

FILED

APR 26 2012

CLERK OF COURT
STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 304710-III

DEBBIE ROTHWELL,
Appellant/Plaintiff,

v.

NINE MILE FALLS SCHOOL DISTRICT; MICHAEL GREEN,
Respondents/Defendants.

Respondents' Brief

EVANS, CRAVEN & LACKIE, P.S.
Michael E. McFarland, Jr., WSBA #23000
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR RESPONDENT

FILED

APR 26 2012

CLERK OF COURT
COURT OF APPEALS
SPokane, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 304710-III

DEBBIE ROTHWELL,
Appellant/Plaintiff,

v.

NINE MILE FALLS SCHOOL DISTRICT; MICHAEL GREEN,
Respondents/Defendants.

Respondents' Brief

EVANS, CRAVEN & LACKIE, P.S.
Michael E. McFarland, Jr., WSBA #23000
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT.....	9
	A. Scope of Review.	9
	B. The Act is to be liberally construed to provide injured workers with coverage.....	12
	C. Ms. Rothwell's PTSD is an "injury" under the Act.....	14
	D. Ms. Rothwell's PTSD was caused by her exposure to a single traumatic event.	19
	E. The other "events" Ms. Rothwell argues caused her PTSD do not change the determination she suffered an "injury" under the Act.	24
IV.	CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Boeing Co. v. Key</i> , 101 Wn.App. 629, 5 P.3d 16 (2000).....	14, 15, 19
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	13
<i>Crown, Cork & Seal v. Smith</i> , 171 Wn.2d 866, 259 P.3d 151 (2011).....	26
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	12, 17, 18, 25
<i>Dennis v. Dep't of Labor & Indus.</i> , 190 Wn.2d 467, 745 P.2d 1296 (1987).....	17
<i>Garrett Freightlines, Inc. v. Dep't of Labor & Indus.</i> , 45 Wn.App. 335, 725 P.2d 463 (1986).....	20
<i>Gold Seal Chinchillas v. State</i> , 69 Wn.2d 828, 420 P.2d 698 (1966).....	11
<i>Grimes v. Lakeside Indus.</i> , 78 Wn.App. 554, 897 P.2d 431 (1995).....	21
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	10
<i>Guile v. Ballard Comm. Hosp.</i> , 70 Wn.App. 18, 851 P.2d 689 (1993).....	9
<i>Hilding v. Dep't of Labor & Indus.</i> , 162 Wn.2d 168, 298 P. 321 (1931).....	13
<i>In Re Adeline Thompson</i> , No. 904743 (Wash. Bd. of Indus. Ins. Appeals July 20, 1992)	27, 28

<i>In Re Daniel R. Heassler,</i> Nos. 892447, 892448 (Wash. Bd. of Indus. Ins. Appeals November 13, 1990)	28, 29
<i>In Re David T.D. Erickson,</i> No. 65990, 4 (Wash. Bd. of Indus. Ins. Appeals July 15, 1985)	27, 29
<i>In Re James V. Jacobs,</i> No. 48634 (Wash. Bd. of Indus. Ins. Appeals October 7, 1977)	26, 27
<i>In Re Laura Cooper,</i> No. 54585 (Wash. Bd. of Indus. Ins. Appeals February 9, 1981)	27, 29
<i>In Re Renford Gallier,</i> No. 893109 (Wash. Bd. of Indus. Ins. Appeals December 13, 1990)	27
<i>Keytronic Corp., Inc., v. Aetna Fire Underwriters Ins., Co.,</i> 124 Wn.2d 618, 881 P.2d 2001 (1995).....	9
<i>Kinney v. Cook,</i> 150 Wn.App. 187, 208 P.3d 1 (2009).....	9
<i>Lehtinen v. Weyerhaeuser Co.,</i> 63 Wn.2d 456, 387 P.2d 760 (1963)	16, 19
<i>Lightle v. Dep't of Labor & Indus.,</i> 68 Wn.2d 507, 413 P.2d 814 (1966).....	12
<i>Meyer v. Univ. of Wash.,</i> 105 Wn.2d 847, 719 P.2d 98 (1986).....	9
<i>Olympia Fish Prod., Inc. v. Lloyd,</i> 93 Wn.2d 596, 611 P.2d 737 (1980).....	10
<i>Pagnotta v. Beall Trailers,</i> 99 Wn.App.28, 991 P.2d 728 (2000).....	10
<i>Ranger Ins. Co. v. Pierce Co.,</i> 164 Wn.2d 545, 192 P.3d 886 (2008).....	10

<i>Rothwell v. Nine Mile Falls Sch. Dist.</i> , 149 Wn.App. 771, 206 P.3d 347 (2009).....	1, 16
<i>Sharpe v. Am. Tel. & Tel. Co.</i> , 66 F.3d 1045 (9th Cir.1995)	29
<i>Tomlinson v. Puget Sound Freight Lines, Inc.</i> , 140 Wn.App. 845, 166 P.3d 1276 (2007).....	12
<i>Young v. Dept. of Labor & Indust.</i> , 81 Wn.App. 123, 913 P.2d 402 (1996).....	20
STATUTES	
RCW 51.04.010	19
RCW 51.04.100	16
RCW 51.08.100	passim
RCW 51.08.142	14, 16, 17
RCW 51.32.010	14, 19
RCW 51.32.180	14
OTHER AUTHORITIES	
Engrossed House Bill 1396 (1988).....	16, 17, 18
WAC 296-14-300.....	17, 18
WAC 296-14-300(1).....	14, 15, 16
WAC 296-14-300(2).....	15
Washington Industrial Insurance Act.....	passim

I. INTRODUCTION

The issue on appeal is whether Debbie Rothwell's claim against her former employer, Nine Mile Falls School District ("the District"), is barred by Washington's Industrial Insurance Act ("Act"). More specifically, the precise issue is whether Ms. Rothwell's post-traumatic stress disorder ("PTSD") constitutes an "injury" as defined by the Act. As a matter of law, the answer to that question is "yes," as the undisputed facts establish that Ms. Rothwell's PTSD was caused by an exposure to a sudden, tangible, and traumatic event that produced an immediate result.

Since Ms. Rothwell's PTSD was an "injury" as defined by the Act, the District is entitled to immunity from Ms. Rothwell's negligence claim. The trial court therefore properly dismissed Ms. Rothwell's claim on summary judgment.

II. STATEMENT OF THE CASE

This is the second time this case has been in front of this Court. This Court first reviewed this case after the trial court granted the District's CR 12(b)(6) motion. *See, Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn.App. 771, 206 P.3d 347 (2009). This case returns to this Court after the trial court dismissed Ms. Rothwell's claim on summary judgment.

In arguing that summary judgment was improper, Ms. Rothwell places great reliance on this Court's prior holding, arguing that the Court's

reasoning at that time precluded the trial court from granting summary judgment. Ms. Rothwell's argument in that regard is unpersuasive, as this Court's prior ruling was simply that Ms. Rothwell's claims, as pled, *may not* be not barred by the Act. This Court now has the benefit of the evidence established through discovery, including Ms. Rothwell's own testimony and the testimony of her health care providers. That evidence and testimony establish that Ms. Rothwell's claimed PTSD is the result of an "injury" as defined by the Act. As such, Ms. Rothwell's claims against the District fail as a matter of law.

Ms. Rothwell was employed as a janitor for the Nine Mile Falls School District in December of 2004. CP 63. On December 10, 2004, Ms. Rothwell was scheduled to work at Lakeside High School (LHS) beginning at 4:00 p.m. CP 63. After receiving a telephone call from a fellow staff member, she agreed to come into work early. CP 63. Upon her arrival at LHS, Ms. Rothwell learned that a student had committed suicide in the main entrance by shooting himself in the head. CP 64-65.

Initially, Ms. Rothwell was assigned to the front gate of the high school to prevent unauthorized access to school grounds by members of the media. CP 66. At some point in time Ms. Rothwell left her post and entered the building. CP 67. While observing the suicide scene for the first time, Ms. Rothwell learned that the student in question was Skylar

Cullitan. CP 68. Mr. Cullitan was an acquaintance of Ms. Rothwell's.
CP 68. When she learned that Mr. Cullitan was the student involved, she became distraught and left the building for approximately 30 minutes to compose herself. CP 68. Ms. Rothwell testified:

A. . . . I went into the entryway and I opened the left side and walked in. And it's just like, Oh wow. Wow. This is way more than a nose bleed. This is way more than a nose bleed, you know. You know, the way Kirk made it sound, it was just like a little spot like this (Indicating). You know, no big deal. Just like a nosebleed. But it was huge. You know, needles, blankets. You know, papers all over everything.

Q. And so what did you do?

A. . . . And I go, "Do you know who it was?" And Reed, you know, he goes, "Yeah Skyler." No, no, no, it wasn't Skyler. He goes, "Yeah it was Skyler." He goes, "Did you know Skyler?" I go, "Yeah, Skyler wouldn't do that," you know. And I go, "What a hard lesson to learn. Why did he do it," you know.

And it's just like, you know, I just started losing it. You know, I started crying. And I told Reed I'll be back. And instead of going back to the office, I went down the south hall, went out, got in my car, went off school grounds across the road, started crying. I think I stayed there for 15, 20 minutes. . .

CP 68.

Ms. Rothwell could not eat that night, and was so upset that she vomited. CP 78.

Aid was rendered to Mr. Cullitan by a variety of medical personnel in the foyer of LHS. CP 66. He was eventually transferred to the hospital. CP 66. Once Mr. Cullitan was gone, Ms. Rothwell walked into the foyer to prepare to clean up the scene. CP 68. Superintendent Michael Green, was in close proximity to Ms. Rothwell when she was preparing to clean. CP 68-69. Mr. Green told Ms. Rothwell that she did not need to do the work. CP 69. He advised Ms. Rothwell that they could find someone else to do the work. CP 69. Ms. Rothwell insisted upon doing the work, and proceeded to do so. CP 69. Specifically, Ms. Rothwell testified:

A. . . . And I saw Michael.
And at that time he was in the office with the door closed. And, you know, he's, he saw me and came back out. Asked me if I have - - he goes, Do you have a problem cleaning it up? You know, I go, you know, Guess I have to, you know. I go, you know, We do that blood borne pathogen every year, you know. Just like a bloody nose, right?

Q. Okay. So when you say Michael again - -

A. He goes, Well, if you got a problem with it, I'll find someone else to do it. You know, and I didn't want to lose my job, so I said, you know, I take the class, so I can do it. Don't want to do it, but can do it.

...

Q. So his words were, If you don't want to do it, I'll find someone else to do it?

A. Yes.

Q. And what did you say in response to that?

A. I told him I'll clean it up. I didn't want to lose my job.

Q. Okay. Well, did you tell him that, I don't want to lose my job, or did you tell him I will clean it up?

A. No, I told him I'd clean it up, part of my job.

CP 69.

Superintendent Green knew that Ms. Rothwell had been trained in the handling of blood-borne pathogens, and was qualified to clean up the area. CP 69. Based upon her insistence upon cleaning up the area, he permitted her to continue with the work. CP 69.

While emergency personnel were still present at LHS, Ms. Rothwell picked up a back-pack. CP 67. It was ultimately determined that the back-pack belonged to Mr. Cullitan. CP 67. When she picked up the back-pack, she was told to put it down by emergency responders. CP 67. Out of extreme precaution, Stevens County Sheriff's deputies called the Spokane County Police Explosives Unit, who detonated the materials using a "water cannon." CP 78. Ms. Rothwell now alleges that she became distraught after learning that the back-pack she had handled contained a "bomb." *Appellant's Brief*. However, the act of picking up the backpack has not been causally related by any medical professional to any damages sustained by Ms. Rothwell. *See* CP 103.

Ms. Rothwell also claims that she was responsible for searching for LHS for “bombs” as a precautionary measure. *Appellant's Brief*. The "search" revealed nothing out of the ordinary. CP 69, 75-76. At the very most, Ms. Rothwell could have looked around the building to see if anything was out of place. CP 69, 75-76. Doing so is standard procedure, as staff members are more familiar with their buildings than responding emergency personnel. CP 75-76.

In the days after the suicide, students brought candles and cards to the scene of the suicide. CP 89-90. Ms. Rothwell cleaned upon the candles and cards. CP 90. She now alleges that removing the candles and cards contributed to her post-traumatic stress disorder. *Appellant's Brief*. However, cleaning the candles and cards has never been causally related by any health professional to any of Ms. Rothwell’s alleged damages. *See* CP 103, 125.

Subsequent to the evening in question, Ms. Rothwell underwent counseling by John Baumann. CP 103. He diagnosed her with post-traumatic stress disorder *caused by the observance of the suicide scene*. CP 103 (emphasis added). In particular, Mr. Baumann noted in a clinical formulation section of a chart note:

Debbie suffers from a very clearcut case of PTSD
occasioned by having had to clean up some of the remains

of a high school student who had shot himself in the entry to the school.

CP 103 (emphasis added).

During his deposition, Mr. Baumann testified clearly and unequivocally that Ms. Rothwell's PTSD was caused by her exposure to the suicide scene:

Q. And in Ms. Rothwell's case given your diagnosis of PTSD, you concluded that she had been exposed to a traumatic event; correct?

A. Yes.

Q. All right. And, in fact -- strike that. If you look back at where we were reading from on Page 15 of Exhibit 1 --

A. Yes.

Q. -- you state that Ms. Rothwell's PTSD was occasioned by having had to clean up some of the remains of a high school student who had shot himself in the entry of the school; correct?

A. Yes.

Q. And is that another way, sir, of saying that the traumatic event that triggers, or triggered Ms. Rothwell's PTSD was having had to clean up some of the remains of a high school student who had shot himself in the entry of the high school?

A. Yes.

Q. All right. Just so that I'm clear, when you gave Debbie Rothwell a diagnosis of PTSD, it was based

upon her exposure to the traumatic event of having to clean up the suicide scene?

A. Correct.

CP 42-43.

Similarly, Ms. Rothwell testified that her PTSD symptoms started shortly after her exposure to the suicide scene:

Q: And that's what I'm in-artfully trying to get at is after cleaning up this suicide scene *you started having symptoms that you believe were caused by cleaning up the suicide scene. Correct?*

A: *Yes.*

Q: *When did you start having those symptoms?*

A: *The next day.*

CP 58 (emphasis added).

Ms. Rothwell was exposed to a single traumatic event - the suicide scene at LHS on December 10, 2004. That single traumatic event was of some notoriety, fixed as to time and susceptible to investigation. Pursuant to Ms. Rothwell's testimony, her exposure to the suicide scene produced the immediate onset of symptoms.¹ Pursuant to the testimony of Ms. Rothwell's health care provider (Mr. Baumann), Ms. Rothwell's PTSD is

¹ As noted, Ms. Rothwell testified that her symptoms started "the next day." However, she testified that she broke down emotionally upon discovering that she knew the decedent, and vomited later that night. Nonetheless, the DSM-IV specifically states that PTSD can have a delayed onset of up to six months.

the result of her exposure to a single traumatic event – the suicide scene. As such, Ms. Rothwell's PTSD constitutes an "injury" under the Act. The District is therefore entitled to immunity from Ms. Rothwell's claims.

III. ARGUMENT

A. Scope of Review.

An appellate court engages in the same inquiry as the trial court when reviewing the propriety of a grant of summary judgment. *Keytronic Corp., Inc., v. Aetna Fire Underwriters Ins., Co.*, 124 Wn.2d 618, 623-24, 881 P.2d 2001 (1995). A court should grant summary judgment when the evidence establishes the absence of a dispute as to any material fact. CR 56(c). A material fact is one upon which the outcome of litigation depends. *Kinney v. Cook*, 150 Wn.App. 187, 192, 208 P.3d 1 (2009).

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.

Guile v. Ballard Comm. Hosp., 70 Wn.App. 18, 21-2, 851 P.2d 689 (1993) (internal citations omitted). Once the absence of a material fact is established, the non-moving party must show that a basis in fact creates a genuine issue for the fact finder. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A genuine issue of fact exists, which

precludes summary judgment, only when reasonable minds could reach different factual conclusions after considering the evidence. *Ranger Ins. Co. v. Pierce Co.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

However, "[t]he 'facts' required by CR 56(e) are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (internal citations omitted). "The nonmoving party's burden is not met by responding with conclusory allegations, speculative statements, or argumentative assertions." *Pagnotta v. Beall Trailers*, 99 Wn.App.28, 36, 991 P.2d 728 (2000). Where no genuine issue of material fact exists, a grant of summary judgment is necessary to avoid a useless trial. *Olympia Fish Prod., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

Despite her own testimony regarding her immediate onset of symptoms after being exposed to the suicide scene, and despite Mr. Baumann's testimony unequivocally relating Ms. Rothwell's PTSD to her exposure to the suicide scene, Ms. Rothwell argues that her PTSD is the result of a "series" of events. In making this argument, she relies heavily upon this Court's previous decision in this case and asserts that the same conclusions should apply here. This argument ignores the difference between the standard this Court was required to utilize on the previous

appeal (reviewing a CR 12(b)(6) dismissal) and the standard this Court must utilize in the instant appeal (reviewing a CR 56 dismissal).

Dismissal of a claim under CR 12(b)(6) is appropriate "only if it can be said that there is no state of facts which the plaintiff could prove in support of entitling him to relief under his claim." *Gold Seal Chinchillas v. State*, 69 Wn.2d 828, 830, 420 P.2d 698 (1966). In contrast, pursuant to CR 56, the Court considers the "pleadings, depositions, answers to interrogatories, and admissions on file." That distinction is of significance. For example, when this Court issued its prior holding, its analysis was limited to Ms. Rothwell's bare assertion that her injuries were caused by a series of events spread over multiple days. Now, this Court has the benefit of Mr. Baumman's deposition testimony that Ms. Rothwell's PTSD was "occasioned by having had to clean up some of the remains of a high school student who had shot himself in the entry to the school." CP 103. By way of another example, this Court was previously limited to Ms. Rothwell's bare assertion that Superintendent Green "ordered" her to clean up the suicide scene. Now, the Court has the benefit of Ms. Rothwell's testimony that Superintendent Green *asked* her if she would clean up the scene, explaining that he could find someone else to clean up the scene if she was not comfortable doing so. The Court now has Ms. Rothwell's own testimony that she advised Mr. Green that she would clean up the scene.

When this case was previously before the Court, there was no testimony as to the cause of Ms. Rothwell's PTSD. The Court now has that testimony, which establishes as a matter of law that Ms. Rothwell's PTSD is an "injury" under the act.

B. The Act is to be liberally construed to provide injured workers with coverage.

Washington's Industrial Insurance Act ("Act") "is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

"We construe the Industrial Insurance Act liberally to reduce to a minimum the suffering and economic loss arising from injuries or death in the course of employment." *Tomlinson v. Puget Sound Freight Lines, Inc.*, 140 Wn.App. 845, 850, 166 P.3d 1276 (2007) (citing RCW 51.12.010). "Accordingly, where reasonable minds can differ over the meaning of the Act's provisions, we resolve all doubts in the injured worker's favor." *Id.*, 140 Wn.App. at 850-51 (citation omitted); *See also Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966) ("We are committed to the rule that the Industrial Insurance Act is

remedial in nature and its beneficial purposes should be liberally construed in favor of its beneficiaries”).

This court is committed to the doctrine that our Workmen’s Compensation Act should be liberally construed in favor of its beneficiaries. It is a humane law and founded on sound public policy, and is the result of thoughtful, painstaking, and humane considerations, and its beneficent provisions should not be limited or curtailed by a narrow construction.

Hilding v. Dep’t of Labor & Indus., 162 Wn.2d 168, 175, 298 P. 321 (1931). “The IIA is the product of a compromise between employers and workers. Under the IIA, employers accepted limited liability for claims that might not have been compensable under the common law. In exchange, workers forfeited common law remedies.” *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006) (citation omitted).

Although Ms. Rothwell is not seeking benefits under the Act, the Court is nonetheless required to liberally construe the provisions of the Act in favor of finding an "injury." While a finding that Ms. Rothwell's PTSD constitutes an "injury" precludes her claims against the District, such a finding is beneficial to future workers seeking to establish industrial injuries under the Act. As such, regardless of the preclusive effect on Ms. Rothwell's claim, the Court must liberally construe the meaning of the term "injury" so as to provide other injured workers with the benefits of the Act. A narrow interpretation of the term "injury," as is

urged by Ms. Rothwell, defeats the dual purposes of the Act in giving workers broad rights to recovery for injuries, and giving employers immunity from work-related injuries.

C. Ms. Rothwell's PTSD is an "injury" under the Act.

Disability benefits are available under the Act for workers who sustain industrial injuries or develop occupational diseases. *RCW 51.32.010, RCW 51.32.180*. An industrial injury is “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.” *RCW 51.08.100*. Mental conditions or disabilities caused by stress are, by express direction of the legislature, excluded from the definition of occupational disease. *RCW 51.08.142; WAC 296-14-300(1); Boeing Co. v. Key, 101 Wn.App. 629, 632, 5 P.3d 16 (2000)*. In accordance with this directive, the Department adopted Washington Administrative Code (WAC) 296-14-300(1), which provides:

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

- (a) Change of employment duties;
- (b) Conflicts with a supervisor;
- (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;

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

WAC 296-14-300(1).

Stress may, however, be compensable as an industrial injury if it results from exposure to a traumatic event. WAC 296-14-300(2) (“Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.”). To support a claim for benefits, therefore, work-related stress must be caused by a sudden, tangible, external traumatic event that produces an immediate result. *RCW 51.08.100; Boeing*, 101 Wn.App. at 633-34. The event, whether emotional or physical, must also be “of some notoriety, fixed as to time and

susceptible of investigation.” *Rothwell v. Nine Mile Falls School Dist.*, 149 Wn.App. 771, 781, 206 P.3d 347 (2009) (quoting *Lehtinen v. Weyerhaeuser Co.*, 63 Wn.2d 456, 458, 387 P.2d 760 (1963)), review denied, 169 Wn.2d 1017 (2010).

Based upon the foregoing, it is absolutely clear that Ms. Rothwell's PTSD constitutes an "injury" under the Act. Of note in that regard is the fact that Ms. Rothwell's claimed injury does not fall within any of the examples of stress-induced exclusions set forth in WAC 296-14-300(1). That is, Ms. Rothwell's claimed injury was not the result of conflicts with a supervisor, work load pressures, job dissatisfaction, etc. More important is the fact that Ms. Rothwell's own health care providers causally relates her PTSD to her exposure to a single traumatic event.

The legislative history behind RCW 51.04.100 supports the conclusion that Ms. Rothwell's PTSD is an "injury." In 1988, the Legislature expressed its intention that mental conditions or disabilities caused by employment not be compensable as "occupational diseases:"

The department shall adopt a rule pursuant to chapter 34.05 RCW that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140.

RCW 51.08.142. That statute, RCW 51.08.142, was passed in Engrossed House Bill 1396 (1988). Representative Art Wang discussed the

Legislature's intent behind enacting RCW 51.08.142: " . . . Moreover, it responds to the *Dennis* case and it will incorporate present Labor and Industries policy by adopting a rule - - by having the department adopt a rule to respond to the so called mental-mental situations. . ." E.H.B. 1396, 50th Leg., Reg. Sess. (1988) (floor remarks of Representative Art Wang). The case Representative Wang referred to was *Dennis v. Dep't of Labor & Indus.*, 190 Wn.2d 467, 745 P.2d 1296 (1987). In that case, the Court held that disability resulting from work-related aggravation of a nonwork-related disease may be compensable as an occupational disease. *Id.*

The Department complied with the Legislature's mandate in EHB 1396 by adopting WAC 296-14-300:

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

...

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

It is clear from the Legislature's response to *Dennis* and the Department's adoption of WAC 296-14-300 that the intent was to preclude claims for mental illness resulting from *normal workplace stresses occurring over long periods of time*. In *Dennis* the claimant alleged an occupational illness resulting from his work as a sheet metal worker for 38 years. *Dennis*, 109 Wn.2d at 469. The claimant's work required him to

cut metal with tin snips for four to five hours a day. *Id.* His physician testified that the work aggravated osteoarthritis in his wrists and the osteoarthritis became disabling as a result of *repetitive* metal snipping. *Id.* (emphasis added). The Court concluded that the claimant was due compensation because his disability resulted from work-related aggravation of a preexisting non-work-related disease.

Obviously concerned about "mental-mental" claimants seeking compensation for aggravation of an underlying condition resulting from the *regular* stressors of the job, the Legislature directed the Department of Labor and Industries to adopt WAC 296-14-300. That regulation simply requires mental harm claims to be adjudicated pursuant to RCW 51.08.100. There is nothing contained in the legislative history regarding EHB 1396 suggesting that the Legislature intended to preclude claims of the nature Ms. Rothwell is claiming in this matter. To the contrary, the record establishes that Ms. Rothwell is not claiming any type of aggravation of a pre-existing mental condition. Ms. Rothwell is likewise not claiming an injury caused by regular stressors of her job. Finally, Ms. Rothwell is not claiming that her PTSD developed over a long period of time. To the contrary, the record establishes that Ms. Rothwell's PTSD was caused by her exposure to a single traumatic event (Mr. Cullitan's

suicide), an event of notoriety and an event fixed in time and susceptible of investigation.

D. Ms. Rothwell's PTSD was caused by her exposure to a single traumatic event.

The Act provides the exclusive remedy for all on-the-job injuries and occupational diseases covered by the Act. RCW 51.04.010; 51.32.010. Accordingly, the Act precludes a plaintiff's claims for emotional distress if those claims arise out of an "injury" as defined by the Act. *See Boeing Co. v. Key*, 101 Wn.App. 629, 5 P.3d 16 (2000).

RCW 51.08.100 states that "[i]njury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." The event or happening must also be "of some notoriety, fixed as to time and susceptible of investigation." *Lehtinen v. Weyerhaeuser Co.*, 63 Wn.2d 456, 458, 387 P.2d 760 (1964).

Ms. Rothwell's argument that her PTSD does not constitute an "injury" is based upon definitions gleaned from dictionaries and applied to the words of RCW 51.08.100. Relying upon those dictionary definitions, Ms. Rothwell argues that her PTSD was not caused by a single "event," and that none of the "events" were sudden. Specifically, Ms. Rothwell argues that she did not suffer an "injury" under the Act because she was

subjected to various stimuli over a specific temporal timeframe, i.e., two days.² Ms. Rothwell's argument in this regard is not persuasive, as Washington case law has never imposed a specific timeframe on an "event" in order to qualify as an "injury" under the Act.

The "sudden and tangible happening" element in RCW 51.08.100 was explained in *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 725 P.2d 463 (1986) as follows:

Washington law does not clearly mandate a certain temporal duration to establish "a sudden and tangible happening," as required by RCW 51.08.100. The statute requires a relation between the injury and "some identifiable happening, event, cause or occurrence capable of being fixed at some point in time and connected with the employment." The key is not in the establishment of a duration or time frame . . . , but in the establishment of causation, the connection between the physical [or mental] condition, and employment. This causal condition must be established by medical testimony.

Garrett Freightlines, 45 Wn.App.at 342-43. With regard to the medical testimony, courts "must give special consideration to the attending physician's opinion." *Young v. Dept. of Labor & Indust.*, 81 Wn.App. 123, 129, 913 P.2d 402 (1996). Furthermore, "[t]he industrial injury need not

² Ms. Rothwell also argues, in part, that she did not suffer an "injury" because the traumatic "events continued to disturb Ms. Rothwell for several years." *Appellant's Brief*, pg. 36. This argument confuses the "sudden and tangible happening" element of RCW 51.08.100 with the symptoms caused by the "sudden and tangible happening."

be the sole proximate cause of disability." *Grimes v. Lakeside Indus.*, 78 Wn.App. 554, 561, 897 P.2d 431 (1995).

It is clear from case law that the time frame is not the dispositive factor in determining whether a "sudden and tangible happening" occurred. Rather, it is the ability to identify a specific *cause* of the employee's condition that is dispositive as to whether an "injury" has occurred. In this case, Mr. Baumann, has causally related Ms. Rothwell's PTSD to a single traumatic event:

Debbie suffers from a very clearcut case of PTSD *occasioned by having had to clean up some of the remains of a high school student* who had shot himself in the entry to the school.

CP 103 (emphasis added).

Mr. Baumann testified clearly that his diagnosis of PTSD is not based upon the other acts/events that Ms. Rothwell now argues may have contributed to her PTSD:

Q. And so part and parcel with that answer is that Ms. Rothwell never reported to you as experiencing anxiety, depression, fear, nightmares, avoidance or any other PTSD symptoms related to walking through the building looking for evidence of a bomb?

A. Nothing about that.

Q. Okay. So any, the answer to my question is correct?

A. That -- well, my diagnosis was based only on connection with the, the suicide and not on anything else like what you've just described.

CP 44.

On March 14, 2007, before Ms. Rothwell filed this lawsuit, Mr. Baumann wrote a letter to Ms. Rothwell's counsel regarding Ms. Rothwell's injury and that cause thereof:

She is diagnosed posttraumatic stress disorder, DSM-IV 309.81. Debbie's symptoms began after her exposure to the human remains of a completed suicide attempt that occurred at her workplace 2 years ago. She reports that she was ordered to take the primary role in certain aspects of cleanup of blood and body tissues from the victim of a suicide. Debbie reports believing that this experience would not be especially upsetting for her because as a person experienced in hunting and fishing she was familiar with blood and the like. However, it appears that shortly after the experience of the cleanup process she began to suffer nightmares and intrusive recollections about this event that have caused her a great deal of distress, frequent panic attacks, or experiences that she describes as "freaking out."

CP 106.

Mr. Baumann testified clearly and unequivocally that Ms. Rothwell's claimed PTSD was the result of having cleaned up the suicide scene. *See, Baumann Depo., pg. 9, lines 21-25; pg. 10, lines 1-11.* Indeed, Mr. Baumann was not even aware of the other events Ms. Rothwell now

claims caused or contributed to her injury. *Baumann Depo.*, pg. 20, lines 3-25; pg. 21, line 1.³

Mr. Baumann's testimony in that regard is entirely consistent with Ms. Rothwell's own testimony, in which she testified that her PTSD started immediately after being exposed to the suicide scene ("freaking out," breaking down and crying and vomiting) and continued the following day. CP 58, 68, 78.

It is clear from the evidence before this Court that Ms. Rothwell's PTSD qualifies as a sudden and tangible happening. Ms. Rothwell's own provider testified that Ms. Rothwell experienced PTSD *due to cleaning up the suicide*. Ms. Rothwell admitted in her deposition that she experienced her symptoms *from cleaning up the suicide scene*. The event in question was of notoriety, fixed in time and susceptible to investigation. Certainly, the events of December 10, 2004, and Ms. Rothwell's exposure to those events, were not part of Ms. Rothwell's normal day-to-day activities. She is not claiming a mental injury that developed slowly over time as a result of working conditions. Rather, she is claiming a diagnosable injury (PTSD) whose cause can be and has been determined. Indeed, the

³ Ms. Rothwell's other health care provider, Randi Carter, PA-C, likewise testified as to the cause of Ms. Rothwell's PTSD: "Well, PTSD is usually from a traumatic event. So I would assume a suicide would be, cleaning up after a suicide, would be a traumatic event in my eyes." CP 175.

diagnoses of PTSD requires, per the DSM-IV diagnostic criteria, the "exposure to an extreme traumatic stressor." According to Ms. Rothwell's providers, her PTSD was in fact caused by her exposure to an extreme traumatic stressor – the suicide scene. As such, Ms. Rothwell sustained an "injury" as defined by the Act.

E. The other "events" Ms. Rothwell argues caused her PTSD do not change the determination she suffered an "injury" under the Act.

Ms. Rothwell's argument that her PTSD was caused by a series of events, and not just her exposure to the suicide scene, is not persuasive. In fact, Ms. Rothwell's argument in that regard is in direct conflict with the testimony of her health care provider. As noted, Mr. Baumann testified that his diagnosis of PTSD was based "only on connection with the, the suicide and not on anything else..." CP 96. As such, while Ms. Rothwell can *argue* that her PTSD was caused by events other than her exposure to the suicide scene, those arguments are in direct contradiction to the testimony of her health care provider. Further, Ms. Rothwell's argument is in conflict with her own testimony that she immediately "started losing it" and had to leave the school premises to get herself "back together" after learning a student she knew attempted suicide. CP 67. Finally, Ms. Rothwell's interpretation of the definition of "event" is too narrow, and thus violates the principle that the Act is to be construed broadly in favor

of coverage. *See Dennis*, 109 Wn.2d at 470. Specifically, Ms. Rothwell argues that there were "series" of "events" that caused her PTSD: (1) cleaning up the suicide scene; (2) "searching" for "bombs" in the school; and (3) being required to pick up cards and mementos left by students for Mr. Cullitan. Ms. Rothwell's attempt to characterize her actions in this regard as separate and distinguishable "events" ignores the fact that all of these "events" arise from and are inextricably intertwined with the single traumatic event in question – Mr. Cullitan's suicide. Ms. Rothwell was exposed to Mr. Cullitan's suicide, and the suicide scene, in a number of ways, including cleaning up the suicide scene; "searching" for "bombs" in the school, and picking up cards and mementos. All of those actions flow directly from and were occasioned by a single traumatic event. But for Mr. Cullitan's suicide, Ms. Rothwell would not have cleaned up the suicide scene, "searched for bombs," or picked up cards and mementos left by students. Ms. Rothwell's actions all relate to a single traumatic event and her exposure to that single traumatic event. That event was of some notoriety, fixed as to time and susceptible of investigation. Ms. Rothwell's exposure to that event caused her PTSD. There is simply no "series" of events that removes Ms. Rothwell's PTSD from the definition of "injury" under the Act.

However, assuming *arguendo*, that there were a series of "events" that caused Ms. Rothwell's PTSD, she nonetheless suffered a "sudden and tangible happening" characterized as an "injury" under the Act. Although Board of Industrial Insurance Appeals decisions are not binding on this court, they can provide useful and instructive guidance. *Crown, Cork & Seal v. Smith*, 171 Wn.2d 866, 876 n. 4, 259 P.3d 151 (2011) (citing *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984) (appellate courts give substantial weight to an administrative agency's interpretation of the law)).

The Board, as early as 1977, held that an individual can suffer an "injury" under the Act even if the "sudden and tangible happening" occurs over time. See *In Re James V. Jacobs*, No. 48634 (Wash. Bd. of Indus. Ins. Appeals October 7, 1977). In *Jacobs*, the Board held in pertinent part:

However, there is no legal requirement that such tangible happening or event be instantaneous or confined to a period measured in a certain number of seconds or even minutes.

In our understanding of this record, there was a sufficiently sudden, tangible, and identifiable happening or event in the morning of January 9, 1975, namely, a hike by claimant of almost a mile into his surveying area in the Lake Ozette vicinity, over rough terrain and mostly uphill and with a heavy equipment pack on his back, from the strenuous exertion of which, superimposed upon fatigue from three prior days of exhausting field work, he collapsed. . . In light of this factual picture, we have no trouble in finding all elements of an "injury," within the meaning of RCW 51.08.100 and the judicial interpretations thereof.

In Re James V. Jacobs, No. 48634, 2-3 (Wash. Bd. of Indus. Ins. Appeals October 7, 1977); *See also In Re Laura Cooper*, No. 54585 (Wash. Bd. of Indus. Ins. Appeals February 9, 1981) (emotional trauma suffered over five hours still constitutes an "injury" under the Act even though symptoms did not appear until five days later); *In Re David T.D. Erickson*, No. 65990, 4 (Wash. Bd. of Indus. Ins. Appeals July 15, 1985) (holding that emotional trauma occurring for approximately three weeks, which ultimately led to the employee's suicide, qualified as an "injury" under the Act because it was "of some notoriety, fixed as to time and susceptible of investigation"); *In Re Renford Gallier*, No. 893109 (Wash. Bd. of Indus. Ins. Appeals December 13, 1990) (employee experienced a "tangible happening" of hand-carrying boxes and removing office belongings for two hours).

The *In Re Adeline Thompson*, No. 904743 (Wash. Bd. of Indus. Ins. Appeals July 20, 1992) case is also instructive. In *Thompson*, the claimant sought acceptance of a mental disorder alleged as the result of exposure to hydrochloric acid. Particularly pertinent to this appeal is the following:

In the present case, there were several events which occurred "from without" that acted upon Ms. Thompson's emotionally fragile state. Although not personally exposed to the scene of a violent trauma or to any actual danger, she witnessed emergency vehicles and workers in hazardous

materials suits in the vicinity of her workplace. She overheard a co-worker complain of a symptom she herself experienced immediately upon entering the building, i.e., an odd odor or taster in the air. Dr. McConnell testified on claimant's behalf that absent actual exposure to the chemical, the mere knowledge of and concern about the spill triggered the conversion reaction [mental disorder].

...

The events . . . constituted a sudden and tangible happening of a traumatic nature, and such event produced an immediate and prompt result, diagnosed as a conversion disorder requiring medical treatment.

In Re Adeline Thompson, No. 904743 at 3-4.

The Board's decision in *In Re Daniel R. Heassler*, Nos. 892447, 892448 (Wash. Bd. of Indus. Ins. Appeals November 13, 1990), is likewise applicable to the instant case. In *Heassler*, the claimant, a paramedic, alleged he suffered a psychological industrial injury when he responded to the scene of sixty-three year old man who had shot himself in the right temple. The claimant provided life support to the victim and transported him to the hospital. The claimant testified that after he completed his shift he:

went home like I always do, changed my uniform, took a shower, and went to my local haunt and had morning coffee. It's just my morning routine.

I was sitting there talking to one of the fellow that hangs out at the coffee shop, and I still had stuff all over my glasses. I went into the bathroom and I looked at my glasses, and they were speckled with little microscopic pieces of blood all over them and I just tweaked out. I washed my glasses, and I went straight to work. I went to

see the chief, and he was busy. I went into the bathroom to go the bathroom, and that's when I had that first suicidal thought of shooting myself where my last patient had shot himself. . .

In Re Daniel R. Heassler, Nos. 892447, 892448 at 1. The Board found the claimant had suffered an "injury" under the Act and reasoned:

we have an emotionally fragile individual who underwent what was, for him, a traumatic event. Mr. Heassler need only prove that the February 1989 on-the-job traumatic incident proximately caused some disability or need for treatment. Both his treating psychiatrist and social worker found the suicide to be the event responsible for claimant's inability to work, and his need for psychiatric treatment.

Id. at 3.

The Ninth Circuit Court of Appeals is in accord. *See Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045 (9th Cir.1995). In *Sharpe*, the court held that under Washington law, the employee's transfer to a more stressful position which resulted in increased seizures over the period of ten days "was an injury under the Act." *Sharpe*, 66 F.3d at 1052. There, the court approvingly cited *In Re David T.D. Erickson, supra*, and *In Re Laura Cooper, supra*, for support that mental trauma over the course of ten days constitutes an "injury" under the Act. *Sharpe*, 66 F.3d at 1052.

In this case, the alleged "series" of "events" all occurred within a very short period of time. Ms. Rothwell helped "search for bombs" within hours of arriving at the school. CP 67, 69, 75. That "search for bombs"

was performed within hours of Ms. Rothwell cleaning up the suicide scene. The following day, Ms. Rothwell began picking up cards and mementos left by students.⁴ Even if all of Ms. Rothwell's conduct in responding to the suicide are deemed separate "events," they nonetheless (pursuant to her argument) combined to cause the PTSD. Even looked at separately, those "events" are of some notoriety, fixed as to time and susceptible of investigation. According to Ms. Rothwell, they combined to cause her a single, identifiable injury – PTSD.

It also cannot go without noting that but for her exposure to the scene of the suicide, a sudden and tangible happening, Ms. Rothwell would not have continued to experience mental distress each time a stimuli would raise that memory. For example, Ms. Rothwell testified that it was "emotionally traumatic" for her to hear students crying and talking about the suicide. CP 89. However, the sole reason it was "emotionally traumatic" was because she cleaned the scene of a suicide of an individual she knew, not because individuals were crying. Just like picking up cards and mementos, Ms. Rothwell's trauma from hearing students cry are not separate and distinct "events," but the natural response of her exposure to

⁴ It should be noted that picking up cards cannot logically be construed as causing her PTSD as Ms. Rothwell's act of picking up cards utterly fails to satisfy the clinical criteria of PTSD listed in the DSM-IV, mainly the requirement that the act involve the threat of death or serious injury.

the single traumatic event of the student suicide. Accordingly, Ms. Rothwell's PTSD constitutes an "injury" under the Act, thus precluding her claims against the District.

IV. CONCLUSION

Based upon the foregoing, the District respectfully requests this Court affirm the trial court's order granting summary judgment to the District.

RESPECTFULLY SUBMITTED this 26th day of April, 2012.

EVANS, CRAVEN & JACKIE, P.S.

By  39319

MICHAEL E. McFARLAND, JR., #23000
Attorney for Respondent

DECLARATION OF SERVICE:

On the 26th day of April, 2012, I caused the foregoing document described as Respondent's Brief to be personally served on all interested parties to this action as follows:

William J. Powell
Powell, Kuznetz & Parker, P.S.
316 W. Boone, Suite 380
Rock Point Tower
Spokane, WA 99201


Brooke Johnson