85 2816, 1990 WL 33481 (1990)). Neither *Favor* nor *Woolnough* is relevant here because, among other reasons, those decisions addressed facts that occurred before the effective date of the exclusionary provisions of WAC 296-14-300. Moreover, as explained *supra* n. 3, even under the former statutory scheme stress from strained relations with co-workers and management does not meet the distinctive-conditions-of-employment test that derives from the "arising naturally" element of the occupational disease definition at RCW 51.08.140.

CABR Dixon 15.

In sum, it is both undisputed and indisputable that Mr. Apostol's claim is one for a mental condition from job stress, and therefore the claim cannot be allowed as an occupational disease. WAC 296-14-300.

D. Mr. Apostol's reliance on a "lighting up" theory is misplaced because he incurred no industrial injury and cannot pursue an occupational disease theory.

1. This Court should refuse to entertain Mr. Apostol's "lighting up" argument because he did not properly raise it before the trial court.

In his appeal to this Court, Mr. Apostol asserts for the first time that it was error for the Industrial Appeals Judge (IAJ) to not give a "lighting up" jury instruction or to apply that theory to his appeal. *See, e.g.,* AB 13-14. This Court may refuse to review this claim of error because Mr. Apostol did not raise it at the Board⁵ or properly raise it before the Superior Court.⁶ *Garrett Freightlines, Inc.*, 45 Wn. App. at 346 (failure to raise argument in petition for Board review of IAJ's proposed decision as required under RCW 51.52.104 waives that argument); RAP 2.5(a); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 130-31, 847 P.2d

⁵ Mr. Apostol's Petition for Review of the IAJ's Proposed Decision and Order did not make any claim of error for failure to give the "lighting up" or any other instruction. CABR 3-4. Nowhere in the record did Mr. Apostol request a jury instruction.

⁶ In his briefing to the Superior Court, Mr. Apostol argues that IAJ should have given a "lighting up" jury instruction. CP 75-76. He did not, however, request that instruction from the IAJ at hearing and thus cannot cite to any basis for error in the Board record.

428 (1993). Courts hold pro se litigants to the same standards as attorneys. *See State v. Sullivan*, 143 Wn.2d 162, 178, 19 P.3d 1012 (2001) (“Respondent, acting pro se, is required to follow applicable court rules.”); *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P.3d 300 (2002) (“Pro se litigants expected to comply with [RAP] rules.”).

2. **Mr. Apostol could not have any condition “lit up” under the Industrial Insurance Act because he did not prove he incurred any industrial injury or occupational disease, which is a requirement of the “lighting up” doctrine.**

Mr. Apostol discusses the “lighting up” theory and he argues that a jury instruction on this theory should have been given. *See, e.g.*, AB 7-8 (citing, inter alia, *McDonagh v. Dep’t of Labor & Indus.*, 68 Wn. App. 749, 845 P.2d 1030 (1993)). His arguments are misplaced. First of all, Mr. Apostol never requested a jury trial in his appeal to the Superior Court even though that was an option. *See* RCW 51.52.115. Because Mr. Apostol chose to not have a jury hear his case by failing to request such, it is improper for him to assert that a jury instruction should have been given. More importantly, the “lighting up” theory is of no relevance to Mr. Apostol’s appeal to this Court because the lighting up theory applies only when the worker proves the occurrence of an industrial injury or occupational disease under the Industrial Insurance Act.

Washington courts have recognized “that disability resulting from work-related aggravation of a non-work-related disease may be compensable as an occupational disease.” *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 472, 745 P.2d 1295 (1987). But the Legislature’s clear directive in RCW 51.08.142 that stress-caused mental conditions or disability be excluded from coverage under the Industrial Insurance Act removes any application the lighting up theory could possibly have to Mr. Apostol’s claim. Because the very condition that Mr. Apostol contends is the result of “lighting-up” is expressly excluded from the definition of occupational disease, there is no compensable disease that could be lit up.

Washington courts have also held that the lighting up theory applies in the context of industrial injuries. *Dennis*, 109 Wn.2d at 476. The *Dennis* court acknowledged “that where an *injury* lights up a quiescent or latent preexisting disease or weakened condition, resulting disability is attributable to the *injury*.” *Dennis*, 109 Wn.2d at 476 (emphasis added).

As explained *supra* Part VI.B, substantial evidence supports the Superior Court’s finding that Mr. Apostol incurred no industrial injury. A precondition of a worker proving a disease or weakened condition was “lit up” by an injury is proof that he incurred an industrial injury as defined by

the Industrial Insurance Act. It is impossible for Mr. Apostol to attribute his mental condition to a covered industrial injury because he failed to prove the occurrence of any single traumatic event that would qualify as “injury” under RCW 51.08.100. *See* discussion *supra* Part VI.B.

E. Mr. Apostol’s argument that the Industrial Appeals Judge was required to provide him with guidance on how to present his case is unsupported legally and factually.

For the first time in this case, Mr. Apostol raises an argument that the Industrial Appeals Judge (IAJ) was required to give him better guidance than she did on presenting his appeal before the Board. AB 3, 15.⁷ Mr. Apostol did not raise this argument in his petition to the Board to review the IAJ’s proposed decision (CABR 4-5), nor did he properly raise the argument before the Superior Court. This Court should refuse to hear this argument because Mr. Apostol did not raise it in his Petition for Review to the Board. *See, e.g., Garrett Freightlines, Inc.*, 45 Wn. App. at 346 (waiver by failure to raise argument in petition for review at the Board as required under RCW 51.52.104).

Furthermore, Mr. Apostol’s assertion that the IAJ was required to give him guidance is based on inapplicable case law relating to instruction of juries. His assertion should be rejected because it is not supported by

⁷ The IAJ was not under any legal obligation to affirmatively assist Mr. Apostol in putting on his case. But, as the IAJ noted in her proposed decision, she did make “[s]ignificant efforts . . . to explain to Mr. Apostol the differences between an occupational disease and industrial injury.” CABR 11.

cogent argument or pertinent authority. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004); RAP 10.3(a)(6). Further, Mr. Apostol's appeal was never presented to a jury. Although Mr. Apostol was entitled to request a jury in his de novo review at Superior Court, he did not make any jury request. *See* RCW 51.52.115.

Moreover, the IAJ was under no obligation to give any jury instruction, whether on the "lighting up" theory or otherwise, since there are no juries at Board hearings. The only issue that was before the Board is whether Mr. Apostol incurred an industrial injury or occupational disease in the course of employment. As previously argued, any application of the "lighting up" theory requires one to first prove that he incurred an industrial injury or occupational disease as defined by the Industrial Insurance Act. Since Mr. Apostol failed to prove that he incurred an industrial injury or occupational disease, any issue of what disease or condition may have been "lit up" by the non-existent industrial injury or occupational disease is irrelevant.

Finally, Mr. Apostol's complaint that the IAJ should have provided him with more help appears to be based on his pro se status. *See* AB 15. As the Department explained *supra* Part VI.D.1, however, pro se litigants are held to the same standards as attorneys in putting on their cases. *See generally In re Olson*, 69 Wn. App. 621, 625-26, 850 P.2d 527 (1993); *In*

re Wherley, 34 Wn. App. 344, 349, 661 P.2d 155 (1983), *review denied*, 100 Wn.2d 1013 (1983); *State v. Sullivan*, 143 Wn.2d at 178; *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. at 310.

F. Mr. Apostol's conclusory claims under the constitution and under RCW 49.60.030 are not supported by argument or citation to authority and are, in any event, unsupportable.

Mr. Apostol makes cursory reference to his constitutional rights, suggesting in a single conclusory sentence he has a constitutional right to workers' compensation coverage for workplace stress. AB 7-8. He does not, however, make any argument about or even identify which provision of the federal or state constitution he is trying to invoke, or what effect the constitution has on his appeal. His unsupported and conclusory constitutional attack should be rejected. "[N]aked castings into the constitutional sea" do not warrant consideration. *Fria v. Dep't of Labor & Indus.*, 125 Wn. App. 531, 535, 105 P.3d 33 (2004) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)), *review denied*, 154 Wn.2d 1018 (2005); *see also* RAP 10.3(a)(6); *Bercier v. Kiga*, 127 Wn. App. at 824 (theory unsupported by argument should be rejected as waived).

Mr. Apostol similarly makes a conclusory, unsupported assertion that RCW 49.60.030 supports his case. AB 17. He has similarly waived this attack because he has not supported it with any argument or authority. *Bercier v. Kiga*, 127 Wn. App. at 824; RAP 10.3(a)(6). Moreover, the

only issues on appeal to this Court arise from Mr. Apostol's Industrial Insurance claim. This is distinct from a civil suit and precludes Mr. Apostol from arguing for any relief or review under chapter 49.60 RCW. A separate civil suit initiated in superior court is required to obtain any relief under chapter 49.60 RCW. RCW 49.60.030(2); *Rhoades v. Dep't of Labor & Indus.*, 143 Wn. App. 832, 845, 181 P.3d 843 (2008).

Any reference to a potential cause of action outside Title 51 RCW is outside the scope of review of this Court because Mr. Apostol's appeal is limited to review of the Superior Court's findings and conclusions regarding Mr. Apostol's industrial Insurance Act claim for benefits. *See* RAP 2.4(a). Accordingly, the Court should decline to entertain Mr. Apostol's unsupported and conclusory constitutional and RCW 49.60.030 arguments.

G. Mr. Apostol's request for a remedy under a torts theory is misplaced in this workers' compensation case and, in any event, unsupportable on this record.

Mr. Apostol also asks in his Brief of Appellant for a remedy for what he perceives as emotional harm allegedly caused by the Department's administration of his claim. AB 17-18. Mr. Apostol states that he seeks this remedy based on events distinct from the alleged injury that triggered filing his workers' compensation claim. AB 17-18.

Mr. Apostol's request for tort relief on appeal to this Court is inappropriate.

Mr. Apostol's basis for tort recovery, if any, is outside the Industrial Insurance Act. As the Court of Appeals explained in *Rushing v. ALCOA, Inc.*, 125 Wn. App. 837, 841, 105 P.3d 966 (2005), theories for recovery in workers' compensation cases must derive from the Industrial Insurance Act. The Act provides no remedy for the tort recovery Mr. Apostol seeks. The Act provides the exclusive remedy for workers injured in the course of employment. RCW 51.04.010. This provision is "sweeping, comprehensive, and of the broadest, most encompassing nature." *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004). A person receiving benefits under the Act has no separate remedy for his injuries except where the Act specifically allows a cause of action. *Cena*, 121 Wn. App. at 356.⁸ Accordingly, Mr. Apostol's request for tort relief as part of his appeal to this Court or otherwise is inappropriate.

Further, Mr. Apostol never alleged and cannot demonstrate compliance with RCW 4.92.100-110 in his tort allegations against the Department, a state agency. Washington law requires proper filing of a

⁸ Mr. Apostol cites and quotes from a *Hawaii* appellate court decision interpreting *Hawaiian* law. AB 17-18 (citing *Hough v. Pacific Insurance Co.*, 83 Hawai'i 457, 927 P.2d 858 (1996)). *Hough* would not support seeking a tort remedy even in a *Hawaiian* workers' compensation case. More importantly, the instant case is controlled by Washington law, and Washington law does not authorize a tort remedy either in the context of a workers' compensation appeal or in a separate tort action. *Cena v. State*, 121 Wn. App. at 356; *Rushing v. ALCOA, Inc.*, 125 Wn. App. at 841.

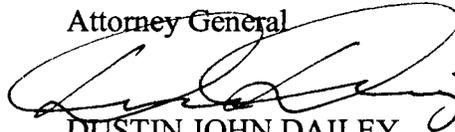
notice of claim with the Office of Risk Management in order to litigate a tort claim against the State of Washington, such as that alleged by Mr. Apostol. No action shall be commenced against the State until 60 days have elapsed after the claim is presented to and filed with the Office of Risk Management. RCW 4.92.110. There is no record that Mr. Apostol has complied with this requirement. His assertion of a tort claim before this Court is improper and futile.

VII. CONCLUSION

For the reasons stated above, the Department requests that this Court affirm the decision of the Superior Court rejecting Mr. Apostol's stress claim.

RESPECTFULLY SUBMITTED this 19th day of November, 2008.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of November, 2008, at Tumwater, WA.



CYNTHIA RAVES
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