

67722-5

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No. 67722-5-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Jane E. Potter,

Appellant,

v.

Department of Labor & Industries of the State of Washington,

Respondent.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

In its response, the Department attempts to paint a picture of Jane Potter as an individual with a “long-standing history of anxiety,” of which her current condition is merely a continuation. See Br. of Resp. at 3-5. In doing so, the Department takes a number of events in Ms. Potter’s past out of context. The Department also argues that recognition of Ms. Potter’s condition is prohibited by the provisions of RCW 51.08.142 & WAC 296-14-300 as a mental condition or disability caused by stress. Br. of Resp. at 40-46. It is not. The Department ignores the fact that Ms. Potter’s “condition” is Multiple Chemical Sensitivity (MCS), which is a complex disorder of (currently) unknown physiological origin.

The Department also contends that Ms. Potter’s MCS did not arise “proximately” and “naturally” out of her chemical exposure on the job with Davis Wright Tremaine (DWT). Br. of Resp. at 28-40. The essence of the Department’s position is that there is no direct evidence that Ms. Potter was ever exposed to any chemicals, and that the ventilation in her office was perfectly fine. But the uncontroverted testimony of an industrial hygienist established that Ms. Potter’s office was defectively ventilated; there is also ample evidence in the record demonstrating the presence of chemicals off-gassing from new furnishings in Ms. Potter’s office.

As an initial matter, Ms. Potter addresses the Department’s contention that she has improperly stated the standard of review in this case.

II. ARGUMENT

A. THE DEPARTMENT MISSTATES THE STANDARD OF REVIEW BECAUSE IT ERRONEOUSLY CONTENDS THAT ITS OWN MOTION BEFORE THE SUPERIOR COURT WAS NOT ONE FOR SUMMARY JUDGMENT

In its brief, the Department argues that the superior court did not enter summary judgment against Ms. Potter because it “issued findings of fact, conclusions of law, and judgment (not summary judgment), after reviewing the entire Board record.” Brief of Respondent at 26. However, the superior court merely signed off on the “Department’s Proposed Findings of Fact and Conclusions of Law and Judgment,” which explicitly referenced the Department’s “Trial Brief and Motion for Judgment as a Matter of Law.” CP 106, 107. As Ms. Potter argued in her opening brief, the Department’s motion/brief was inappropriate because it tried to do two things at once—request judgment as a matter of *law*, and argue the facts in its favor.

The Department consistently styled its motion as one for judgment as a matter of law under CR 50. However, CR 50 motions are explicitly reserved for “judgment as a matter of law in jury trials.” See CR 50. Understanding that the Department initially demanded a jury trial, Ms. Potter construed the Department’s motion as one for summary judgment under CR 56. See CP at 89. This construction was appropriate because, throughout its briefs, the Department repeatedly requested the court for judgment “as a matter of law” against Ms. Potter’s claim. See CP 53-84 (Department’s Motion pages 1, 4, 15, 21, 27, 28); CP 100 (Explicitly

stating that the Department’s initial brief was a “CR 50 motion for judgment as a matter of law.”).

The Department’s “Trial Brief and Motion for Judgment as a Matter of Law” was also inappropriate because such a motion simultaneously attempts to both argue the facts *and* contend that there are no material facts in dispute. The Department cannot be allowed to shield itself from the burden of proof required in a summary judgment motion by simply styling its motion as both one for judgment as a matter of law *and* a trial brief. The Department’s brief was either a motion for judgment as a matter of law or a trial brief—it cannot be both. Since the Department, throughout its brief, consistently asked for judgment as a matter of law, it should be held to the ordinary burden of proof: absence of material factual disputes.

Given the context of its motion and the relief requested therein, the Department’s motion was one for summary judgment, and the standard of review is clear: “[w]hen a party appeals from a board decision, and the superior court grants summary judgment affirming that decision, the appellate court’s inquiry is the same as that of the superior court.” Stelter v. Dep’t of Labor & Indus., 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

“Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Id.

Finally, in the section of its brief devoted to the standard of review in this case, the Department asserts that this Court should “view the record in the light most favorable to the party who prevailed in superior court: the Department.” Br. of Resp. at 28 (internal quotations omitted). Not only does the Department argue that it did not move the superior court for summary judgment, but it also suggests a diametrically opposed standard of review: that the facts should be considered in a light most favorable to the party which moved the superior court for “judgment as a matter of law.” CP at 53-84; 100-05. In support of this asserted standard of review, the Department cites to Harrison Memorial Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). However, the Department’s reliance on that case is misplaced, because Gagnon was an appeal from a judgment rendered after the conclusion of a complete bench trial. See 110 Wn. App. at 480.

Even if there is some doubt in this Court’s mind when considering the procedural posture of the Department’s motion before the superior court, because the ultimate outcome of the case there rested upon an interpretation of law, the standard of review is, at the least, *de novo*. The decisions of the BIIA and the superior court, in rejecting Ms. Potter’s claim for benefits, relied upon an erroneous construction of the Industrial Insurance Act (IIA), specifically the conclusion that RCW 51.08.142 and WAC 296-14-300 bar recognition of MCS. CP at 108; CABR at 14-15. Issues of statutory construction are reviewed *de novo*. Dep’t of Labor &

Indus. v. Granger, 159 Wn.2d 752, 757, 153 P.3d 839 (2007). More importantly, “where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker.” Id. (internal quotations omitted).

B. THE DEPARTMENT’S CONTENTION THAT JANE POTTER HAS A “LONG-STANDING HISTORY OF ANXIETY” IS MISLEADING BECAUSE THE DEPARTMENT AND ITS HIRED EXAMINERS HAVE TAKEN SEVERAL EVENTS IN MS. POTTER’S PAST OUT OF CONTEXT

The Department, relying on a selective reading of the record and the one-time examinations of Drs. Stumpp and Hamm, erroneously contends that Ms. Potter’s current symptoms are merely a continuation of her “long standing history of anxiety complaints.” Brief of Respondent at 1, 3, 42-43. However, a closer look at some of the events in Ms. Potter’s past reveals that the Department has distorted the magnitude and facts of those events in order to portray Ms. Potter as mentally and emotionally unstable.

First, the Department states that Ms. Potter reported, as early as 1998, that she experienced “dizziness and panic-type symptoms in elevators, confined spaces, and heights,” for which she was prescribed anti-anxiety medication. Br. of Resp. at 3. However, none of the citations to the record given by the Department actually support its assertion that Ms. Potter received medication in conjunction with these issues. But even to the extent that Ms. Potter had some issues with heights or elevators, it

does not automatically follow that those issues reveal a “long-standing history of anxiety.” Fear of heights and confined spaces (an elevator being a combination of the two) is quite common, and not an indicator of psychiatric disturbance of the magnitude and pervasiveness that the Department asserts.

Next, the Department references an incident where Ms. Potter visited Dr. Shuhart in May, 2002, complaining of “persistent fatigue and chest discomfort.” Br. of Resp. at 3; Shuhart at 13. Dr. Shuhart stated that Ms. Potter’s chest discomfort “might be related to what was going on in her life,” and determined that she was suffering from some anxiety. Shuhart at 18. But what was “going on in her life” is not mentioned by the Department. Ms. Potter testified that she had recently gone through an acrimonious break-up, was having difficulties with her employer, and experienced stress as a result of her fear of elevators and working on the 63rd floor of the Columbia Tower after the 9/11 terrorist attacks. Potter at 46-47; Shuhart at 16-17. Ms. Potter testified that as soon as her employment and relationship issues resolved she had no more anxiety. Potter at 48; Shuhart at 20.

The Department also focuses in on Ms. Potter’s complaints about exposure to copier toner in 2004 while working for DWT, emphasizing her complaints at that time of mental “fuzziness.” Br. of Resp. at 4. But the bulk of Ms. Potter’s symptoms were upper-respiratory in nature, ranging from nasal stuffiness to sore throat. See Shuhart at 23-24. The

Department attempts to link these problems to Ms. Potter's ostensible "long-standing history of anxiety" by selectively quoting her as having expressed to Dr. Shuhart that exposure to copier toner was "causing her significant worry and concern." Br. of Resp. at 4. The full quote from Dr. Shuhart bears repeating: "[Ms. Potter's] also concerned that she may be exposed to carcinogens, which she thought might be in the toner material from the copy machines, and that *caused her significant worry and concern, considering her recent diagnosis of breast cancer in situ.*" Shuhart at 26. Not only had Ms. Potter undergone surgery related to this breast cancer diagnosis, but a close relative had also been recently diagnosed with cancer, and the person who had occupied Ms. Potter's office before her had died of lung cancer. Potter at 48.

Taken in their full context, these events do not demonstrate a "long-standing history of anxiety," but rather the reactions of a normally-constituted person, with normal fears, to significant life events.

C. JANE POTTER'S MCS IS NOT BARRED BY RCW 51.08.142 AND WAC 296-14-300 AS A "SUBJECTIVE PERCEPTION OR FEAR OF CHEMICALS" BECAUSE ALL CREDIBLE EVIDENCE SUGGESTS THAT MCS IS A PHYSIOLOGICAL, RATHER THAN PSYCHOLOGICAL, ILLNESS

The Department argues that Ms. Potter's "condition" is a "mental condition resulting from her subjective perceptions or fear of chemicals," and thus not an occupational disease within the meaning of RCW 51.08.142 & WAC 296-14-300. Br. of Resp. at 40. Notably, the Department has chosen not to renew its *Frye* objection to evidence that Ms.

Potter suffers from MCS. Br. of Resp. at 2 n. 1. As such, the superior court's finding that evidence of MCS meets the general acceptance requirement of our state's *Frye* test is a factual finding which is a verity on appeal. See McCleary v. State, 269 P.3d 227, 246 (Wash. 2012) ("Unchallenged findings of fact are verities on appeal."); CP at 85-87.¹

Thus, the only real ground upon which the Department can challenge Dr. Keifer's diagnosis of MCS is that he could not have reached his diagnosis based on the facts of Ms. Potter's case.

In arguing that Ms. Potter's condition is subject to the exclusion of mental conditions based on stress, the Department incorrectly suggests that "the issue [under RCW 51.08.142 & WAC 296-14-300] is not whether MCS is a physiological disease but whether *Potter's condition* was a mental disorder caused by stress." This suggestion is obviously incorrect because "Potter's condition" is MCS, and thus MCS is only barred by RCW 51.08.142 & RCW 296-14-300 if it is a "mental disorder caused by stress." Stated properly, the threshold issue is whether Ms. Potter suffers from MCS and, if so, whether MCS is a "mental condition[] or mental disabilit[y] caused by stress." WAC 296-14-300.

The Department downplays the significance of the MCS diagnosis by cryptically referring to Ms. Potter's malady as a "condition." See generally Br. of Resp. at 40-46. But by minimizing the diagnostic label of

¹ The Department is of the mistaken impression that the superior court's unchallenged *Frye* Ruling prevents Ms. Potter from referring to the proclamation of May as "MCS Awareness Month" by Governor Gregoire. Br. of Resp. at 44. However, in its *Frye* Ruling, the superior court explicitly stated that Ms. Potter's Exhibit 14, Governor Gregoire's Proclamations, is admissible as "instructive" evidence." CP 86.

MCS, the Department also ignores a critical component of the thrust of its experts' opinions about Ms. Potter's "condition." The testimony of Drs. Stumpp and Hamm is of little value in diagnosing Ms. Potter's "condition" in this case because neither of those physicians believes that MCS is a legitimate diagnosis. See Stumpp at 25-27; Hamm at 29, 45-47. The Department called both Drs. Stumpp and Hamm in order to determine whether Ms. Potter's claim for workers' compensation benefits should be accepted under the diagnosis of MCS. Thus their alternative diagnosis—generalized anxiety disorder—was not really an alternative diagnosis at all, but the only viable one in light of the fact that they do not even recognize the existence of MCS. See, e.g., Stumpp at 26 (describing MCS as a "sociologic phenomenon" in which there is a "high burden of psychiatric disease—anxiety disorders, depression, panic attacks—in people that suffer from it").

The Department's strategy of not contesting the admissibility of MCS as a diagnosis under *Frye* and referring vaguely to Ms. Potter's "condition" is thus a double-edged sword. On the one hand, it allows the Department to argue that MCS (or "Potter's condition") is essentially a continuation of Ms. Potter's "long-standing history of anxiety" and predicated upon Ms. Potter's ostensibly irrational and unsubstantiated fear of exposure to chemicals on the job with Davis Wright Tremaine (DWT). On the other hand, it diminishes the value of the testimony of its own experts. Because Drs. Stumpp and Hamm testified that they do not believe

in the validity of MCS as a diagnosis, their testimony should be afforded little weight in determining whether MCS is a condition barred by RCW 51.08.142 & WAC 296-14-300 as a mental condition caused by stress.

This point demonstrates the import of the traditional rule that, in workers' compensation cases, the opinions of the injured worker's attending physician should be afforded "special consideration." Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Part of the policy underlying the "special consideration" rule is that "an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 654, 833 P.2d 390 (1992). Here we have two attending physicians, both of whom concur in the diagnosis of MCS, and both of whom categorically reject the notion that Ms. Potter's current symptoms are a continuation of some pre-existing psychiatric condition. See Shuhart at 46; Keifer at 51-52. On the other hand, both of the Department's experts examined Ms. Potter one time each, and through a forensic review of (what ironically consisted mostly of her attending physicians') medical records, determined that Ms. Potter's condition is all in her head—not to mention their categorical rejection of MCS. The opinions of Drs. Keifer and Shuhart should thus be afforded special consideration, especially when considering whether Ms. Potter's "condition" is MCS, or simply a generalized anxiety disorder.

The final issue is whether MCS itself is a "mental condition[]" or

mental disabilit[y] caused by stress.” WAC 296-14-300. As has already been shown, Drs. Stumpp and Hamm really have nothing to add to this issue because they both believe that MCS is not a legitimate diagnosis. In postulating that Dr. Keifer’s diagnosis of MCS is actually a mental condition, the Department relies heavily on his statement from October of 2007 that Ms. Potter’s symptomatology was likely “an additional panic-like reaction or anxiety-like reaction.” Br. of Resp. at 42. But Dr. Keifer also testified that this early theory was “merely a construct” that he used to understand an abnormally severe reaction to a low-level chemical exposure—essentially part of the differential diagnosis. Keifer at 22-23. Moreover, this construct pre-dated Dr. Keifer’s final diagnosis, rendered after consideration of many other possibilities, of MCS in September of 2008. Keifer at 39.

Dr. Keifer explicitly testified that he did not believe that Ms. Potter “had a generalized anxiety disorder to start with,” and that any anxiety associated with the toxicity of the chemicals to which she was exposed was, “given her experience, not . . . unfounded.” Keifer at 51-52. Dr. Keifer acknowledged that there may be “some debate as to the physiologic nature of [Ms. Potter’s] responses [to her chemical exposure],” but stated that her symptoms were related to her exposure, and would not have occurred but for the exposure. Keifer at 52. Similarly, Dr. Shuhart testified that Ms. Potter’s condition is not the “somatic expression of her underlying anxiety,” and also that her condition is “occupational in

nature.” Shuhart at 46. Thus, the opinion of both of Ms. Potter’s attending physicians is that her MCS is not a mental condition based on stress, but an occupational condition directly related to her on-the-job chemical exposure at DWT’s offices.

The declarations of Professor Steinemann and Dr. Hu in support of Ms. Potter help clarify the physiological nature of MCS. They also rebut Dr. Stumpp’s assertion that MCS is a misdiagnosis of unrecognized or untreated psychiatric illness. See Stumpp at 26; CABR at 283-84. Dr. Hu stated explicitly that “MCS is a ‘real’ clinical problem (not purely a psychogenic problem, such as a somatization disorder, or malingering) for which the biology remains unclear” CABR at 504. Professor Steinemann cited her own published, peer-reviewed study where she and her co-author found that only 1.4% of MCS sufferers “had a history of prior emotional problems.” CABR at 487. Furthermore, Professor Steinemann stated that Dr. Stumpp’s contention of a psychiatric basis for MCS “is inconsistent with federal and state government attention to [MCS],” and furthermore that the “concept that MCS represents an underlying anxiety or other psychological disorder” has been “widely discredited.” CABR at 488. MCS is thus not subject to the provisions of RCW 51.08.142 & WAC 296-14-300.

**D. JANE POTTER’S DEFECTIVELY VENTILATED OFFICE,
IN CONJUNCTION WITH THE CHEMICALS OFF-
GASSING FROM NEW FURNISHINGS IN HER OFFICE,
SATISFIES THE “NATURALLY” AND “PROXIMATELY”
REQUIREMENTS OF *DENNIS***

Under the rule announced in Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 745 P.2d 1245 (1987), Ms. Potter has the burden of proving that her MCS arose “proximately” and “naturally” out of her employment. The Department contends that Ms. Potter cannot prove that her MCS was proximately caused by conditions of her employment because “there is no evidence [she] was exposed to any chemicals at any significant level in her office.” Br. of Resp. at 31. But the Department misconstrues the nature of MCS, one of the hallmarks of which is that it presents in response to low levels of chemical exposure—not necessarily at a “significant level” or concentration. See Keifer at 39, 43.

The Department attempts to bolster its argument by pointing out that there is no direct evidence of Ms. Potter’s exposure to “any substantially concentrated off-gassing chemical.” Br. of Resp. at 31. In so doing, the Department minimizes the importance of the material safety data sheets (MSDS) from the materials used in the remodel, as well as this Court’s holding in Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 833 P.2d 390 (1992).

First, the MSDS are evidence of the chemicals to which Ms. Potter was exposed during and after the remodel of DWT’s offices. The Department quotes Nancy Beaudet, the industrial hygienist who evaluated Ms. Potter’s office space at DWT, as stating that “the MSDS do not tell what necessarily is going to be offgassing from the material.” Br. of Resp. at 31 (internal quotations omitted). But that quote seems a bit out of

context, especially given Ms. Beaudet's earlier statement that she incorporated the MSDS into her findings regarding the toxicity of Ms. Potter's office. Beaudet at 84. Another point Ms. Beaudet made vis-à-vis the MSDS is that they do not necessarily tell you what is going to be off-gassing from the material because "[the off-gassing] could be a chemical reaction of multiple ingredients," or "a reaction of one product with another product." Beaudet at 86.

The MSDS are in the un-paginated section of the CABR titled "exhibits." The first few pages are a summary of the MSDS provided to Ms. Potter by DWT, following which are the actual MSDS themselves. In particular, the Greenguard Indoor Air Quality Certification for the SheerWeave blinds in Ms. Potter's office lists the chemical emissions of those blinds. The chemicals emitted include volatile organic compounds such as formaldehyde and styrene. Although there are also MSDS for many other products, all of which were used in the remodel of DWT's offices, the chemicals used therein are too numerous to list. Despite the fact that no specific testing was done in order to show the actual concentration of off-gassing chemicals, Ms. Beaudet testified unequivocally that organic compounds continue to off-gas from new furnishings after they are installed. Beaudet at 74. The Department does not offer any evidence to refute the testimony of Ms. Beaudet, but instead argues that no tests directly show the presence or concentration of any particular chemicals in Ms. Potter's office. Yet under this Court's holding

in Intalco, the fact that Ms. Potter is unable to identify the particular chemical which caused or gave rise to her illness is not fatal to her case.

In Intalco, this Court specifically held that the Industrial Insurance Act does not require “that the claimant identify the specific toxic agent responsible for his or her disease or disability.” Intalco, 66 Wn. App. at 656. In that case, testing by an industrial hygienist had revealed high levels of fluoride in the Intalco plant, but there was no suggestion that fluoride itself caused the injured workers’ conditions. Id. at 649, 655. Instead, the workers’ physicians keyed in on the presence of aluminum, and specifically “animal studies [which] revealed that aluminum exposure could cause symptoms similar to those exhibited by the claimants.” Id. at 656. The only evidence on the record regarding the presence of aluminum was the testimony of the industrial hygienist “that numerous toxins, including aluminum, benzene solubles, petroleum pitch volatiles, and carbon monoxide *would* also be present in the pot room atmosphere.” Id. at 649 (emphasis added). Similarly, the evidence offered by Ms. Beaudet was that volatile organic compounds *would* off-gas from the new furnishings in Ms. Potter’s office. Thus, the evidence offered by Ms. Potter is essentially the same as that found sufficient by this Court in Intalco.

Additionally in Intalco, the injured workers’ physicians had engaged in “extensive investigations of the claimants’ medical and work histories [which] revealed no other likely cause of their disease.” 66 Wn.

App. at 656. Dr. Keifer similarly took an extensive history from Ms. Potter, and then went through over a year of work-ups and diagnostics to rule out numerous other possibilities before rendering his final diagnosis of MCS. See generally Keifer at 13-40. Dr. Keifer testified that Ms. Potter's condition was "directly related to her exposure" to chemicals in her DWT office. Keifer at 52.

The Department states that Ms. Potter's reliance on Intalco is misplaced because "unlike the situation in Intalco, there is no evidence of exposure to toxins in excess of permissible levels, and there is no evidence of neurologic deficits, only subjective reporting of brain fog." Br. of Resp. at 34, 35 (internal quotations omitted). But the Department again fundamentally misconstrues the nature of MCS, which presents in response to low levels of exposure to unrelated chemicals. Keifer at 43. Additionally, the Department incorrectly states that there is no objective evidence of MS. Potter's illness. The diagnosis of MCS is based on the credible report of symptoms by the patient, and Ms. Potter also exhibited objective signs of dysfunction in some of the tests requested by Dr. Keifer.. Dr. Keifer referred Ms. Potter for pulmonary testing in November, 2007, which revealed "dyspnea on exertion that was severe and limited," and an abnormally high pulse rate with simple exertion. Keifer at 66, 27. Dr. Keifer also tested Ms. Potter's blood oxygen saturation, which revealed an unexplained drop from 97 to 93 percent when Ms. Potter went into a supine position. Keifer at 31. Dr. Keifer also referred Ms. Potter to a

naturopathic physician who may be able to provide additional objective findings based upon his specialized knowledge, but coverage of that was denied by the Department because Ms. Potter's claim was rejected. Keifer at 48-49.

The Department also states that Ms. Potter's reliance on the New Hampshire Supreme Court's holdings in Kehoe I and Kehoe II is inappropriate because those holdings do not support her case. Br. of Resp. at 35. Specifically, the Department contends that "The *Kehoe* court did *not* hold the worker there 'presented sufficient testimony that conditions of her employment caused her MCS.'" Id. However, the Department incorrectly cites to Kehoe I, where the New Hampshire court originally held that evidence of MCS was admissible and remanded the case for reconsideration by the trial court. See Br. of Resp. at 36 (citing to Kehoe, 648 A.2d at 474). In fact, on remand, the workers' compensation board again denied the worker's claim, holding that she "failed to prove by a preponderance that the MCSS is causally related to a risk or hazard of employment" Kehoe II, 686 A.2d 749, 752 (1996). The New Hampshire Supreme Court again reversed, holding that, where none of the injured worker's treating physicians "expressed any doubt that work contributed to, or at a minimum aggravated, her condition," the claimant had met her burden of proof. 686 A.2d at 753-54. Also, similar to Ms. Potter's case, the "respondents relied on two medical experts Neither, however, offered a direct opinion about the causation issue." Id. at 753.

Just like in Ms. Potter's case, one of the experts "took issue with [the] holding in the claimant's first appeal that MCSS is an occupational disease." Id. Just as in Kehoe II, "[t]he overwhelming balance of medical evidence relating to causation is the opinions offered by the claimant's treating physicians." Id.

The last issue is whether Ms. Potter's MCS arose "naturally" out of her employment with DWT. Under Dennis, the "naturally" component of the occupational disease test requires that Ms. Potter prove that her MCS "came about as a matter of course as a natural consequence or incident of distinctive conditions or [her] employment." Dennis, 109 Wn.2d at 481. Here, the off-gassing furnishings in Ms. Potter's office, combined with the defective ventilation in her office, are sufficiently distinctive conditions under the meaning of Dennis.

The Department's citation to Witherspoon v. Dep't of Labor & Indus., 72 Wn. App. 847, 866 P.2d 78 (1994), is inapposite because in that case, as the Department acknowledged, "there was no showing that the conditions of the worker's employment caused him to be in contact with the bacteria [which causes meningitis] any more than he would be in ordinary life or other employments." Br. of Resp. at 38 (quoting Witherspoon). There was testimony in Witherspoon that the bacteria which causes meningitis "occurs almost everywhere commonly." 72 Wn. App. at 850. Here, unlike was the case in Witherspoon, Drs. Keifer and Shuhart testified that Ms. Potter's condition is directly related to chemical

exposure in her office. Keifer at 52, Shuhart at 46. The testimony of Drs. Stumpp and Hamm does not actually refute this attribution of causal relationship, but instead simply suggests that Ms. Potter has a pre-existing generalized anxiety disorder which was not caused or aggravated by her chemical exposure.

The Department's citations to Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 880 P.2d 29 (1994), and Gast v. Dep't of Labor & Indus., 70 Wn. App. 239, 852 P.2d 319 (1993), are also misplaced because there is no question that the condition at issue in those cases was a mental condition. In Wheeler, the court was asked to address a "hypothetical" claim for workers' compensation benefits predicated on "a mental disability resulting from [her supervisor's] harassment." 65 Wn. App. at 566, 568. In Gast, the injured worker appealed a jury verdict for the Department that her "stress-related disease" was not compensable under the IIA because the "rumors, innuendos, and inappropriate comments by co-workers" on which her claim was predicated were "not distinctive conditions of employment." 70 Wn. App. at 320. Not only are the holdings in these cases obviated by the passage of WAC 296-14-300, but they lack any truly distinctive conditions.

In Ms. Potter's case, the defective ventilation of her office, in combination with the off-gassing chemicals therein, are sufficiently distinctive of her employment because those conditions are not simply "conditions coincidentally occurring in . . . her workplace." Dennis, 109

Wn. 2d at 481. The Department argues that Ms. Potter did not show that “conditions of her employment caused her to be in contact with the low-level chemicals any more than she would be in ordinary life or other employments.” Br. of Resp. at 40. But Ms. Potter presented the uncontroverted testimony of an industrial hygienist, Nancy Beaudet, that the building plans erroneously called for two supply vents instead of a supply and a return vent in Ms. Potter’s office. Beaudet at 74. The effect of this, as Ms. Beaudet further testified, was to create positive pressure in Ms. Potter’s office which prevented the mixing and circulation of air in Ms. Potter’s office. Beaudet at 75. Thus the off-gassing chemicals remained in the air in Ms. Potter’s office instead of cycling out as they would have in a properly ventilated office.

The Department attempts to refute this testimony by quoting the testimony of Lisa Wabik, DWT’s facilities manager, for the notion that “[t]he building engineer . . . confirmed there was a return working just fine.” Br. of Resp. at 32. However, the Department is impermissibly offering this hearsay testimony to prove the truth of the building engineer’s supposed statement to Ms. Wabik. Additionally, this issue is clearly beyond the expertise of Ms. Wabik, and she stated in her testimony that she believed the engineer “installed I believe it was a 24 by 24 additional grill into Jane’s office to allow more air flow to be able to come through.” Wabik at 43. Ms. Wabik did agree that “there was some sort of

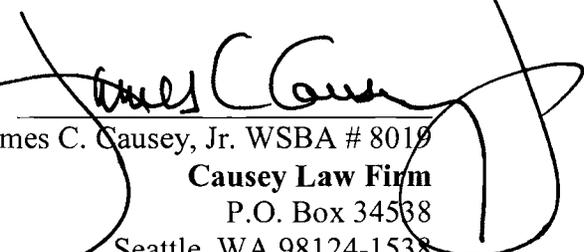
defect with the return that was pointed out by Ms. Beaudet and fixed by the engineers subsequent to [Ms. Beaudet's assessment]." Id.

The Department finally states that Ms. Potter's claim of defective ventilation is refuted by Ms. Beaudet's own testimony wherein Ms. Beaudet stated that she was not sure if she wanted to characterize the "error on the architectural plan as an error in a room with a bunch of lawyers." Br. of Resp. at 32; Beaudet at 74. This statement was, given its context, clearly made in jest, and the Department has absurdly mischaracterized it.

III. CONCLUSION

For the foregoing reasons, Ms. Potter respectfully requests that this court reverse the superior court and require that the Department of Labor & Industries accept her workers' compensation claim.

Respectfully submitted this 15th day of March, 2012.



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Proof of Service

I certify that I served a copy of the Appellant's Reply Brief on all parties or their counsel of record on the date below as follows:

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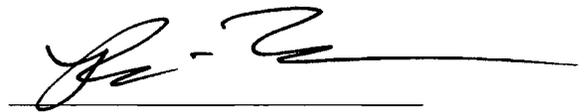
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 15th day of March, 2012, at Seattle, Washington



Brian M. Wright
Legal Intern