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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 47166-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

FRANK SHAW,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

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REPLY BRIEF OF APPELLANT

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## 1. Reversal Is Required

Let us begin with the obvious. The Department of Retirement Systems (DRS) has admitted its Final Order must be reversed.

Mr. Shaw filed his Petition for Review of DRS' Final Order with the Thurston County Superior Court on December 17, 2013. (CP 5-19) Now, in July of 2015, DRS agrees with Mr. Shaw that a LEOFF 2 member's activities in conjunction with employment activities need not be the sole cause of his disability. Brief of Respondent Department p.1. Clearly this matter must be remanded. The question which remains is what form should that remand take. We urge you to not only reverse the erroneous application of the law, but also direct DRS to grant Mr. Shaw a duty disability retirement.

DRS denied Mr. Shaw's claim for duty disability, after reconsideration, on January 31, 2011. (Appeal Record 003)<sup>1</sup> Mr. Shaw appealed that decision to DRS' hearing process on March 31, 2011. (AR 003) After hearings, DRS and Mr. Shaw filed their last post-hearing briefs with the Presiding Officer on November 2, 2012. (AR 0131-0155 and 0156-0159) The Presiding Officer

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<sup>1</sup> Hereinafter AR.

considered the matter for thirteen months before entering the Final Order. (AR 0012) DRS is arguing that after considering the case for over a year, the Presiding Officer never considered the facts.

2. DRS Did Not Ask for Cross-Review of the Superior Court Denial of Bifurcation.

DRS filed a Motion for Order Bifurcating Judicial Review Proceeding with the Superior Court on September 13, 2014. (CP 28-45) In that Motion, DRS said “The Department found that his claim for duty disability was predicated on a pre-existing condition, but that, as a matter of law, a pre-existing condition could never form the basis of a LEOFF duty disability.” (Emphasis in original.) (CP 28) Nowhere did DRS suggest that it agreed with Mr. Shaw that the Presiding Officer had made an error of law and DRS continued to defend the “sole cause” ruling through the Superior Court.

DRS argued that there should be one hearing to determine whether a pre-existing condition can form the basis for a LEOFF 2 disability. (CP 29) DRS argued that, if the Superior Court rejected the “sole cause” or “aggravation” rule, it would have no choice but to remand the matter to DRS to “complete its review and decide the remaining issues.” (CP 36)

Mr. Shaw argued that the Superior Court could and should review all issues, legal and factual, reverse DRS' Final Order and remand directing DRS to grant duty disability benefits. (CP 46-62)

The Superior Court denied DRS' motion. (CP 74) DRS did not appeal or seek cross-review of that order. RAP 5.1(d) and RAP 5.2(f). Davis v. Altose, 35 Wn.2d 807, 215 P.2d 705 (1950); State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011). Absent such an appeal, DRS should not now be heard to argue this matter must be bifurcated and that this case must be remanded to DRS to "complete its review and decide the remaining issues." That bridge was already crossed.

### 3. Mr. Shaw Is Entitled To A Final Decision In His Favor.

Even though the Superior Court denied DRS' motion, DRS is essentially arguing that its Presiding Officer, having considered the matter for more than a year, violated the law governing administrative hearings. DRS wants another bite of the judicial apple.

The document appealed is designated on its first page as a "Final Order". Conclusion of Law No. 3 reads as follows:

This proceeding is conducted under the Washington Administrative Procedure Act (WAPA). The Presiding Officer enters this Final Order for DRS, as the Director's designee. (CAR 0004)

In this case, the Presiding Officer was designated pursuant to WAC 415-08-025.

RCW 34.05.461 governs final orders entered in administrative proceedings. Subsection three of that statute provides:

Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. (Emphasis supplied)

DRS has adopted WAC 415-08-010 which provides as follows:

This chapter governs the procedure the department follows in conducting adjudicative proceedings under chapter 34.05 RCW. The department adopts the model rules of procedure contained in chapter 10-08 WAC to the extent that those provisions are not contrary to the provisions of this chapter. These rules shall govern all adjudicative proceedings before the department.

WAC 10-08-210 provides:

Every decision and order, whether initial or final, shall:

- (1) Be correctly captioned as to the name of the agency and name of the proceeding;
- (2) Designate all parties and representatives participating in the proceeding;
- (3) Contain appropriate numbered findings of fact meeting the requirements in RCW 34.05.461;
- (4) Contain appropriate numbered conclusions of law, including citations of statutes and rules relied upon;
- (5) Contain an initial or final order disposing of all contested issues;
- (6) Contain a statement describing the available post-hearing remedies. (Emphasis supplied)

DRS argues that the Presiding Officer violated the requirements of the statute, the DRS rule, and the general rule regarding adjudicative proceedings, to issue a final order that does not decide all contested issues. In fact, DRS is arguing that, if this court reverses the Final Order, it has no choice but to send the matter back to DRS to do its duty to enter an order containing all the required findings of fact.

The Final Order in this case is not a model of clarity. However, since the law compelled the Presiding Officer to decide all questions, then it becomes clear the Presiding Officer had obviously found Mr. Shaw's admitted disability was caused by actions or activities occurring in connection with his employment. Mr. Shaw's pre-existing condition of post-traumatic stress disorder and/or depression caused by his early life experiences set him up to develop a disabling psychological condition as a result of the work actions or activities he experienced with the Fire Department. See Conclusion No. 21. (AR 009-0010)

The Presiding Officer then finds that in order to qualify for LEOFF 2 Line of Duty Disability Benefits, Mr. Shaw must show that performance of required or particularly authorized duties was the sole cause of a particular disabling condition. (Emphasis supplied).

In short, if all the necessary Findings of Fact and Conclusions of Law are contained in the Final Order, the Presiding Officer must be understood to have determined that Mr. Shaw had demonstrated his disability was the result of the effect of his duty activities on his preexisting mental condition. But because those activities, were not the "sole" cause, she determined he had not

met his burden of proof. If the "sole cause" test does not apply, then the Final Order must be reversed and the matter remanded, with direction to find Mr. Shaw entitled to duty disability benefits.

We believe this case has gone on long enough, and it is time for the court to finally decide whether Mr. Shaw's disability was "incurred in the line of duty."

#### 4. Three Findings Bind DRS.

DRS describes actions taken by the LEOFF Plan Administrator and a DRS Petitions Examiner. Even though those persons made the wrong decision, perhaps they can be excused since they did not have all the evidence and testimony which was developed in the course of the hearings. However, the Presiding Officer had no such excuse.

Bear in mind that, as DRS concedes, and the Presiding Officer found, DRS had previously determined that Mr. Shaw had:

- 1) Incurred a mental disability;
- 2) Became totally incapacitated for continued employment in a LEOFF eligible position; and
- 3) Separated from his LEOFF-eligible position due to the disability."

(AR 005-006, Brief of Respondent DRS p.5)

5. DRS' Own Rule Requires A Ruling For Mr. Shaw.

DRS urges you to accord great weight to its interpretation of the law it administers. (Respondent's Brief p. 9-10) The only formal interpretation we are aware of is contained in WAC 415-104-480(2) which states:

**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.

WAC 415-104-480(1)(a) speaks of a member who has incurred a physical or mental "disability." In short, it is the cause of "disability" which is at issue. The court in Ruse v. Department of Labor and Industries, 138 Wn.2d 1, 6-7, 977 P.2d 570 (1999) said:

In an aggravation case, the employment does not cause the disease, but it causes the disability because the employment conditions accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the disability being caused by the employment in an aggravation case.

## 1. Reversal Is Required

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WAC 415-104-480(1)(a) speaks of a member who has incurred a physical or mental "disability." In short, it is the cause of "disability" which is at issue. The court in Ruse v. Department of Labor and Industries, 138 Wn.2d 1, 6-7, 977 P.2d 570 (1999) said:

In an aggravation case, the employment does not cause the disease, but it causes the disability because the employment conditions accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the disability being caused by the employment in an aggravation case.

Next, DRS argues that in order for LEOFF 2 disability benefits to receive favorable tax status, Federal Law required the statute to be "in the nature of a workman's compensation act."

(Respondent's Brief p. 12) The Federal regulation required that the disability be service connected. (Respondent's Brief p.12) DRS then argues that the legislature intended to ensure that the disability was "service connected" and the disability had to have more than a "temporal connection" with the member's employment. (Respondent's Brief p. 12) However, DRS then concedes, as it must, that all that is required in a workers' compensation case is that the injury occur in the course of employment or while the employee was "on the clock." (Respondent's Brief p. 16) In short, all that need be shown is a "temporal connection."

WAC 415-104-480(2) seems to extend beyond a strict temporal connection. It encompasses any activity occurring in conjunction with employment. Just as there is no mention of "sole cause" in the rule, there is no mention of "naturally and proximately." However, Mr. Shaw does not need to rely on the most extensive interpretation of WAC 415-104-480(2). The facts of Mr. Shaw's case bring him well within the naturally and proximately test established in Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987) as cited and followed in Dillon v. Seattle Police Pension Board, 82 Wn.App 168, 171, 916 P.2d 956 (1996). In short, we are not arguing that the

administrative definition of "line of duty" contained in WAC 415-104-480(2) be ignored, we are arguing that it should be given effect.

DRS says "...DRS agrees with Mr. Shaw: consistent with its long-standing practice, that performance of LEOFF duties must be the proximate cause, but need not be the sole cause, of a member's disabling condition." (Emphasis supplied)  
(Respondent's Brief p. 16)

However, this does not precisely state Mr. Shaw's position. His position is that the rule refers to an action or activity occurring in conjunction with his employment or status as a firefighter that was authorized by law, rule, regulation, or a condition of employment or service, which was a proximate cause of his disabling condition. This is consistent with the standard definition of proximate cause contained in WPI 15.01 which reads as follows<sup>2</sup>:

The term "proximate cause" means a cause which in a direct sequence [unbroken by any superseding cause,] produces the *[injury]* *[event]* complained of and without which such *[injury]* *[event]* would not have happened.

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<sup>2</sup> See also WPI 15.02 which says:

The term "proximate cause" means a cause that was a substantial factor in bringing about the *[injury]* *[event]* even if the result would have occurred without it.

[There may be more than one proximate cause of an *[injury]* *[event]*.]

It is also consistent with WPI 155.06 which is used in workers' compensation cases, and reads as follows:

The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the *[condition]* *[disability]* *[death]* complained of and without which such *[condition]* *[disability]* *[death]* would not have happened.

[There may be one or more proximate causes of a *[condition]* *[disability]* *[death]*. For a worker to recover benefits under the Industrial Insurance Act, the *[industrial injury]* *[occupational disease]* must be a proximate cause of the alleged *[condition]* *[and]* *[disability]* *[death]* for which benefits are sought. The law does not require that the *[industrial injury]* *[occupational disease]* be the sole proximate cause of such *[condition]* *[disability]* *[death]*.]<sup>3</sup>

Oddly, the rule amendment DRS intends to use to clarify the matter creates its own confusion. It says:

The rule will clarify that the work actions and activities defined in WAC 415-104-480(2) must be the proximate cause of the member's disability (but need not be the sole cause of the member's disability). (Emphasis supplied) (Respondent's Brief, p. 20)

This apparently means work activities must still be the sole "proximate" cause. If that were not so, then the parenthetical

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<sup>3</sup> See also WPI 155.06.01, WPI 155.06.02 and WPI 155.06.03.

language would need to state “but need not be the sole proximate cause of the member’s disability.”

6. There Is No Room For Further Fact Finding At The DRS Administrative Level.

DRS then argues for a series of ever finer slices of logic requiring a factual determination of exactly which precise job functions Mr. Shaw was unable to perform and which precise psychiatric diagnosis interfered with that precise job function. However, WAC 415-104-480(2) does not make any such fine distinctions.

It does not require a finding of the precise duty which Mr. Shaw is unable to perform, because the Department has already determined that he cannot perform the duties of a firefighter. That is a given. The reason he could not perform those duties is because he has a mental disability. That is a given. Was the disability cause by an action or activity which occurred in conjunction with Mr. Shaw’s employment or status as a firefighter? That is the only question.

DRS next seems to suggest that Mr. Shaw changed his claim from being based on depression to including PTSD for some nefarious reason. However, it is clear from Dr. Vlahakis’

testimony, that he treated Mr. Shaw for four years, before Mr. Shaw revealed that he had been a victim of childhood sexual abuse. (AR 1028, Vlahakis Testimony p. 188, l. 2-13) We can easily imagine Mr. Shaw's reluctance to admit that he had been the victim of sexual abuse or, as a lay person, perhaps to even see how that abuse affected his reaction to work activities so many years later.

When assessing a person's psychiatric condition, the patient's perception of what is happening around him is more important than what we might describe as what is "actually going on, or what other people might perceive is going on." (AR 1032, Vlahakis Testimony p. 192, l. 5-13)

DRS suggests that for each triggering event at work, one must determine whether it is a "distinctive condition" of his particular employment. However, that is not at all what WAC 415-104-480(2) requires. It requires only "an action or activity occurring in conjunction with employment." There is no mention of "distinctive" conditions.

Mr. Shaw had problems well beyond simple anger. Looking at the whole man, we come to understand that anger, lack of trust, recurrence of PTSD and depression were all caused by activities which occurred in conjunction with his employment.

He was emotionally upset by things happening at work. (AR 1037, Vlahakis Testimony p. 197, l. 3-7) For example, there was the incident where he had to leave work and sit in his truck and sob. (AR 872) Dr. Vlahakis explains that a person with PTSD usually has depression that goes along with it, as they go hand in hand. (AR 1039, Vlahakis Testimony p. 199, l. 19-23) The same medications are used to treat both PTSD and depression so there is probably some bio-chemical overlap between the two. (AR 1039, Vlahakis Testimony p. 199-200)

Dr. Dougherty agreed with Dr. Vlahakis and described his agreement as follows:

I do agree with Dr. Vlahakis that the sorts of negative interactions he has had with supervisors and coworkers, have been quite distressing to him resulting in depression and an increase of posttraumatic symptoms such as nightmares and intrusive traumatic memories along with sleep disturbance, et cetera, and should be seen as the proximate cause of those symptoms. (Emphasis supplied)  
(AR 1051, Dougherty Testimony p. 211, l. 9-15)

DRS argues Dr. Dougherty "briefly interviewed Mr. Shaw." (Respondent's Brief, p. 23.) That is not accurate.

Dr. Dougherty's first saw Mr. Shaw on November 30, 2009. (AR 1047, Dougherty Testimony p. 207, l. 3) Mr. Shaw was referred to him in connection with a Social Security Disability evaluation. (AR 1046, Dougherty Testimony p. 206, l. 19-23) Dr. Dougherty then saw Mr. Shaw a second time. (AR 1047, Dougherty Testimony p. 207, l. 23-25) He said that he "met with him to try to get a more careful understanding of his work situation, how it affected him, what had gone on there and any relationship possible symptoms either overt or underlying." (AR 1048, Dougherty Testimony p. 208, l. 4-11) Dr. Dougherty was also able to read DRS' second petition decision and gain additional information from that. (AR 1048, Dougherty Testimony p. 208, l. 12-17)

DRS' position depends on the theory that Mr. Shaw was disabled from his work by a personality disorder. However, not one single expert in all the records testified to that effect. In fact, DRS' witness, Dr. Fischer, specifically denied that his personality disorder (if he has one) was disabling or that his depression was disabling or that both together were disabling. (AR 114, Fischer Testimony p. 273, l. 2-12)

Given this record, we cannot see how any conclusion could be reached that supports the DRS theory. There is no evidence to support that theory.

RCW 34.05.574(1) allows the court to avoid remand where the remand “would cause unnecessary delay.” If ever there was a case that called for the application of that provision, this is it.

We also submit that there is no “substantial evidence” in this record which would let DRS reach any decision other than finding Mr. Shaw entitled to duty disability retirement. RCW 34.05.570(3)(e). Any decision to the contrary would be arbitrary and capricious and clearly erroneous. RCW 34.05.570(3)(i). Tassoni v. Department of Retirement Systems, 108 Wn.App 77, 29 P.3d 63 Review Denied 145 Wn.2d 1030, 42 P.3d 975 (2001); Morrison v. Department of Retirement Systems, 67 Wn.App 419, 835 P.2d 1044 (1992). RCW 34.05.570(3)(e)(i).

7. Mr. Shaw Should Be Awarded Attorney's Fees.

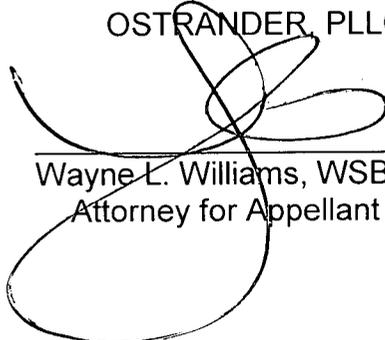
This case cries out for the awarding of attorney's fees. DRS, itself, has finally admitted that its Presiding Officer failed to apply the correct law to this case. Mr. Shaw has been put to great expense and disruption of his life. DRS had the authority to identify the legal error and request it be allowed to correct that error at any stage of these proceedings, but failed to do so. Under these circumstances an award of attorney's fees is fully justified.

8. Conclusion.

We ask the Court to reverse and remand the DRS Final Order and direct DRS to grant Mr. Shaw duty disability benefits. We ask the Court to award Mr. Shaw attorney's fees and costs.

DATED this 17<sup>th</sup> day of August, 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 Response Brief of Appellant, was mailed and emailed on this date to each of the following:

Sarah Blocki  
Office of the Attorney General  
P.O. Box 40108  
Olympia, Washington 98504-0108  
SarahB@atg.wa.gov

DATED this 17<sup>th</sup> day of August, 2015.

  
Julie Hatcher