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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRANK SHAW,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

Frank Shaw was sexually abused, as a child. When he told his mother, she blamed him. This affected him deeply, but he was able to put the abuse and his mother's betrayal behind him and become a successful husband, firefighter and paramedic.

Then Mr. Shaw was wrongly accused by his fire department of acting inappropriately, with a child, while on duty. Two doctors have testified that this incident and other work incidents which followed, caused Mr. Shaw to develop major depression and post traumatic stress disorder (PTSD).

The Department of Retirement Systems (DRS) determined Mr. Shaw was mentally disabled from performing his duties as a fire fighter. However, DRS denied "duty" disability benefits because Mr. Shaw's duties were not the "sole" cause of his disabling condition.

DRS entered a Final Order, which held that members of the Law Enforcement Officers and Fire Fighters System 2 (LEOFF 2)[1] can only receive line-of-duty retirement benefits pursuant to RCW 41.26.470(7) and WAC 415-104-480(2) if the

[1] Law Enforcement Officers' and Fire Fighters' Retirement System, Plan 2. This plan covers those who first became members on and after October 1, 1977. RCW 41.26 010(22)

performance of duties particular to LEOFF 2 employment "was the sole cause of a particular disabling condition." The Superior Court wrongly affirmed the DRS Final Order.

There is nothing in the governing statute (RCW 41.26.470(7)) nor corresponding Administrative Code provision WAC 415-104-480(2), which supports such a restrictive interpretation of the phrase "became disabled in the line-of-duty."

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering paragraph 1 of its order of January 16, 2015, which found that DRS had properly applied a LEOFF 1 test of duty disability as enunciated in Dillon v. Seattle Police Pension Board, 82 Wn.App 168, 916 P.2d 956 (1996) to Mr. Shaw.

2. The Superior Court erred in entering paragraph 2 of its January 16, 2015 Order by rejecting the common law proximate cause concept[2], articulated in Ruse v. Department of Labor and Industries, 138 Wn.2d 1, 977 P.2d 570 (1999) and by imposing a "sole cause" rule to LEOFF 2.

3. The Superior Court erred in denying Mr. Shaw attorney's fees under either RCW 49.48.030 or RCW 4.84.350-360.

[2] The superior court and DRS describe this as the "Aggravation Rule"

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a Fire Fighter or Law Enforcement Officer, who has been determined by DRS to have a disability incapacitating him or her for continued employment as a LEOFF 2 member, have to show that the "sole cause" of his or her disabling condition was performing required or authorized duties, to prevent DRS from denying benefits to those who's disability resulted from the combined effects of a pre-existing condition and performance of their duties? Assignments of Error No. 1 and 2.

2. Do RCW 41.26.470 and WAC 415-104-480 deny duty disability benefits to those whose pre-existing condition is made "symptomatic" by duties, but grant benefits to those whose pre-existing condition is made "worse." Assignments of Error No. 1 and 2.

3. Are DRS and the Courts precluded from considering the proximate cause, aggravation or "lighting up" concept used in workers' compensation cases when construing the provisions of the statutes and rules governing LEOFF 2? Assignments of Error No. 1 and 2.

4. Are DRS and the Courts precluded from applying the concept that an attending physician's opinion should be given

special consideration in LEOFF 2 cases, because that rule was originally adopted in workers' compensation cases? Assignments of Error No. 1 and 2.

5. Is Mr. Shaw precluded from receiving attorney's fees pursuant to RCW 49.48.030 or RCW 4.84.350-360? Assignments of Error No. 1, 2 and 3.

IV. STATEMENT OF THE CASE

DRS granted Mr. Shaw non-duty-disability retirement on September 6, 2008. (DRS Final Order, Finding of Fact No. 7, AR 2).[3] Mr. Shaw petitioned DRS to review that decision contending that he was entitled to duty-related disability benefits. (DRS Final Order, Finding of Fact No. 8, AR 3) His petition was denied on August 17, 2009. (DRS Final Order, Finding of Fact No. 9, AR 3) In September 2009, Mr. Shaw's then counsel asked DRS to reconsider its decision and submitted a formal motion to that effect on April 2, 2010. (DRS Final Order, Finding of Fact No. 10, AR 3) Mr. Shaw's claim for duty-disability benefits was again denied on January 31, 2011. (DRS Final Order, Finding of Fact No. 11, AR 3) On March 31, 2011 Mr. Shaw filed a Notice of Appeal

[3] AR refers to the DRS Certified Administrative Record, as required by RCW 34.05.566.

from DRS' decision requesting a hearing. (DRS Final Order, Finding of Fact No. 12, AR 3) Hearings were finally held, and DRS issued its Final Order on December 9, 2013. (DRS Final Order, AR 12).

DRS' final order denied Mr. Shaw duty-disability benefits, holding that the definition of "line-of-duty" requires a LEOFF 2 member to show that "performance of those required or particularly authorized duties was the sole cause of a particular disabling condition." (DRS Final Order, Conclusion of Law No. 25, AR 11).

The Superior Court's Final Order Affirming DRS' Final Order was entered on January 15, 2015. CP 297-298. The Superior Court's Order was timely appealed to this Court on January 27, 2015. (CP 299-302).

V. ARGUMENT

Frank Shaw became a LEOFF 2 member in 1989. (DRS Final Order, Finding of Fact 4, AR 2). Frank Shaw is a disabled member of LEOFF 2 whom DRS had granted non-duty disability benefits. (DRS Final Order, Finding of Fact 7, AR 2). By granting non-duty disability benefits DRS has necessarily already determined:

1) That Mr. Shaw incurred a mental or physical disability;

2) That Mr. Shaw became totally incapacitated for employment in a LEOFF eligible position; and

3) That Mr. Shaw separated from a LEOFF eligible position, due to his disability. (WAC 415-104-485 (1)(a)(b) and (c)).

The only remaining question is the connection between Mr. Shaw's mental disability and his employment duties. Resolution of that issue turns on what the legislature intended when it used the words "disabled in the line of duty" in RCW 41.26.470. A copy of that statute is attached as Exhibit 1.

A. "Line Of Duty "Disability As Use In LEOFF 2.

Beginning October 1, 1977, LEOFF 2 applied to newly hired law enforcement officers and firefighters. RCW 41.26.030(22).

The phrase "who became disabled in the line of duty" was first introduced into LEOFF 2 and RCW 41.26.470 by Section 1, Chapter 88, Laws of 1989. It authorized continued LEOFF 2 service credit for disabled members who were receiving disability leave supplements under RCW 41.04.500 through 41.04.530.

RCW 41.04.500, reads as follows:

> County, municipal, and political subdivision employers of full-time, commissioned law enforcement officers and full-time, paid firefighters shall provide a disability leave supplement to such employees who qualify for payments under RCW 51.32.090[4] due to a temporary total disability. (Emphasis supplied)

In 2004, RCW 41.26.470 was amended to provide a different level of benefits to those who became "disabled in the line of duty." Section 1, Chapter 4, Laws of 2004.[5] That law added subsections (6) and (7) to RCW 41.26.470, which, in relevant part, read as follows:

> (6) A member who becomes disabled in the line of duty, and who ceases to be an employee of an employer except by service or disability retirement, may request a refund of the member's accumulated contributions.
>
> (7) A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each

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[4] RCW 51.32.090 provides injured workers with workers' compensation temporary total disability benefits, also known as time loss benefits.

[5] Prior to the adoption of RCW 41.26 470(6) and (7), in 2004 there was no distinction between LEOFF 2 duty and non-duty benefits Section 1, Chapter 39, Laws of 2006, was enacted to provide an additional total disability benefit. There are now three types of disability benefits, non-duty, line-of-duty and total disability RCW 41.26 470(a). DRS calls total disability benefits "catastrophic." WAC 415-104-482.

> year of service beyond five, and shall have the allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three. An additional benefit shall not result in a total monthly benefit greater than that provided in subsection (1) of this section.

When the LEOFF-2 duty disability benefits were enacted in 2004, DRS adopted WAC 415-104-480(2) which defined "line of duty." Subsection (2) provides as follows:

> (2) How is 'line of duty' defined? Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service.

Please note there is no requirement that one must incur a physical or mental disability <u>solely</u> in the line of duty.

The WAC LEOFF 2 definition of line of duty is extremely broad. It is not limited to those actions specifically related to law enforcement or fire fighting, such as driving a fire truck, arresting a wrongdoer, etc. It does not require the action to occur within employment, but only that it occur "in conjunction" with employment. It is difficult to imagine a broader definition of line of duty.

WAC 415-104-480 also contains subsection (5) which relates to duty disability and says:

> (5) What evidence will the department use to determine whether I am entitled to benefits under this section? The department will consider any relevant information submitted by you or your employer, or otherwise available to the department, including:
>
> (a) Information and determinations by the department of labor and industries (L&I) or a self-insurer;[6], [7] (Emphasis supplied)

WAC 415-104-480(13) provides, in relevant part, as follows:

> (13) When does a duty disability retirement benefit end?
> * * *
> Your duty disability benefit will cease if:
> * * *
> (b) Medical examination reveals that you are no longer totally incapacitated for employment in a LEOFF eligible position and you are no longer entitled to workers' compensation benefits under Title 51 RCW.[8] (Emphasis supplied)

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[6] Workers' compensation legal principals are inherent in the "determinations" by DLI, which DRS has bound itself to consider pursuant to WAC 415-104-108(5).

[7] Chapter 51.14 RCW allows certain large employers to self-insure, paying workers' compensation benefits directly, and making certain determinations about those benefits. This power includes the ability to request that the Department allow or deny a claim. RCW 51 14.130.

[8] When determining duty disability, Social Security determinations have no relevance because Social Security benefits are provided to all eligible individuals, without regard to whether their disability was incurred in the line of duty.

These provisions show DRS recognition of the interplay between LEOFF 2 and workers' compensation. In granting benefits, workers' compensation information and determinations are relevant and considered by DRS. To terminate LEOFF 2 benefits, a member must have ceased to receive workers' compensation benefits.

B. Prior Firefighter Retirement Statutes Used Narrower "Duty" Definitions Than LEOFF 2.

Chapter 41.16 RCW was in effect from 1947 to 1955. RCW 41.16.130 provided benefits for "Any firefighter who shall become disabled as a result of the performance of his or her duty or duties as defined in this chapter. . ." RCW 41.16.010(10) defined performance of duty as:

> ...the performance of work and labor regularly required of firefighters and shall include services of an emergency nature rendered while off regular duty, but shall not include time spent in traveling to work before answering roll call or traveling from work after dismissal at roll call.[9]

Only in determining whether one is entitled to a catastrophic benefit, does DRS consider, among other things, "information from and determinations made by the Department of Labor and Industries, the Social Security Administration, or a self-insurer." WAC 415-104-482(4)(b). (Emphasis supplied)

[9] This incorporates the workers' compensation "coming and going" rule which denies coverage when travelling to and from work Belnap v. Boeing, 64 Wn.App 212, 823 P.2d 528 (1992).

In 1955, Chapter 41.18 RCW was enacted to provide disability benefits to "Every firefighter who shall become disabled as a result of the performance of duty. . ." RCW 41.18.050. RCW 41.18.010(14) defined performance of duty as "...the performance of work or labor regularly required of firefighters and shall include services of an emergency nature normally rendered while off regular duty." In AGO 57-58 No. 117, the Attorney General stated that disability included incapacity suffered in the line of duty from any cause, including sickness or disease and advised that poliomalitis suffered "in connection with the performance of his duties" was compensable.

In 1970, the legislature enacted LEOFF Plan 1, and RCW 41.26.120 provided disability benefits "...for any disability incurred in the line of duty." The statute included both those physically or mentally disabled. RCW 41.26.120(1).

The current language of RCW 41.26.470(7), for LEOFF 2, uses the expression "becomes disabled in the line of duty." This can be compared to the LEOFF 1 phrase "incurred in the line of duty" which obviously implies a more direct connection between the performance of duty and the disability than the LEOFF 2 "becomes disabled in the line of duty." The LEOFF 2 phrase

implies only a temporal connection and includes a disability which arose "in conjunction" with duty but was not necessarily caused by the duty itself. WAC 415-104-480(2).

C. The Legislature Intended An Expansive LEOFF 2 Duty Standard.

The legislature is presumed to be familiar with its prior enactments when it passes a new statute. Kingston Lumber Supply Company v. High Tech Development Inc., 52 Wn. App 864, 765 P.2d 27 (1988), review denied 112 Wn.2d 1010 (1989); State v. Pearson, 13 Wn. App 870, 538 P.2d 567 (1975). When the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings. State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008); United Parcel Service Inc. v. State Department of Revenue, 102 Wn.2d 355, 687 P.2d 186 (1984).

A change in legislative intent is presumed when a material change is made in a statute. Rhoad v. McLean Trucking Company, Inc., 102 Wn.2d 422, 686 P.2d 483 (1984); Strunk v. State Farm Mutual Auto Insurance Company, 90 Wn.2d 210, 580 P.2d 622 (1978). Having used the phrase "incurred in the line of duty" in LEOFF 1 and the phrase "becomes disabled in the line of duty" in LEOFF 2, one must assume the legislature intended a

change in the law. One must also assume that the change was one meant to benefit the firefighters covered by the law.

D. Pension Statutes Are Liberally Construed In Favor Of Members

In cases involving pensions, doubt should be resolved in favor of the party for whose benefit the pension statute was enacted. Bowen v. State Wide City Employees Retirement System, 72 Wn.2d 397, 433 P.2d 150 (1967). A similar rule applies in the workers' compensation context, where statutes are construed in favor of the claimant for whose benefit the act was passed. Gaines v. DLI, 1 Wn.App. 547, 463 P.2d 269 (1969); Kellum v. DRS, 61 Wn.App 288, 810 P.2d 523 (1991). Clearly, the provision of duty disability benefits was enacted for Mr. Shaw and other firefighters covered by the act and must be interpreted in their favor.

In Morrison v. DRS, 67 Wn.App 419, 426, 835 P.2d 1044 (1992), the court found that "any ambiguities in the standard by which to determine disability should be construed in Morrison's favor given the remedial nature of pension statutes, which Washington Courts liberally construe in favor of the intended beneficiary." Morrison at 427.

The Morrison court cited Malland v. DRS, 103 Wn.2d 484, 490, 694 P.2d 16 (1985) as establishing the proposition that

while the fiscal integrity of the LEOFF system is important, it is just as important to encourage police officers and firefighters, who are not able to adequately perform their jobs, to retire. Morrison, at 67 Wn.App. 427; Malland, at 103 Wn.2d 490. (Emphasis supplied).

E. LEOFF 1 "Duty Disability" Has Been Interpreted By Applying Workers' Compensation Cases.

Dillon v. Seattle Police Pension Board, 82 Wn.App 168, 916 P.2d 956 (1996), solidified the connection between LEOFF and workers' compensation. It specifically determined that an injury "incurred in the line of duty" is equivalent to an injury incurred "in the course of employment" as used in workers' compensation cases. Dillon at p. 171. This is a LEOFF 1 case.

The court held that "a worker shows his disease was proximately caused by his work if he establishes he would not have contracted the disease, but for the aggravating condition of his job." The court cited Dennis v. DLI, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987).

Mr. Dillon was a police officer who shot himself in the hand, while off duty. He was granted a non-duty disability retirement, but in 1988 was ordered to return to duty. Dillon did not believe he could perform, and became anxious and depressed. He

sought psychiatric treatment." Dillon at p. 170. He was again found to be disabled, but the local board determined that his disability was not incurred in the line of duty. He appealed.

The court held that:

> From this evidence, which was uncontradicted, a fair-minded, rational person would objectively conclude that Dillon's mental disability resulted from the stress of being required to perform the duties of a patrol officer with his physical limitations, and was therefore incurred in the line of duty – that is, as a natural and proximate result of his specific employment. Dillon at p. 174-175.

Mr. Dillon's pre-existing non-duty physical condition resulted in on-duty stress which caused Mr. Dillon to become psychologically disabled.

Woldrich v. Vancouver Police Pension Board, 84 Wn.App 387, 928 P.2d 423 (1996) adopted the tests established in Dennis[10] and Dillon. The court felt Mr. Woldrich had not established that his disability met the requirements of the Dennis and Dillon tests. The court deferred to the local Board's interpretation that a stress reaction to a disciplinary promotion,

[10] This case is discussed on the next page.

under Mr. Woldrich's circumstances, was not a disability incurred in the line of duty. Woldrich[11] at p. 393.

Footnote one to Woldrich, contained evidence which supported the conclusion that Mr. Woldrich did not have a psychiatric problem at all, but instead had a paranoid personality disorder. The local Board was entitled to believe that testimony, and that alone would have justified its decision, without reaching the legal question.

Dillon and Woldrich both relied on Dennis v. DLI, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987) for the proposition that a "disability resulting from work-related aggravation of a nonwork-related disease may be compensable as an occupational disease." (Emphasis supplied)

The Dennis court said:

> Moreover, we have long recognized that benefits are not limited to those workers previously in perfect health. Groff v. Department of Labor & Industries, 65 Wn.2d 35, 44, 395 P.2d 633 (1964); Kallos v. Department of Labor & Industries, 46 Wn.2d 26, 30, 278 P.2d 393 (1955); Jacobson v. Department of Labor &

[11] Woldrich has been criticized and was not followed by In the Matter of the Application for Pera Police and Fire Plan Line of Duty Disability Benefits of Stephen Brittain, 724 N.W.2d 512 (Minn 2006). There, the court found the phrase "a disability arising out of any active duty" encompassed an officer's depression which was said to have been caused by a hostile work environment and a supervisor who harassed him.

> Industries, 37 Wn.2d 444, 448, 224 P.2d 338 (1950); Miller v. Department of Labor & Industries, 200 Wn. 674, 682-83, 94 P.2d 764 (1939).
>
> Miller, at 682-83. The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. Wendt v. Department of Labor & Industries, 18 Wn.App. 674, 682-83, 571 P.2d 229 (1977).[12]

Jordan v. Seattle, 30 Wash., 298, 304-305, 70 Pac. 743 (1902) established the same "aggravation" rule, in tort law. One is responsible to injuries to the sick, the weak and the infirm as much as to the strong and the healthy. This has been the law for over 110 years.

In employment discrimination cases, damages can be awarded where national origin discrimination "lights up" a pre-existing PTSD condition. Xieng v. Peoples National Bank, 63 Wn.App 572, 582, 821 P.2d 520, 526 (1991). There is nothing to

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[12] The court also commented on the question of whether a symptomatic pre-existing condition which was aggravated by work would prevent the worker from receiving benefits.

> Where a claimant establishes a disease-based disability arising naturally and proximately out of employment, we are inclined to view the "symptomatic-asymptomatic" issue in terms of whether segregation rules apply, rather than to perceive a bar to any award if a preexisting disease was symptomatic prior to work-related aggravation of that disease.
>
> Dennis at p. 476.

Actually, in a workers' compensation context, only occupational diseases have to "arise out of employment." For industrial injuries, it is sufficient that the injury occurred while the worker as within "the course of employment." Dennis at p 480-481.

suggest that a liberally construed LEOFF 2 law should not apply the same standard.

Workers' compensation law does not require that work conditions be the sole proximate cause of a disability. Wendt v. DLI, 18 Wn.App 674, 571 P.2d 229 (1977).[13] There is no reason LEOFF 2 firefighters should be governed by a sole cause standard.

F. LEOFF 1 Cases Have Interpreted "Line of Duty" Broadly

Allen v. Thurston County Fire Protection District No. 9, 68 Wn.App 1, 841 P.2d 1265 (1993) is a LEOFF 1 case where a fire chief had a heart attack at work. It was sufficient that it occurred at work, and no more need have been shown. He received a duty disability retirement. This case was cited in Woldrich, supra, as an example of a disability incurred in the line of duty.

In City of Pasco v. Napier, 109 Wn.2d 769, 755 P.2d 170 (1988), Mr. Napier was a fire fighter who was granted duty disability benefits for a claim based upon "recurring joint pain and extreme fatigue." Napier at p. 771.

[13] In this case, Mr. Shaw's employer had no position on the question of whether or not Mr Shaw's disability was incurred in the line of duty. See Exhibit 147.

In Newlun v. DRS, 53 Wn.App 809, 770 P.2d 1071 (1989), Mr. Newlun was a police officer who became addicted to cocaine while operating as an undercover officer. There was medical testimony that the acute stresses, the sensitivity, shame and embarrassment about his circumstances and the stigma attached, all resulted in him being unable to perform as a Spokane police officer. The court determined that Mr. Newland was mentally disabled and unable to carry out his duties.[14]

G. The Court Should Give Special Consideration To The Opinion Of An Attending Physician

A helpful line of cases, applied in workers' compensation, is that the decider of fact should give "special consideration" to the opinion of a claimant's attending physician. Hamilton v. DLI, 111 Wn.2d 569, 761 P.2d 618 (1988). That case upheld a jury instruction which directed the jury that "special consideration should be given to the opinion of the Plaintiff's attending physician."

The reasoning which supports the rule in workers' compensation is equally applicable to LEOFF disability cases. The

[14] There was discussion of the issue of withdrawal of contributions, which does not affect this case.

court explained the reasoning, behind the attending physician rule, as follows in Young v. DLI, 81 Wn.App 123, 128-129, 913 P.2d 402 (1996), as follows:

> Spalding v. Department of Labor & Indus., 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947) first gave special consideration to the attending or treating physician's testimony in workers' compensation cases. Recognizing that a hard and fast rule was not desirable, the court nevertheless found
>
> > that an attending physician, assuming of course that he shows himself to be qualified, who has attended a patient for a considerable period of time for the purpose of treatment, ... is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once.

The wisdom of the rule requiring that special consideration be given to the opinion of the attending physician is so great that, in Groff v. DLI, 65 Wn.2d 35, 395 P.2d 633 (1964), the Supreme Court held that a trier of fact who chose to accept the testimony of someone other than the attending physician, had to explain, in Findings of Fact, why they found that testimony preferable.

In Judd v. DLI, 63 Wn.App 471, 820 P.2d 62 (1991) the court said that special consideration extends to the testimony of

an attending psychologist or psychiatrist. In this case, Dr. Vlahakis was Mr. Shaw's attending physician and his opinion should be given special consideration.

H. Cases From Other Jurisdictions Support Mr. Shaw's Position.

In Employees' Retirement System of the City of Baltimore v. Dorsey, 430 Md.100, 59 A.3d 990 (2013) the City of Baltimore's retirement system required that disability be the "direct result of bodily injury through an accident independent of all other causes and independent of any preexisting physical or medical conditions, job-related or otherwise. . ." Dorsey at p. 106.[15]

Mr. Dorsey suffered a 25% impairment of his back and a 25% impairment of his arm due to an assault which had occurred in the line of duty. Mr. Dorsey also had an additional 15% pre-existing disability of his back. The court held that the law did not bar Mr. Dorsey from receiving line-of-duty benefits simply because his preexisting condition inflated the disability to a higher percentage than the required threshold. The courts made reference to workers' compensation cases which it found to be helpful in line-of-duty determinations. Dorsey at p. 117. The court

[15] Please note that RCW 41.26.470 has none of the qualifying verbiage that the Maryland court was faced with.

identified a Maryland rule holding that, if an accidental injury accelerated or aggravated an existing disease or infirmity, then the claimant is entitled to disability. Dorsey at p. 118.

In Re: PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain, 705 N.W.2d 576 (Minn.Ct.App. 2005) the Minnesota court held that line-of-duty benefits were payable to Mr. Brittain. Mr. Brittain had clashed with his new supervisor. Mr. Brittain was found occupationally disabled by a disability which was caused by his hostile work environment. His work environment caused his mental disability. Duty benefits were granted.

In Re: Application of Hildebrandt, 701 N.W.2d 293, (Minn. Ct. App. 2005) a 911 operator was disabled after she experienced a severe anxiety reaction and depression from responding to a 911 call. The stress which caused her disability was rooted in her reaction to the expectations of her supervisors. The court held that her disability arose within the meaning of "any act of duty" and she was granted benefits.

In Heaton v. Marin County Employees Retirement Bd, 63 Cal.App.3d 421, 133 Cal.Rptr. 809 (1976), Ms. Heaton felt she was given the "dirty work" to do and because of potential prisoner

violence, she had become very nervous. She also stated she had problems at home concerning her husband and children.

The Retirement Board argued that the statues required that the incapacity be caused solely by injury or disease arising out of employment. The Appellate court looked to workers' compensation statutes for guidance, noting the similarity of the service-connectedness language of the two statutes. The court held that applying the workers' compensation rule by analogy was appropriate.

The court found that employment need not be the sole or substantial cause of disability before an award can be made. The court recognized this construction avoided automatic rejection of psychiatric disorders, saying "thus, in every case (such as here) where the symptomatology is somewhat subjective, the expert would as a matter of course conclude that a contributing cause was a preexisting condition, family life, or employment conditions." Heaton at p. 430. Since this would cause denying benefits in almost all cases, the court held Ms. Heaton's disability was service connected.

In Hunter v. City of Tampa, 379 So.2d 426 (1980) the Florida District Court of Appeals rejected the argument that city

employment had to be the sole cause of a psychological condition. Evidence that a specific accident and its sequele either caused or aggravated a depressive condition requiring psychological treatment was sufficient proof that his disability was caused by his work.

In Schweitzer v. Codd, 63 A.D.2d 66, 406 N.Y.S.2d 820 (1978) the statute granted benefits for permanent and total disability "incurred in the line of duty." Schweitzer at p. 406 fn.1. The court held that evidence that duty incidents caused or aggravated disability was sufficient to grant line-of-duty benefits.

In Kelly v. Board of Trustees of the Police Pension Fund Article II, 47 A.D.2d 892, 367 N.Y.S.2d 32 (1975) the court held that if disability was causally related to an on-duty accident, Mr. Kelly was entitled to accident disability benefits, even though he had a pre-existing cervical condition.

In Board of Trustees v. Sistrunk, 310 So.2d 405 (1975) and Police Pension Board, City of Hollywood v. Gaines, 389 So.2d 677 (1980) the District Court of Appeals of Florida Third and Fourth Districts held that, even though a person had a pre-existing condition, if they would not have been disabled but for the on-duty

incident, then aggravation of a pre-existing physical condition was sufficient to award disability retirement benefits.

In Wade v. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E. 2d 1101, 315 Ill.Dec 772 (2007), the court found that an officer was entitled to line of duty benefits, and said:

> As appellate panels have observed, a disability pension may be based upon the line-of-duty aggravation of a preexisting physical condition. See Alm v. Lincolnshire Police Pension Board, 352 Ill.App.3d 595, 598, 287 Ill.Dec. 627, 816 N.E.2d 389 (2004); Barber v. Board of Trustees of Village of South Barrington Police Pension Fund, 256 Ill.App.3d 814, 818, 196 Ill.Dec. 511, 630 N.E.2d 446 (1993) ('There is no requirement that the duty-related incident be the originating or primary cause of the injury, although a sufficient nexus between the injury and the performance of the duty must exist').

I. DRS Was Not Justified In Creating A "Sole Cause" Rule

Having studied the statutes, WACs, Washington cases and cases from other jurisdictions, we can turn to the DRS Final Order in the case.

The concluding and most important paragraph of the DRS Final Order, reads as follows:

> 25. The definition of 'line of duty' in WAC 415-104-480(2), and the holding in Woldrich, together dictate that LEOFF retirement for mental disability in the line of duty be granted only upon a persuasive showing that a member's disabling condition arose naturally and proximately from performance of duties particular to LEOFF employment, that is, that performant of those required or particularly authorized duties was the sole cause of a particular condition.
>
> The Appellant does not supply clear countervailing authority by which the workers' compensation aggravation rule could be read into the Department's duty disability retirement rule. Since he bases his claim for duty disability retirement exclusively on application of the aggravation rule, his claim cannot be approved. (Emphasis supplied).[16] (AR 11).

DRS attempted to distance itself from the Final Order's Draconian language in its argument to the Superior Court. There, DRS invoked a new "symptomatic" vs. "worsening" distinction, even though the DRS Final Order did not utilize any such distinction.

DRS argued, before the Superior Court, that the DRS Administrative Decision "depends only on the rejection of the Aggravation Rule." (RP 1-16-15, p. 28). The DRS position is that by rejecting the multiple cause "Aggravation Rule" you need not

[16] It is worth noting that evidence was introduced that Mr. Shaw's depression (as opposed to PTSD) was solely caused by his duties. Infra p. 28.

adopt a "Sole Cause Rule." (RP 28, 1-16-15). This is logic chasing its tail.

In a further effort to distance DRS from the "Sole Cause" basis for its final decision, DRS argues that an asymptomatic allergy to strawberries which, due to a work exposure, causes a person to break out in hives and gasp for breath, has not caused the hives condition to worsen merely made it symptomatic. (RP 30, 1-16-15). This makes no sense, on its face. What if the gasping person was unable to breathe and died? Would DRS deny benefits on the theory the hives had not worsened, merely became symptomatic?

To add insult to injury, DRS next claims Mr. Shaw did not argue his childhood PTSD had worsened, only that it became "symptomatic." (RP 30, 1-16-15). DRS makes this argument notwithstanding DRS has determined Mr. Shaw's mental health condition has disabled him from LEOFF work. If his mental health did not worsen, how did it become disabling, after many years of service?

DRS then argued that if Mr. Shaw's pre-existing condition had worsened, DRS might have granted him duty disability benefits. (RP 31, 1-16-15).

In fact, Mr. Shaw's attending physician, Dr. Vlahakis, testified as follows:

> We call it a 'kindling phenomenon.' And I think that's what was going on with Frank, that he would have these incidents happen and each incident, then, lowered his threshold to react to the next incident. And so things that under other circumstances he might have been able to just deal with and kind of, you know, just brush it off, he was not able to do that because he had become so sensitized to it.
>
> And so each negative interaction with, let's say, the chief, the assistant chief, the people that were there, further sensitized him and increased the likelihood that he would respond more strongly to the next one. (Vlahakis Test. p. 194, lines 12-23).

In short, Mr. Shaw's mental condition not only became symptomatic, but each new event made it worse.

Dr. Vlahakis also testified that the allegations that Mr. Shaw was alleged to have engaged in inappropriate sexual behavior at work "led to depression and his having to be treated" for depression. (AR 203-204). In short, those allegations caused depression.

Therefore, there is testimony in the record that Mr. Shaw's PTSD became <u>worse</u> as a result of job duties and evidence his depression was <u>caused</u> by his job duties.

Even under the DRS convoluted, post-hearing argument, Mr. Shaw qualifies for benefits. However, you should make no mistake the "Sole Cause Rule" was the one used to decide this case.

After Mr. Shaw's Final Order was entered, DRS issued a Final Order in another case, which said:

> 'Line of Duty'
>
> In line with the discussion and conclusions in Appeal of Shaw, DRS Docket No. 11-L-002 (December 9, 2013), in LEOFF Plan 2 an applicant's claimed disability is 'incurred ... in the line of duty' for duty disability benefits where performance of required or particularly authorized duties was the sole cause of a condition shown to be disabling. (Emphasis supplied). In re the Appeal of Mark Novak, for line-of-duty disability retirement (Washington State Department of Retirement Systems, Docket No. 11-L-003, January 6, 2015).[17]

The "symptomatic" vs. "worsened" distinction was not used in the Shaw Final Order and should not be applied here. If it were applied, Mr. Shaw would meet the test. The "Sole Cause" Doctrine, which is what was actually used by DRS, must be rejected.

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[17] Because the Final Order in that case is 57 pages long, we have attached, as Exhibit 2, a true and correct copy of only the first page, page 51, where the language of the Conclusion of Law may be found, and the last page.

J. The Factual Record Requires A Duty Finding For Mr. Shaw.

Mr. Elliott was an Assistant Chief of the Ellensburg Fire Department[18] which he described as follows:

> Q. Let me ask you if you describe the Department in the following words: 'Poor communication for sure in every area of the organization both ways, all ways, a very negative culture in the organization where, you know, it is all in perception whether you fit in or you didn't fit in, you know, you were sort of a castaway and certain people were selected for removal and those types of things. Very negative culture.' Are those your words?
> A. I believe so. (Hearing transcript, Day, p. 150, l. 15-23, AR 0990).

Obviously the job was stressful for everyone. For Mr. Shaw, his work was often traumatic. Mr. Shaw described an incident where the ambulance was not properly prepared when he came on shift and he became very animated and angry. He asked to be allowed to go home sick, and then left on his own. (Hearing transcript, Day 1, p. 31, l. 1-25, AR 0870). He described himself as being "sick, anguished, emotionally, physically drained. I was awash with confusion." (Hearing transcript, Day 1, p. 32, l. 2-3, AR 0872). He sped off and made it across the street where he sobbed uncontrollably in his truck for 10 to 12 minutes. (Hearing transcript,

[18] Hearing Transcript, Day 1, p. 26, l 10-11, AR 0866

Day 1, p. 32, l. 8-12, AR 0872). The incident with the ambulance was around August of 2005. (Hearing transcript, Day 1, p. 32, l. 21-25, AR 0872).

In the course of his job he was exposed to a variety of startling and traumatic situations. He described them as follows:

> All manner of injury, a simple thumb stuck in a door at the grocery store to a young baby thrown in my hands that had been run over by a car, to when the fire service as a whole, nationwide, came out with what's called the START, Simple Triage and Rapid Transport assessment system. I had to determine whether the patients in a multiple patient accident were viable and declare them dead and walk away whether they were potentially breathing or had a heartbeat because there were others that needed my assistance. (Hearing transcript, Day 1, p. 39, l. 16-24, AR 0879).

Accusations of inappropriate contact that were made against Mr. Shaw had an immediate effect. He described it as follows:

> Q. When you were accused of the inappropriate contact, did that bring to mind your own experience?
> A. Yes, it did. That night, after the accusations, the remembrances and the dream cycles of that period of time started again. (Hearing transcript, Day 1, p. 28, l. 24 to p. 29, l. 3, AR 0868).

Dr. Fischer was hired by DRS and diagnosed Mr. Shaw with a personality disorder and recurrent episodes of major depression. (Hearing transcript, Day 2, p. 229, l. 12-14, AR 1247). In fact, it appears that Dr. Fischer formed her conclusion that Mr. Shaw had a personality disorder and then looked for support in the records she had been supplied:

> Q. Okay. So now let's turn to Mr. Shaw. On what did you base your conclusions that Mr. Shaw had a personality disorder NOS, not otherwise specified?
> A. Well, I went through the diagnostic criteria of the personality disorder and looked for events that had occurred in the record which supported that. (Hearing transcript, Day 2, p. 234, l. 7-12, AR 1252).

Of course if anyone's entire life were laid out, a psychiatrist could go through that life and find support for a personality disorder. There are bound to have been times when each of us has bristled at authority, been angry, been moody, been dissatisfied with co-workers who we did not think were making full effort, where we did not get along with our spouse or in-laws, etc.

There is a long list of reasons why Dr. Fischer's testimony should not be given any weight. She never personally saw Mr. Shaw, so she could not assess his general appearance; assess the characteristics of his speech; assess his mood and

affect, including stability, range and congruence, and appropriateness of affect; assess whether his thought processes were coherent; assess whether there are recurrent or persistent themes in his thought processes; assess his level of insight, judgment, and capacity for abstract reasoning; assess whether the symptoms he described were being minimized or exaggerated; assess whether he appeared to provide accurate information; assess whether particular questions evoked hesitation or signs of discomfort; assess whether he was able to communicate about emotional issues; or assess how he responded to comments and behaviors. Dr. Fischer agreed these were all real limitations. (Hearing transcript, Day 2, p. 267 l. 3 to p. 268 l. 15, AR 1285-1286).

Dr. Fischer does not have hospital privileges. (Hearing transcript, Day 2, p. 273, l. 13-16, AR 1291). Dr. Fischer had never spoken with any of Mr. Shaw's coworkers or superiors, his wife, any member of his family, or to Dr. Daugherty or Dr. Vlahakis (Hearing transcript, Day 2, p. 268 l. 21 to p. 269, l. 4, AR 1286-1287).

Dr. Fischer did not make any diagnoses under DSM-IV[19] Axes III, IV, and V, notwithstanding that the use of a multi-axial assessment is thought to be helpful for a variety of reasons set forth in the DSM-IV, as she conceded. (Hearing transcript, Day 2, p. 269, l. 10-12, AR 1287). She did not prepare a report of her evaluation although she generally does, because she was asked by DRS' attorney to just testify. (Hearing transcript, Day 2, p. 271, l. 6-12, AR 1289).

Her theory that Mr. Shaw's work was not a factor in his disability, is not supported by the fact that he felt so much better when he quit working at the fire department, and that after he left the department, his wife said she "had her husband back." (Hearing transcript, Day 1, p.69, l. 19-21, AR 0859).

Dr. Fischer's testimony also has a fatal problem. She testified:

> Q. Now, your opinion, as I understand it, is that Mr. Shaw had depression but his depression was not disabling; is that correct?
> A. That's true.
> Q. Mr. Shaw had a personality disorder but the personality disorder was not disabling; is that correct?
> A. That's true.

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[19] Diagnostic and Statistical Manual of Mental Disorders (4th Ed.) produced by the American Psychiatric Association

> Q. Either one of those conditions or both taken together, in your opinion, did not disable him from performing his duties as a firefighter; is that correct?
> A. That's true. (Hearing transcript, Day 2, p. 273, l. 2-12, AR 1291).

If the two conditions she diagnosed, personality disorder and depression, did not disable Mr. Shaw from performing as a firefighter/paramedic, then some psychiatric condition she did not diagnose must have done so. The DRS grant of non-duty benefits established that he is mentally disabled from performing his duties as a firefighter. That is a given.

Dr. Fischer also showed a remarkable insensitivity and lack of insight when she construed a letter to mean that Mr. Shaw did not feel the actual child abuse was traumatic, only that his mother's not believing his report of it was traumatic. (Hearing transcript, Day 2, p.261, l. 15 to p.262 l. 7, AR 1279). This is convenient, because she concedes moments later that the sexual abuse itself would have risen to the criteria for post traumatic stress disorder, but Mr. Shaw's not being believed would not meet that criteria. (Hearing transcript, Day 2, p.262, l. 8-12, AR 1280).

Mr. Shaw was physically sexually abused as a child. When he told his mother of this, she blamed him for it and said it was his fault. (Hearing Transcript, Day 2, p. 188, AR 1206).

It is important to note that "For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury." DSM-IV, Posttraumatic Stress Disorder, Diagnostic Features, p. 424. Those who have been subject to childhood sexual abuse, can also have "impaired affect modulation; self-destructive and impulsive behavior; ... hostility; ... feeling constantly threatened; impaired relationships with others ..." etc. DSM-IV, Posttraumatic Stress Disorder, p. 425. But, of course, it is dangerous for a lay person to pick through the DSM-IV, in an attempt to make diagnoses that require medical training and experience.

In this case, both Dr. Daugherty and Dr. Vlahakis have medical training and experience and have made remarkably similar diagnoses. Dr. Vlahakis has been a practicing psychiatrist for 34 years. (Hearing transcript, Day 2, p. 183, l. 7-9, AR 1201). He is Board certified and has hospital privileges. (Hearing transcript, Day 2, p. 184, l. 4-11, AR 1202). He has been the president of the Yakima County Medical Society; the board of

trustees of the Washington State Medical Association; board member and president of the Washington Psychiatric Association; and a delegate from Washington to the National Assembly of the American Psychiatric Association. (Hearing transcript, Day 2, p. 184, l.16-22, AR 1202).

Dr. Vlahakis has been treating Mr. Shaw since June 21, 2005, as his attending physician, and has met with him on many occasions, and met with him and his wife on occasion. (Hearing transcript, Day 2, p. 185, l. 10-19, AR 1203). He testified a central component of a psychiatric evaluation is an interview with the patient, and that "...I'm not sure how one could do a psychiatric evaluation on someone if they've never seen them." (Hearing transcript, Day 2, p. 186, l. 1-6, AR 1204). Dr. Vlahakis does not feel Mr. Shaw suffers from a personality disorder. (Hearing transcript, Day 2, p. 186, l. 25 to p. 187, l. 2, AR 1204).

He has diagnosed Mr. Shaw as having recurrent major depression, and post-traumatic stress disorder. (Hearing transcript, Day 2, p. 187, l. 7-9, AR 1205). Dr. Vlahakis testified:

> . . . That he was predisposed to have these issues as we've talked about, things like anger and trust and so forth and depression, but that there were continuing triggers during his line of employment that really caused this to flare up.

> And that's the connection that I make with his disability being work-related. (Hearing transcript, Day 2, p. 192, l. 20-25, AR 1209).

He also described a very significant concept which has direct application to Mr. Shaw's situation.

> Well, I think the primary thing was that the issues that were most important to him - - and again, I'll calm (sic) [come] back to this issue of basic trust and who can you trust - - were const- - - not constantly, that's not fair - - were periodically inflamed by what was going on in the work setting.
>
> The other thing that happens is a phenomenon that we call "kindling" and not to be too technical about it, it comes out of patients with epilepsy who have seizures. And we know well that if that person has a seizure, it lowers the threshold for them to have another seizure; in other words, it increases the likelihood of further seizures. We call it a "kindling phenomenon." And I think that's what was going on with Frank, that he would have these incidents happen and each incident, then, lowered his threshold to react to the next incident. And so things that under other circumstances he might have been able to just deal with and kind of, you know, just brush it off, he was not able to do that because he had become so sensitized to it.
>
> And so each negative interaction with, let's say, the chief, the assistant chief, the people that were there, further sensitized him and increased the likelihood that he would respond more strongly to the next one. (Hearing transcript, Day 2, p. 194, l. 2-23, AR 1212).

Dr. Roland Dougherty has been a licensed psychologist in Washington since 1985. (Hearing transcript, Day 2, p. 205, l. 18-19, AR 1223). He has been an instructor in psychology for several years. (Hearing transcript, Day 2, p. 206, l. 11-14, AR 1224). Mr. Shaw was first referred to him by the State of Washington for a Social Security Disability evaluation. (Hearing transcript, Day 2, p. 206, l. 19-23, AR 1224). When he saw Mr. Shaw on November 30, 2009, he diagnosed him as having an adjustment disorder with depression and post-traumatic stress disorder in partial remission. (Hearing transcript, Day 2, p. 207, l. 9-11, AR 1225). He also thought there were some mild traits that were affecting his perceptions and abilities. (Hearing transcript, Day 2, p. 207, l. 13-16, AR 1225).

When asked whether he values personally seeing a person he is asked to offer an opinion about, Dr. Dougherty said the following:

> Well, I think it's very important in the sense that if one is asked to understand a person. What goes on in a clinical interview very often gives information about personality functioning, level of distress, and symptomatology that may not be evident in a written report or records review or something like that in which a person has not been seen and understood.

> And it's just a standard part of what psychologists are asked to do if they're forming an opinion about a person, is to gather as much information about the person as possible from multiple sources. And I would consider seeing the patient as being the most important source of information.
>
> Very often a records review or cursory report without seeing a person may miss something important. I've seen people who do poorly in terms of the records but look much better upon clinical interview and visa-versa. (Hearing transcript, Day 2, p. 208, l. 21 to p. 209, l. 11, AR 1227).

Dr. Dougherty's opinion on the line of duty question was as follows:

> I have in this sense: I believe that it is quite possible that, more than he realizes, the sorts of stress and situations he had to handle as a first responder may have had more effect on him than he may have recognized.
>
> First responders and veterans often underreport their symptoms, partly for cultural factors. It's not well accepted that you talk about these things because it makes you look weak in the face of other men and that sort of thing.
>
> And partly because one has to function well and so when - - a first responder might often ignore symptoms or not understand their basis and try to pass them off in some kind of fashion.
>
> The - - at another level, the sorts of negative interactional patterns that seemed to have developed over time in the Department, from my understanding of what's gone on, probably

> replayed in some ways symbolically the sorts of betrayal and distress that Mr. Shaw experienced at the hands of the men who sexually abused him and I must say, also his mother who disbelieved his reports.
>
> And I believe that those were important factors that probably, like we might say, broke the camel's back in terms of adding to an underlying vulnerability that was already present. (Hearing transcript, Day 2, p. 213, l. 5 to p. 214, l.1, AR 1231).

Based on this record, the only reasonable conclusion is to accept the opinions expressed by Drs. Dougherty and Vlahakis and find that Mr. Shaw's psychiatric condition was not a personality disorder, but depression and PTSD caused or aggravated by his work so that he became disabled in the line of duty within the meaning of RCW 41.26.470(7).

K. Mr. Shaw Is Entitled To Attorney's Fees And Costs.

When Mr. Shaw is granted his duty-disability benefits by this court, he should also receive his statutory attorney's fees pursuant to RCW 49.48.030, which provides:

> In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of

> recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

On the issue of attorney's fees, we feel that the binding precedent is to be found in Bates v. City of Richland, 112 Wn.App 919, 51 P.3d 816 (Div. III 2002) which determined that recovery of statutory disability benefits qualifies as "wages" within the definition of RCW 49.48.030.

Division II has accepted the reasoning of the Bates court as it applied to Washington State Patrol disability benefits. See Merino v. State, 179 Wn.App 889, 320 P.3d 153 (Div. II 2014). In this case, DRS should be considered the employer for pension purposes. DRS compels both Mr. Shaw, the employee, and the state to make contributions, held by it in trust, to provide LEOFF 2 benefits. RCW 41.26.725.

If an additional or different basis is needed, RCW 4.84.340 and RCW 4.84.350 would also allow an award of attorney's fees. RCW 4.84.350 applies to Judicial review of agency

action and allows awarding fees, expenses and attorney's fees. Gerow v. Washington State Gambling Comm., 181 Wn.App. 229, 324 P.3d 800 (2014).

DATED this 12th day of May, 2015.

WILLIAMS, WYCKOFF &
OSTRANDER, PLLC

Wayne L. Williams, WSBA# 4145
Attorney for Appellant

CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify that a true and correct copy of Brief of Appellant, was mailed and emailed on this date to each of the following:

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DATED this 12th day of May, 2015.

FILED
COURT OF APPEALS
DIVISION II
2015 MAY 13 AM 11:41
STATE OF WASHINGTON
BY DEPUTY

Julie Hatcher

RCW 41.26.470

Earned disability allowance — Cancellation of allowance — Reentry — Receipt of service credit while disabled — Conditions — Disposition upon death of recipient — Disabled in the line of duty — Total disability — Reimbursement for certain payments.

(1) A member of the retirement system who becomes totally incapacitated for continued employment by an employer as determined by the director shall be eligible to receive an allowance under the provisions of RCW 41.26.410 through 41.26.550. Such member shall receive a monthly disability allowance computed as provided for in RCW 41.26.420 and shall have such allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three, except under subsection (7) of this section.

(2) Any member who receives an allowance under the provisions of this section shall be subject to such comprehensive medical examinations as required by the department. If such medical examinations reveal that such a member has recovered from the incapacitating disability and the member is no longer entitled to benefits under Title 51 RCW, the retirement allowance shall be canceled and the member shall be restored to duty in the same civil service rank, if any, held by the member at the time of retirement or, if unable to perform the duties of the rank, then, at the member's request, in such other like or lesser rank as may be or become open and available, the duties of which the member is then able to perform. In no event shall a member previously drawing a disability allowance be returned or be restored to duty at a salary or rate of pay less than the current salary attached to the rank or position held by the member at the date of the retirement for disability. If the department determines that the member is able to return to service, the member is entitled to notice and a hearing. Both the notice and the hearing shall comply with the requirements of chapter 34.05 RCW, the administrative procedure act.

(3) Those members subject to this chapter who became disabled in the line of duty on or after July 23, 1989, and who receive benefits under RCW 41.04.500 through 41.04.530 or similar benefits under RCW 41.04.535 shall receive or continue to receive service credit subject to the following:

(a) No member may receive more than one month's service credit in a calendar month.

(b) No service credit under this section may be allowed after a member separates or is separated without leave of absence.

(c) Employer contributions shall be paid by the employer at the rate in effect for the period of the service credited.

(d) Employee contributions shall be collected by the employer and paid to the department at the rate in effect for the period of service credited.

(e) State contributions shall be as provided in RCW 41.45.060 and 41.45.067.

(f) Contributions shall be based on the regular compensation which the member would have received had the disability not occurred.

(g) The service and compensation credit under this section shall be granted for a period not to exceed six consecutive months.

(h) Should the legislature revoke the service credit authorized under this section or repeal this section, no affected employee is entitled to receive the credit as a matter of contractual right.

(4)(a) If the recipient of a monthly retirement allowance under this section dies before the total of the

retirement allowance paid to the recipient equals the amount of the accumulated contributions at the date of retirement, then the balance shall be paid to the member's estate, or such person or persons, trust, or organization as the recipient has nominated by written designation duly executed and filed with the director, or, if there is no such designated person or persons still living at the time of the recipient's death, then to the surviving spouse or domestic partner, or, if there is neither such designated person or persons still living at the time of his or her death nor a surviving spouse or domestic partner, then to his or her legal representative.

(b) If a recipient of a monthly retirement allowance under this section died before April 27, 1989, and before the total of the retirement allowance paid to the recipient equaled the amount of his or her accumulated contributions at the date of retirement, then the department shall pay the balance of the accumulated contributions to the member's surviving spouse or, if there is no surviving spouse, then in equal shares to the member's children. If there is no surviving spouse or children, the department shall retain the contributions.

(5) Should the disability retirement allowance of any disability beneficiary be canceled for any cause other than reentrance into service or retirement for service, he or she shall be paid the excess, if any, of the accumulated contributions at the time of retirement over all payments made on his or her behalf under this chapter.

(6) A member who becomes disabled in the line of duty, and who ceases to be an employee of an employer except by service or disability retirement, may request a refund of one hundred fifty percent of the member's accumulated contributions. Any accumulated contributions attributable to restorations made under RCW 41.50.165(2) shall be refunded at one hundred percent. A person in receipt of this benefit is a retiree.

(7) A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.

(8) A member who became disabled in the line of duty before January 1, 2001, and is receiving an allowance under RCW 41.26.430 or subsection (1) of this section shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five, and shall have the allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three. An additional benefit shall not result in a total monthly benefit greater than that provided in subsection (1) of this section.

(9) A member who is totally disabled in the line of duty is entitled to receive a retirement allowance equal to seventy percent of the member's final average salary. The allowance provided under this subsection shall be offset by:

(a) Temporary disability wage-replacement benefits or permanent total disability benefits provided to the member under Title 51 RCW; and

(b) Federal social security disability benefits, if any;

so that such an allowance does not result in the member receiving combined benefits that exceed one hundred percent of the member's final average salary. However, the offsets shall not in any case reduce the allowance provided under this subsection below the member's accrued retirement allowance.

A member is considered totally disabled if he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months. Substantial gainful activity is defined as average earnings in excess of eight hundred sixty dollars a month in 2006 adjusted annually as determined by the director based on federal social security disability standards. The department may require a person in receipt of an

allowance under this subsection to provide any financial records that are necessary to determine continued eligibility for such an allowance. A person in receipt of an allowance under this subsection whose earnings exceed the threshold for substantial gainful activity shall have their benefit converted to a line-of-duty disability retirement allowance as provided in subsection (7) of this section.

Any person in receipt of an allowance under the provisions of this section is subject to comprehensive medical examinations as may be required by the department under subsection (2) of this section in order to determine continued eligibility for such an allowance.

(10)(a) In addition to the retirement allowance provided in subsection (9) of this section, the retirement allowance of a member who is totally disabled in the line of duty shall include reimbursement for any payments made by the member after June 10, 2010, for premiums on employer-provided medical insurance, insurance authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA), medicare part A (hospital insurance), and medicare part B (medical insurance). A member who is entitled to medicare must enroll and maintain enrollment in both medicare part A and medicare part B in order to remain eligible for the reimbursement provided in this subsection. The legislature reserves the right to amend or repeal the benefits provided in this subsection in the future and no member or beneficiary has a contractual right to receive any distribution not granted prior to that time.

(b) The retirement allowance of a member who is not eligible for reimbursement provided in (a) of this subsection shall include reimbursement for any payments made after June 30, 2013, for premiums on other medical insurance. However, in no instance shall the reimbursement exceed the amount reimbursed for premiums authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA).

[2013 c 287 § 2; 2010 c 259 § 2. Prior: 2009 c 523 § 6; 2009 c 95 § 1; 2006 c 39 § 1; 2005 c 451 § 1; 2004 c 4 § 1; 2001 c 261 § 2; 2000 c 247 § 1104; 1999 c 135 § 1; 1995 c 144 § 18; 1993 c 517 § 4; 1990 c 249 § 19; prior: 1989 c 191 § 1; 1989 c 88 § 1; 1982 c 12 § 2; 1981 c 294 § 9; 1977 ex.s. c 294 § 8.]

Notes:

Short title -- 2013 c 287: "This act may be known as the Wynn Loiland act." [2013 c 287 § 1.]

Short title -- 2010 c 259: "This act may be known as the Jason McKissack act." [2010 c 259 § 1.]

Effective date -- 2006 c 39: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 14, 2006]." [2006 c 39 § 3.]

Effective date -- 2005 c 451: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [2005 c 451 § 2.]

Application -- 2004 c 4 § 1: "This act applies to all members, subject to section 1 of this act, who become or became disabled in the line of duty on or after January 1, 2001." [2004 c 4 § 2.]

Effective date -- 2001 c 261 § 2: "Section 2 of this act takes effect March 1, 2002." [2001 c 261 § 5.]

Effective dates -- Subchapter headings not law -- 2000 c 247: See RCW 41.40.931 and 41.40.932.

Application -- 1999 c 135 § 1: "Section 1 of this act applies to any member who received a disability retirement allowance on or after February 1, 1990." [1999 c 135 § 2.]

Purpose -- 1993 c 517: See note following RCW 41.26.420.

Findings -- 1990 c 249: See note following RCW 2.10.146.

Severability -- 1981 c 294: See note following RCW 41.26.115.

Legislative direction and placement -- Section headings -- 1977 ex.s. c 294: See notes following RCW 41.26.410.

Disability leave supplement for law enforcement officers and firefighters: RCW 41.04.500 through 41.04.550.

CERTIFICATION OF MAILING

I hereby certify that I have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy thereof, properly addressed and postage prepaid. Dated at Olympia, Washington, this 8th day of January, 2015

Renee Scott, Appeals Coordinator
Department of Retirement Systems
Olympia, Washington

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
BEFORE THE PRESIDING OFFICER

In re the Appeal of	)	Docket No. 11-L-003
	)	
MARK NOVAK	)	
	)	**FINAL ORDER**
for line-of-duty disability retirement (LEOFF Plan 2)	)	

STATEMENT OF THE CASE

Appellant Mark Novak, formerly a member of the Washington Law Enforcement Officers' and Firefighters' Retirement System (LEOFF), Plan 2, requested a hearing before the Department of Retirement Systems (the Department) to contest its denial of his application for retirement for disability incurred in the line of duty.

A hearing was held in Olympia on February 14 and 15, 2013, at which Mr. Novak appeared and testified. Attorney Wayne Williams represented Mr. Novak. Assistant Attorney General Sarah Blocki represented the Department.

ISSUE

Whether Mr. Novak is eligible for retirement for disability in the line of duty.

RESULT

Mr. Novak has not shown that he is eligible for duty disability retirement.

FINDINGS OF FACT

DRS and LEOFF

1. The Washington State Department of Retirement Systems is the agency responsible for administering the statewide Law Enforcement Officers' and Firefighters'

EXHIBIT 2

"Line of duty"

22. In line with the discussion and conclusions in *Appeal of Shaw*, DRS Docket No. 11-L-002 (December 9, 2013), in LEOFF Plan 2 an applicant's claimed disability is "incurred . . . in the line of duty" for duty disability benefits where performance of required or particularly authorized duties was the sole cause of a condition shown to be disabling. In his 2009 medical report Dr. Langer advised the Department of his opinion that Mr. Novak experienced significant anxiety, dysthymia and elements of post-traumatic stress disorder as the direct result of a critical incident, the Harding Road fire. He pressed this view also in his 2010 addenda, that the psychological conditions that he diagnosed in Mr. Novak were the result of a single incident in which Mr. Novak suffered a psychological injury of a traumatic nature from which he developed symptoms approaching, but not quite meeting, the criteria for post-traumatic stress disorder. The elements he apparently meant were detailed in his 2010 addenda as exposure to "a traumatic event in which he was confronted with a threat to his physical integrity and others for whom he was responsible", thereafter "[having] recurrent and distressing recollections of the event, and began avoiding activities, places and people which reminded him of the traumatic event.", with symptoms of difficulty with sleep, irritability, difficulty concentrating and some hypervigilance.

The undersigned is not able to credit his theory for the following reasons.

23. *Reliability of source information* The undersigned considers Dr. Langer's factual description of Mr. Novak's experiences unreliable. Dr. Langer was asked to render a professional opinion of Mr. Novak's mental status for a disability retirement claim some seven years after the last time he had seen Mr. Novak for weekly psychotherapy. He acknowledged that he could not rely on his own memory, and relied on his session notes in his testimony. For this record, Dr. Langer's treatment records with respect to Mr. Novak are his clinical notes and the health care provider forms he completed between late 2000 and late 2003, which were not developed to support a LEOFF disability claim. Dr. Langer has not identified other records that he consulted in forming his opinion. It is assumed that any information he provides now comes from either the treatment records (Mr. Novak's account of the Harding Road fire given in late 2002) or Mr. Novak's more current relation of his experience, in three meetings between May 2009 and February 2013.

For a retrospective mental disability claim, the undersigned considers records developed at the time disability is claimed (in this case the crucial date would be August 1, 2002, when Mr Novak was terminated from his Fire Department employment) more reliable than later-related memories. This is particularly true here where the record indicates that Mr. Novak is not a trustworthy relator. The record contains several examples of his inaccurate relation of events and sequence, others' observations of confusion in his communication, and Dr.

within the knowledge of Mr. Novak and Dr. Langer, neither of whom addressed it.

35. In deciding claims for duty disability retirement, especially for disability claimed to be due to mental conditions where objective physical findings are seldom available, the Department must assess as objectively as possible both the nature and incapacitating effect of the claimed disability and its origin in the performance of the duties of a LEOFF eligible position. It should consider the opinion of a treating psychologist in the context of all the information it can obtain about the applicant's work behaviors and performance, other disinterested professional opinion, and an applicant's experiences and activities outside of his LEOFF duties. When all the information available here is considered together, it must be concluded that Mr. Novak has not shown that as of August 1, 2002, he was disabled, or totally incapacitated for further Fire Department employment, by his reaction to a single incident that occurred in that employment.

ORDER

The Appellant's claim for retirement for disability in the line of duty is denied.

Done this 6th day of January, 2015.

ELLEN G. ANDERSON
Presiding Officer
Department of Retirement Systems

Notice of Further Appeal Rights

Reconsideration: Any party to this appeal may ask the DRS Presiding Officer to reconsider this Final Order, but must do so promptly. The party must file a petition for reconsideration within ten days of the mailing date in the certification at the top of this Order The ten-day time limit is strictly observed; DRS must **receive** the petition within that time. RCW 34.05.470, 34.05.010(6)

A petition for reconsideration must state specific reasons why the Final Order should be changed, and must be addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380.

Judicial Review: A party may request judicial (Superior Court) review of this Final Order. A petition for judicial review must be filed within 30 days of the Final Order mailing date. ***Any party seeking Superior Court review should carefully read and comply with the requirements for judicial review in the state Administrative Procedure Act (chapter 34.05 RCW).*** Petitions for judicial review go directly to the Superior Court; it is not necessary to request DRS reconsideration. RCW 34.05.470(5), 34.05.542.