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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,

Respondent.

RESPONDENT'S BRIEF

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Appendix

Appendix A: Superior Court Judgment (CP 106-109)
Superior Court Ruling on *Frye* (CP 85-87)
Board Decision (BR 2-17)
Department Claim Rejection Order (BR 247)

I. INTRODUCTION

This is a workers' compensation claim rejection case. At issue is not whether multiple chemical sensitivity (MCS) is a recognized disorder. Rather, the issue is whether Potter's condition under the facts of this case arose "naturally" and "proximately" out of her employment, such that it constituted an occupational disease. Even considering the disputed expert opinions on MCS, the Board of Industrial Insurance Appeals and the superior court both answered this question in the negative.

To establish an occupational disease, Potter had to show her condition came about as a proximate and natural consequence of distinctive conditions of her particular employment. She had to show her particular work conditions more probably caused her disease than conditions in everyday life or all employments in general. Mental conditions caused by stress such as subjective perceptions or fear of chemicals are excluded from the definition of occupational disease.

Substantial evidence supports the finding that Potter's condition did not arise as a proximate and natural consequence of any distinctive condition of her employment with Davis Wright Tremaine. Potter's anxiety resulting from her subjective perceptions or fear of chemical exposure does not constitute an occupational disease. The Department of Labor & Industries asks this Court to affirm the superior court judgment.

II. COUNTER STATEMENT OF THE ISSUES¹

1. Does substantial evidence support the finding that Potter's condition did not arise proximately out of her employment, when there is no evidence she was exposed to any chemicals at any significant levels at work, all of her test results were normal, she developed chemical sensitivities in non-work places before the alleged exposures, and her symptoms continued more than a year and a half after she began working entirely from her home?
2. Does substantial evidence support the finding that Potter's condition did not arise naturally out of her employment, when there is no evidence she was exposed to any chemicals at any significant levels at work, all of her test results were normal, she developed chemical sensitivities in non-work places before the alleged exposures, and her symptoms continued more than a year and a half after she began working entirely from her home?
3. Mental conditions caused by stress such as subjective perceptions or fear of chemicals are excluded from the definition of occupational disease. Does substantial evidence support the finding that Potter's condition resulted from her subjective perceptions or fear of chemicals related to her anxiety, when two medical experts, including a psychiatrist, testified to that effect? Did the superior court correctly conclude such condition does not constitute an occupational disease?

III. COUNTERSTATEMENT OF THE CASE

Jane Potter worked for Davis Wright Tremaine as a patent attorney from August 2002 to December 2008. Potter 8; Finding of Fact (FF) 1.3.²

¹ The Department does not challenge the superior court's *Frye* ruling admitting expert opinions on MCS (CP 85-87).

² This brief refers to the testimony taken at the Board of Industrial Insurance Appeals, by the surname of the witness followed by the page number of the hearing or deposition transcript, which is located in the Certified Appeal Board Record (BR).

Findings of Fact and Conclusions of Law refer to those made by the superior court in the judgment on appeal (CP 106-109), which affirmed the Board decision (BR 2-17), which in turn affirmed the Department's claim rejection order (BR 247). Copies of

Potter's occupational disease claim is based solely on her disputed chemical exposures in her remodeled Washington Mutual Tower office from June 17, 2007 to early September 2007, when she began working entirely from home. Potter 14-22; FF 1.4-1.6. Four medical doctors testified about her condition and its likely cause: Dr. Matthew Keifer; Dr. Christopher Shuhart; Dr. Dennis Stumpp; and Dr. John Hamm.

This fact section begins with Potter's history of anxiety before her disputed chemical exposures, followed by the disputed exposures, her continuing symptoms away from work, and procedural history.

A. Potter's Long-Standing History of Anxiety Complaints before Her Disputed Chemical Exposure at Work in June 2007

Potter reported her long-standing problems with anxiety and fear. Shuhart 17. In 1998, she reported dizziness and panic-type symptoms in elevators, confined spaces, and heights, and her then doctor prescribed anti-anxiety medicine. Stumpp 37-38; Hamm 13, 30, 35; Potter 12-13.

In May 2002, Potter visited Dr. Shuhart and reported persistent fatigue, chest discomfort, episodes of "overwhelming fear and doom," breathlessness, dizziness, and a "long-standing intermittent problem with anxiety and fear." Shuhart 12, 17. She reported her fear of elevators and told the doctor she carried Valium with a flashlight and extra water in her

the superior court judgment and ruling on *Frye* motion, Board decision, and the Department's claim rejection order are attached as Appendix A.

purse in case she got stuck. Shuhart 17. However, her examinations and chest x-ray were all normal. Shuhart 14; Stumpp 37. About two weeks later, she visited Dr. Shuhart again and reported continuing sensation and an awareness of her chest, difficulty taking in deep breaths, and fatigue. Shuhart 15. Dr. Shuhart believed Potter had anxiety, might be a generalized anxiety disorder, and potentially a phobic disorder and panic attacks. Shuhart 18-19. He prescribed anti-anxiety medicine. Shuhart 19.

In November 2003, Potter visited Dr. Keifer and reported recurrent stuffy nose and upper respiratory symptoms. Keifer 73; Stumpp 43-44. She attributed her symptoms to her being in a copy room or around printers, staying overnight in her friend's house (described as moldy and wet), and drinking coffee or caffeine. Keifer 73-74; Stumpp 43-44.

In August 2004, she visited Dr. Shuhart and reported her concern about chemical sensitivity. Shuhart 23. She reported being "fuzzy" (described as cognitive abilities being not quite as sharp) and distracted, forgetting names, and having difficulty recalling nouns. Shuhart 23-24, 50; Stumpp 38-39; Potter 26. She also reported nasal stuffiness and scratchy throat and attributed her symptoms to her being exposed to chemicals at work, such as copied materials. Shuhart 23. She reported accelerating symptoms, which "would happen if she hadn't washed her hair before she went to bed" with "the remnants of chemical material she

thought she might be sensitive to in her hair.” Shuhart 24. She reported respiratory symptoms and concerns of exposure to carcinogens, which she thought might be in the copy toner, “causing her significant worry and concern.” Shuhart 26. Her physical examination was “unremarkable,” except for some mild redness and swelling around the lower portions of her nasal cavity and nasal wall. Shuhart 26. Her pulmonary test was normal, and her allergy tests negative. Shuhart 27, 51.

In March 2006, Potter visited Dr. Shuhart and reported depression. Shuhart 32. She felt depressed, found it difficult to focus and think, was too tired to go to work, had massive regrets in life, and had been in bed thinking about death. Shuhart 32. She was worried and self-conscious. Shuhart 32. Dr. Shuhart found low to moderate depression on Beck Depression Inventory, borderline upper normal value on Beck Anxiety Inventory, issues with self-esteem, obsessional worry, feelings of guilt, and regret. Shuhart 33. He prescribed an anti-depressant. Shuhart 33.

B. Potter’s Disputed Chemical Exposures at Her Davis Wright Tremaine Law Office from June 17 to Early September 2007

On June 17, 2007, Potter moved into her new Davis Wright Tremaine office at the Washington Mutual Tower on the 23rd floor. Potter 14; FF 1.3. The law firm’s facilities manager Lisa Wabik testified

that the construction was done in 2006 and complete by the time of the move with certificate of occupancy. Wabik 26.

Potter testified that during the first week of the move, she felt a metallic taste in her mouth, stale air, and strong chemical smells and felt distracted. Potter 16. She testified she started to make mistakes. Potter 17. She felt fatigued in the end of July and early August with nose bleeds. Potter 17. She went hiking to Mt. Rainier and felt out of breath, and her friends thought of taking her to the emergency room. Potter 28.

In September 2007, Potter visited Dr. Shuhart and reported burning eyes, shortness of breath, fatigue, headache, mental confusion, and cough, all of which she attributed to the chemicals she thought were present in her new office. Shuhart 8-10. But her examination was normal. Shuhart 11.

In early September 2007, Potter “began working entirely from home.” Potter 22. She only met her assistant two to three times a week on the ground floor to review files and sign letters. Potter 22. She never returned to work at her office again.

C. Potter’s Continuing Symptoms and Developing New Symptoms after She Began Working Entirely from Home

Potter continued to have symptoms and developed new ones, even after she began working away from her office. Keifer 73-74. She testified

that from the end of September to early October 2007, she was ill 24 hours a day, confused all the time, tired, and had nose bleeds. Potter 24.

On October 8, 2007, she visited Dr. Keifer and reported fuzziness in thought, irritation, headache, burning eyes, running nose, and shortness of breath, which she attributed to chemicals. Keifer 12-15. She reported problems near cash machines and in camera stores, hardware stores, and sometimes clothing stores. Keifer 16. Her physical and neurological examinations were normal. Keifer 21-25. Dr. Keifer made no diagnosis and provided no treatment. Keifer 59-60. He noted Potter was “so concerned about her mental function,” and “a good deal of the brain fog is [likely] an additional panic-like reaction or anxiety-like reaction when she starts to note that her brain does not appear to be functioning well because of the distraction of the olfactory irritation.” Keifer 59. Her concern “only adds to the anxiety and distracts her even further.” Keifer 59-60. Dr. Keifer “recommended that she pay particular attention to this to calm herself down as much as possible during these episodes so that she does not get into the cycle of worsening brain fog.” Keifer 60.

On October 22, 2007, Potter visited Dr. Keifer and reported a new symptom, shortness of breath with exertion, which the doctor explained was not part of her initial complaint. Keifer 26, 60. She complained of mental fuzziness and said she had been on vacation and was more tired

than she would have expected. Keifer 26. She reported crustiness of her nasal mucosa and some blood flakes when she blew her nose. Keifer 26. Potter's heart was normal, her neurologic examination and electrocardiography (EKG) were also normal, and her oximetry was good with stable oxygen in the blood. Keifer 27, 61-62. Although Potter's pulse jumped when she went up a flight of stairs, her pulmonary test was above normal, which was good. Keifer 27-28, 61-62. Dr. Hamm later explained that stress affects lung function and cardiac output, and there is a subjective part to pulmonary and cardiac assessment tests. Hamm 37-38. Dr. Keifer noted: "At this point it's difficult for me to see that her air exchange is significantly impaired given her normal pulmonary functions, normal flows, normal volumes and good saturation." Keifer 62-63.

On November 5, 2007, Potter visited Dr. Keifer and reported the same symptoms and worsening of fatigue with exercise. Keifer 30. She reported more difficulty in keeping up with her walking pace, some peeling of her feet, and some bleeding from nostrils. Keifer 30. She also reported a new symptom of increased tightness in her chest. Keifer 64. Potter had undergone a test to rule out deep venous thrombosis and pulmonary embolism, and the result was normal. Keifer 30-31. Dr. Keifer noted: "We talked about the possibility of this being claim based, but as this has evolved further even away from work, the likelihood of us

being able to connect it to her workplace exposure directly has decreased at least until we have a more demonstrable diagnosis.” Keifer 64-65.³

In December 2007, Potter started a detoxification diet. Potter 32-33. Her detox diet consisted of taking a “series of supplements” (such as milk thistle and vitamin C) and eliminating dairy, sweets, and meat. Potter 50, 63. She wrote to a Dr. Reinstra, saying she did a 3-day detox diet and “within two days [she] was symptom-free.” Potter 50. She wrote her symptoms “completely disappeared” and had “never recurred.” Potter 50-51. Dr. Stumpp testified that detoxification is a naturopathic principle, not founded on any science. Stumpp 52. There is no evidence a person builds up toxins in the body by normal exposures and no evidence a detox diet would remove the waste chemical and toxins in the body. Stumpp 52. Dr. Keifer admitted he was “not well versed in” detoxification. Keifer 38.

On January 14, 2008, Potter visited Dr. Keifer, and her physical examination was again normal. Keifer 68. Dr. Keifer noted Potter had by this time “undergone a number of different tests by a number of different groups . . . [a]ll of which turned out to be normal.” Keifer 67. He also noted that her examinations had shown no pathological abnormality. Keifer 68. He recommended a return to full work duties. Keifer 68;

³ Potter points out “an unexplained drop in blood oxygen saturation” during her November 5 visit to Dr. Keifer. Appellant’s Brief 11. But Dr. Keifer confirmed there was no evidence of oxygen desaturation while exercising. Keifer 62.

Collier 20. Potter then attempted to return to work but became symptomatic when entering the lobby of the building. Potter 34; Stumpp 17. She continued to work from home. Potter 34; Stumpp 17.

On January 24, 2008, industrial hygienist Nancy Beaudet conducted an air quality assessment in Potter's office. Potter had asked human resource director Michelle Collier for the assessment and provided Beaudet's contact information. Collier 11. The assessment was delayed, because Beaudet called Collier to inform that Potter's doctor told Beaudet to postpone it, as the doctor was exploring a potential other cause for Potter's condition and was not sure whether the assessment was necessary. Collier 13. Beaudet tested carbon dioxide (CO₂) and carbon monoxide (CO) in Potter's office and found CO₂ not elevated and CO unremarkable. Beaudet 82. All of her findings were within the right range. Wabik 40.

Beaudet noticed two things in Potter's office. First, Beaudet noticed a smell in the vinyl blinds, but only when she unrolled the blinds, and otherwise noticed no odor with any of the office furnishings. Beaudet 76, 81-82. Potter had complained about a smell in her office in August 2007, about two months after the office move, and the facilities manager Wabik visited Potter's office then and could smell a "faint plasticky smell." Wabik 29. Potter's assistant Sharon Sheridan described the smell as "terrible." Sheridan 95. Wabik testified that no employee other than

Potter and Sheridan raised any air quality concerns, except that some mentioned “a little bit of a new plastic smell” when the blinds were down, but once they had their blinds down for a short period of time, the smell dissipated almost immediately, so there was no specific complaint. Wabik 30-32. In her air quality assessment, Beaudet did not measure whatever off-gassing there might be in the blinds. Beaudet 82. Nor did she evaluate whether any office furnishings had any off-gassing. Beaudet 83.

Second, Beaudet noted that the return (outflow) in the ventilation duct system in Potter’s office “seemed to [her], as a non-architectural ventilation person” erroneously ducted as a supply (inflow). Beaudet 74-75. What Beaudet thought “can happen is that the room becomes positive in pressure,” and “it’s very slight.” Beaudet 74-75. However, Beaudet was unsure she would “characterize it as an error in a room with a bunch of lawyers.” Beaudet 74. Beaudet later admitted that high concentrations of CO₂ may indicate ineffective ventilation, and CO₂ was not elevated. Beaudet 82-83. Dr. Stumpp testified that CO₂ levels are “a surrogate for adequacy of ventilation,” because “if you’ve got adequate ventilation in the area, you won’t have high levels of [CO₂].” Stumpp 31. “So low [CO₂] levels indicate that you’re ventilating the space adequately for the number of people that are there.” Stumpp 32.

Back in June 2007, Potter complained about not having enough air flow in her office. Wabik 27. Wabik immediately contacted the building engineer, who then assessed the air flow and the ventilation duct system in Potter's office. Wabik 27, 42. The engineer confirmed there was in fact a return that was working "just fine." Wabik 43. But an additional grill was installed for even more air flow to accommodate Potter's concern. Wabik 43. Wabik testified that even in her old office in a different building, Potter had complained of air flow and her proximity to the coffee rooms where there were coffee and fax machines. Wabik 35-36.

In February 2008, Potter applied for workers' compensation, with Dr. Keifer's diagnosis of upper respiratory tract irritation, not MCS. BR 345; Keifer 31, 34. Dr. Keifer wrote "NONE" in the claim form as to the presence of objective findings supporting his diagnosis. BR 345; Keifer 72-73. In the same month, Potter visited Dr. Shuhart, saying she wanted to discuss chemical sensitivity. Shuhart 35. She told Dr. Shuhart she had an abnormal diffusion capacity test and there would be a follow-up. Shuhart 35. She reported she had difficulty going to hardware stores, paint stores, anywhere where there are strong smells, candle stores, cleaning aisle in the grocery store, and she had to avoid these places, or her sinuses would become swollen and congested. Shuhart 37.

In July 2008, Potter reported an episode when she went downtown for an interview in a high-rise building. Potter 36; Stumpp 41. She reported a “total recurrence of the symptoms,” with increased heart rate and attributed her symptoms “to certain interior air quality.” Potter 36.

On September 29, 2008, Potter visited Dr. Keifer. Keifer 36. It had been more than a year after she stopped working in her office. But she reported her symptoms had worsened. Keifer 69. She reported confusion, disconnection, inability to concentrate, burning eyes, cough, and dramatic fatigue, and attributed her symptoms to pesticides, formaldehyde, off-gassing paint fumes, and fumes from new remodel situations. Keifer 37. She was treating naturopathically. Keifer 38. Dr. Keifer found her eyes, head, ears, nose, and throat unremarkable, blood pressure normal, pulse normal, temperature good, oxygen saturation normal, cranial nerves normal, and cardiac examination normal. Keifer 38, 70. Dr. Keifer had no specific plan to see her again. Keifer 71.

During her September 29 visit, Potter suggested she had MCS, and Dr. Keifer mentioned it in his chart note. Keifer 70-71. This was the first time Dr. Keifer mentioned MCS as a possible diagnosis. Keifer 71. He later diagnosed Potter with MCS, using the criteria developed by Mark Cullen. Keifer 39-42. Cullen defines MCS with six criteria: (1) a chronic condition; (2) with symptoms that occur reproducibly; (3) in response to

low levels of exposure; (4) to multiple unrelated chemicals; (5) that improve or resolve when the incitants are removed; and (6) the symptoms occur in multiple organ systems. Keifer 38-40, 42-43.

Dr. Keifer admitted his MCS diagnosis was based entirely on Potter's report of symptoms. Keifer 71. He also admitted there was no objective test to diagnose MCS. Keifer 71. "It's based purely on people's reporting, purely symptomatic reporting." Keifer 76.

In October 2008, Dr. Hamm, a Board-certified practitioner in psychiatry, conducted an independent psychiatric evaluation of Potter. Hamm 5-7, 10. Dr. Hamm reviewed Potter's extensive medical records, including those from Dr. Shuhart and Dr. Keifer. Hamm 10-11.

Dr. Hamm believed Potter had a chronic anxiety disorder, "preexisting psychiatric problems" not aggravated by workplace exposure. Hamm 22, 24, 33. He explained that anxiety is based on perceived danger, and a person with anxiety perceives her environment as dangerous when it really is not. Hamm 24, 27. This is a self-generating problem. Hamm 27. Shortness of breath and fatigue are "extremely common" anxiety symptoms, and anxiety interferes with memory, multi-tasking, and various things, affecting the brain function, which some describe as "brain fog." Hamm 29. Hyperventilation is another anxiety symptom; a person with anxiety may breathe shallowly, start feeling dizzy and lightheaded,

and eventually faint for the improper gas exchange in the lungs. Hamm 28. Even “the brightest people can have anxiety disorders.” Hamm 52.

Dr. Hamm has evaluated and treated patients with the MCS diagnostic label and has read psychiatric literature on the subject, some of which came from occupational medicine and neurology. Hamm 44. He explained that these patients often have substantial anxiety symptoms, and anxiety causes brain fog and makes them afraid of chemicals. Hamm 28-29. However, “each individual is a little different,” and “there may be different kinds of exposures and different kinds of reactions.” Hamm 45. Dr. Hamm believed Potter’s fear of the environment was based on her subjective perceptions, not on any objective or scientific data. Hamm 33.

In November 2008, Dr. Stumpp, a Board-certified practitioner in occupational medicine, conducted an independent medical examination of Potter. Stumpp 7-9, 11. Dr. Stumpp did a complete physical examination, including ear, nose, throat, eye, chest, cardiac, and neurological tests, and his findings were all normal, except for some dry skin of her legs. Stumpp 20. Dr. Stumpp reviewed Potter’s extensive medical records, including those from Dr. Shuhart and Dr. Keifer. Stumpp 13-14. Dr. Stumpp pointed out that Potter “had no underlying physiologic disease process documented in spite of her extensive workups.” Stumpp 25.

Like Dr. Hamm, Dr. Stumpp testified that Potter's symptoms are likely somatic manifestations of a generalized anxiety disorder. Stumpp 23. The "trigger for that anxiety is her perception that she's being exposed to chemicals that might be hazardous." Stumpp 40. She developed symptoms "in response to her perception that there were chemicals where she was," just as she developed "similar symptoms in response to a variety of other stressors in her life." Stumpp 23. Dr. Keifer's MCS diagnosis "doesn't address whether or not that perception is warranted." Stumpp 40.

Dr. Stumpp has evaluated patients with similar symptoms and has reviewed extensive literature on MCS. Stumpp 26-27. He testified that MCS is "definitely a medical phenomenon," Stumpp 28, but the problem with the MCS diagnosis is its unproven assumption of chemical exposure, Stumpp 24-26, 100. MCS has been renamed "idiopathic environmental intolerance" (IEI), because scientific studies have found no convincing evidence of any immunologically or medically defined sensitivity or evidence that the symptoms are related to chemicals. Stumpp 25.

Dr. Stumpp testified that Potter can arguably but "doesn't really meet the criteria" for MCS as developed by Cullen. Stumpp 47, 100. She "really technically doesn't meet the criteria, in that she has symptoms when there is no chemical exposure, at least that she's aware of, or no odor." Stumpp 48. But Dr. Stumpp cautioned that "there is no such thing

as no chemical exposure,” in the sense “air we’re breathing always has chemicals in it if you have a sensitive-enough measuring device.” Stumpp 48. Dr. Stumpp believed Potter also does not really meet the reproducibility MCS criteria, because she does not invariably develops symptoms in response to chemicals but also develops symptoms in response to non-chemical stressors. Stumpp 48.

However, Dr. Stumpp pointed out that with MCS, exposure is “self-defined by the patient.” Stumpp 49. Thus, one could argue, “if I was having symptoms, there was an exposure, because it’s patient defined, and if I wasn’t having symptoms, then there wasn’t an exposure, because it’s patient defined.” Stumpp 100. The MCS criteria include chemical exposure, but its diagnosis can be based solely on a patient’s report. Stumpp 47-49, 99-101. “That’s exactly the problem with the diagnosis and the lack of an objective basis for it.” Stumpp 100-01.

Asked about the odor noted in the blinds in Potter’s office, Dr. Stumpp explained that odor-mediated symptoms are pretty common, and such symptoms do not necessarily indicate a disease. Stumpp 30. As to Potter’s recurrent noise irritation, Dr. Stumpp pointed out a doctor’s assessment that her difficulty with irritation, chronic scabbing, crusting, and manipulation is a “common problem whether people are exposed to chemicals or have chemical sensitivities at all.” Stumpp 96. Periodic

bloody noses or scabbiness are common. Stumpp 43. Many things, such as dry air, can cause crustiness of nasal mucosa and flakes of blood when blowing nose. Stumpp 43. If “somebody perceives discomfort in their nose or has irritation of their nose, they’re going to pick it,” and “that usually just make problems worse in terms of nosebleeds.” Stumpp 97.

Although Dr. Keifer disagreed with Dr. Hamm’s and Dr. Stumpp’s opinion that Potter’s symptoms are due to an anxiety disorder unrelated to chemicals, Dr. Keifer admitted “anxiety [was] associated with her concern about the toxicity of these chemicals.” Keifer 52. Dr. Keifer testified that “there is a substantial amount of anxiety associated with the symptomatic presentation of [MCS].” Keifer 41. He also admitted there “may be some debate as to the physiological nature of those responses.” Keifer 52.

Dr. Shuhart testified that Potter’s condition was work-related. Shuhart 46. But Dr. Shuhart was not Board-certified in occupational medicine or psychiatry and did not do a residency in either area. Shuhart 47. His specialty was bone health and osteoporosis. Shuhart 4-7.

Dr. Shuhart testified that some of Potter’s symptoms between 2002 and 2006 are similar to those she developed after the June 2007 office move. Shuhart 45. He testified that some of her non-specific symptoms such as breathing difficulties, cough, rhinitis, and difficulty with concentration, attention, and memory predated the office move. Shuhart

56. Dr. Keifer also testified that when Potter visited him in November 2003, she reported similar symptoms at non-work-related places such as at a house, “where it was moldy with wet carpets, animals.” Keifer 74. Dr. Stumpp consistently testified that Potter had “a lot of presentations which were identical to symptoms she was alleging as part of the claim which predated her exposure.” Stumpp 21.

In May 2009, Dr. Keifer saw Potter and her attorney. Keifer 49, 71-72. Potter said she felt better with her detox diet but had regular episodes, which she attributed to chemicals in her environment. Keifer 49-50. Her physical examination was again normal. Keifer 72. Dr. Keifer admitted that nothing changed in her examinations. Keifer 50. In the same month, Potter also visited Dr. Shuhart with her attorney and said she believed she had MCS. Shuhart 55-57

In November 2009, Potter visited Dr. Keifer and reported an episode on an airplane, including tremor, fatigue, and disorientation. Keifer 53. Potter had generally recovered from the episode but reported continuing fatigue, heart racing with low levels of exertion, and “fogginess in thought, sometimes sort of losing her way.” Keifer 53-54. She reported making mistakes in her work, identified by other lawyers. Potter 54. But Davis Wright Tremaine’s Collier did not believe Potter’s work quality

became worse and testified that as the human resource director, Collier would know of any work quality issue with an attorney. Collier 21-23.

D. Claim Denial, Potter's Appeal, and the Board's Decision that Potter's Condition Was Not an Occupational Disease

The Department rejected Potter's claim, finding that her condition does not constitute an industrial injury or occupational disease. BR 247; FF 1.2. Potter appealed to the Board. BR 246; FF 1.2.

At the Board, the Department moved to exclude expert opinions related to MCS under *Frye*, ER 702, and ER 703. BR 273-344; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Potter filed a response, attaching various documents. BR 364-782. The industrial appeals judge (IAJ) reserved ruling but ultimately denied the motion. BR 221-22.

Besides the four experts who testified in perpetuation depositions, four other witnesses testified at the hearing, including Potter. At the hearing, Potter offered two exhibits, which were admitted into evidence: Exhibit 1 was Potter-created summary of Material Safety Data Sheets (MSDS) and Exhibit 2 was a collection of the MSDS Potter obtained from contractor Lydig, which handled the remodeling project for Davis Wright Tremaine. BR 223; Potter 36-39, 57; Hearing Transcript (02/17/10) 4-5.⁴

⁴ The hearing transcript refers to the colloquy at the Board hearing on February 17, 2010. The transcript is located in the Certified Appeals Board Record.

Potter testified that the MSDS showed the products used in the remodeling at the Washington Mutual Tower and the chemicals associated with these products. Potter 37. She testified that she created the MSDS summary, taking only those portions she found relevant and highlighting some portions. Potter 56-57. However, no witness testified that any of the chemicals listed on the MSDS was actually off-gassing in Potter's office, let alone in any medically significant level. The industrial hygienist Beaudet testified that the MSDS are developed by product manufacturers and are "really designed to protect workers in production facilities or workers where they are using quantities of these chemicals." Beaudet 86; FF 1.9. She testified that the MSDS do not tell "what necessarily is going to be offgassing from the material." Beaudet 85-86; FF 1.9.

Dr. Keifer did not "remember specifically the content" of the MSDS but testified that "a number of these chemicals would *potentially* cause illness if people were exposed to them *in any substantial concentration.*" Keifer 47 (emphasis added). The only chemical about which Potter's counsel asked Dr. Keifer during his deposition was formaldehyde, and Dr. Keifer testified only that it is "a common material," used in "pressed wood and fiberboard, plywood, and things like that," and "it's a carcinogen," "also an allergen," and "*in high enough concentrations*, it *could* be an anesthetic. Keifer 47 (emphasis added).

There is no evidence that any formaldehyde was off-gassing from any material in Potter's office, let alone in any medically significant level.

Dr. Stumpp explained that formaldehyde is "present in the body at all times." Stumpp 57. "So we actually produce formaldehyde, and it's produced by bacteria in our gut all the time." Stumpp 57. He testified that if Potter "was exposed to formaldehyde at sufficient levels, she could get eye, nose, and throat irritation to them, but that would not account for all of her other symptoms and would not account for ongoing symptoms after leaving the area." Stumpp 33-34. Her "symptom complex doesn't suggest that that's what was causing her problem." Stumpp 34.

The IAJ issued a proposed decision, reversing the Department's claim rejection order. BR 221-44. The IAJ found Potter suffered MCS as an occupational disease, stating that her remodeled workplace "contained substances that were off-gassed from the vinyl blinds, and possibly from formaldehyde from various construction components, in sufficient concentrations, that caused her symptoms." BR 241.

The Department petitioned the 3-member Board to review the proposed decision, renewing its *Frye* motion and also arguing that, even if the contested expert opinions on MCS were admissible, Potter's condition still does not constitute an occupational disease under the facts of the case.

BR 75-215. The Board granted the petition and issued a final decision affirming the Department's claim rejection order. BR 2-17, 74.

The Board first ruled that the expert opinions on MCS were admissible under *Frye*. BR 11. However, the Board stated it was still "free to reject MCS as an occupational disease within the meaning of RCW 51.08.140 or even as a disease entity." BR 11. The Board ultimately declined to reach the issue as to whether MCS is recognizable as an occupational disease, finding instead that Potter's condition as diagnosed *in the facts of this case* is not an occupational disease:

However, because we do not believe that Multiple Chemical Sensitivity, *as it is diagnosed in the facts of this case*, meets the definition of an occupational disease, we need not reach the issue of whether we accept this condition as an occupational disease.

BR 11 (emphasis added).

In concluding that Potter's condition did not constitute an occupational disease, the Board pointed out that "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 14. The Board also concluded that Potter's alleged chemical exposure was not a distinctive condition of her employment. BR 15. The Board said, "Remodels are everywhere, and by no means limited to law offices, or to work for that matter. New blinds, new carpets, and new furniture are

encountered in all of everyday life.” BR 15. Potter “had felt this way when exposed to the smell of coffee many years earlier – possibly causing sensitization *at that time*.” BR 15 (emphasis added). To establish an occupational disease, “Potter would need to establish that she was exposed to low levels of chemicals not found in everyday life,” and simply claiming exposures to low-level chemicals at work is insufficient. BR 15.

The Board also stated that Potter’s anxiety based on her subjective perceptions or fear of chemicals does not constitute an occupational disease. BR 12; RCW 51.08.142 (“Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease.”); WAC 296-14-300(1)(g), (i) (excluded mental conditions include . . . “Subjective perceptions of employment conditions or environment” and “Fear of exposure to chemicals”). The Board noted that Dr. Keifer’s explanation of MCS “sounds very much like a psychiatric condition, and not a physical condition.” BR 14.

E. Superior Court Judgment Affirming the Board

Potter appealed to King County Superior Court. CP 1-2. At the superior court, the Department renewed its *Frye* motion and other evidentiary objections. CP 7-30. The court issued a ruling, concluding that the evidence of MCS met the *Frye* test, but otherwise limited the admissibility of Potter’s exhibits on the *Frye* motion. CP 85-87.

The court directed the parties to schedule a hearing on the underlying appeal or waive oral argument. CP 87. The Department filed a trial brief and a motion for judgment as a matter of law. CP 53-84. Potter also filed a response to the Department's trial brief and motion for judgment as a matter of law. CP 88-99. The Department filed a reply, asking the court to affirm the Board decision. CP 100-05.⁵

The superior court issued findings of fact, conclusions of law, and judgment affirming the Board decision. CP 106-09. The court found "no evidence, but only [Potter's] subjective perception, that she was exposed to chemical fumes or off-gassing from new furniture or interior remodeling at levels sufficient to cause physical harm during the course of her employment with Davis Wright Tremaine." FF 1.10. The court also found Potter's examinations and tests in 2007 and 2008 were normal. FF 1.7. The court also concluded that exposures to interior remodeling or new furniture are not distinctive conditions of employment but common occurrences in everyday life. FF 1.12. The court further concluded that "to the extent that subjective perceptions of employment conditions or the employment environment, or a fear of exposure to chemicals, are mental, not physical, conditions, they do not fall within the meaning of RCW 51.08.140 [defining occupational disease]." Conclusions of Law (CL) 2.3.

⁵ The Department initially requested a jury, but the Department and Potter later agreed to have a bench trial.

Potter appealed the superior court's findings of fact, conclusions of law, and judgment (CP 106-09) to this Court. CP 110-15.

IV. STANDARD OF REVIEW

Potter asks this Court to conduct de novo review of the superior court findings and conclusions and direct the Department to accept her claim. Appellant's Brief 23, 46-47. She argues de novo review is appropriate, because the superior court entered summary judgment for the Department. Appellant's Brief 22. She is wrong. The superior court issued findings of fact, conclusions of law, and judgment (not summary judgment), after reviewing the entire Board record. CP 106-09. Even if the superior court granted the Department's motion for a judgment as a matter of law, the only possible remedy for Potter is a remand to the superior court for a hearing, not for this Court to make contrary findings in her favor. *See, e.g., Benedict v. Dep't of Labor & Indus.*, 63 Wn.2d 12, 16, 385 P.2d 380 (1963) ("weight, credibility, and the ultimate determination were for the trier of facts," not appellate court).

The Industrial Insurance Act, Title 51 RCW, governs the standard of review in this workers' compensation case, where an evidentiary hearing occurs only at the Board. RCW 51.52.100, .115. At the Board, Potter had "the burden of proceeding with the evidence to establish a prima facie case for the relief." RCW 51.52.050(2)(a). Although the act

is remedial, the liberal construction rule “does not apply to questions of fact” and did not lessen Potter’s burden of proof. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 6-7, 977 P.2d 570 (1999).

The superior court reviews the Board decision de novo, but based solely on the Board record (except for evidence of procedural irregularities at the Board). RCW 51.52.115. The “findings and decision of the board shall be prima facie correct,” and Potter had the burden of proving otherwise. RCW 51.52.115. If the superior court determines that the Board correctly construed the law and found the facts, “the decision of the board shall be confirmed; otherwise it shall be reversed or modified.” RCW 51.52.115. Here, the superior court affirmed the Board’s decision as “correct” and made specific findings and conclusions. CP 106-09.

The appeal in this Court lies “from the judgment of the superior court as in other civil cases.” RCW 51.52.140. This Court reviews the “record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Evidence is substantial if “sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288,

293, 88 P.3d 413 (2004). To the extent there is any conflicting evidence, such as the conflicting expert opinions on the nature and cause of Potter's condition, this Court must view "the record in the light most favorable to the party who prevailed in superior court": the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

Potter challenges only the superior court's findings of fact 1.7, 1.9, 1.10, and 1.12. Appellant's Brief 2-3. The other unchallenged findings are verities. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002). Potter never argued below, and does not argue here, that her condition qualifies as an injury under RCW 51.08.100. Nor does she challenge the conclusion of law 2.2 that she did not sustain an injury. This unchallenged conclusion is the law of the case. *See Detonics .45 Associates v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982).

V. ARGUMENT

Occupational disease "means such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. To establish an occupational disease, Potter had to show her condition arose both (1) "naturally" and (2) "proximately" out of her employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Mental conditions caused by stress, such as subjective perceptions or fear

of chemicals, are specifically excluded from the definition of occupational disease. RCW 51.08.142; WAC 296-14-300(1)(g), (i).

The superior court correctly concluded that Potter's condition was not an occupational disease. CP 108-09. First, Potter failed to show her condition arose "proximately" out of her alleged chemical exposures at work. There is no evidence she was exposed to any chemicals in any significant levels in her office, and her numerous examinations revealed no physiological disease. Keifer 67-68; Stumpp 25; FF 1.7-1.10. Further, before her alleged exposures, she had reported chemical sensitivities and symptoms developed in non-work places, and her symptoms continued for more than a year and a half after she began working entirely from home. Shuhart 45, 56; Stumpp 21, 23-24; Keifer 69, 72-73; FF 1.6.

Second, for the same reasons stated above, Potter also failed to show her condition arose "naturally" out of her employment. She failed to show her alleged low-level chemical exposures were "distinctive conditions of [her] particular employment," as opposed to "conditions in everyday life or all employments in general." *Dennis*, 109 Wn.2d at 481; FF 1.11-1.12. Finally, Potter's anxiety due to her subjective perceptions or fear of chemicals, as testified to by Dr. Hamm and Dr. Stumpp, does not constitute an occupational disease. RCW 51.08.142; WAC 296-14-300(1)(g), (i); Hamm 22, 24, 33; Stumpp 23; CL 2.3.

A. Potter's Condition Was Not an Occupational Disease, Because It Did Not Arise "Proximally" Out of Her Employment

The superior court correctly concluded that Potter's condition was not an occupational disease, because she failed to establish that her condition arose "proximately" out of her employment. CP 108-09.

To meet the "proximately" requirement, Potter must establish "by competent medical testimony" that her claimed condition was "probably, as opposed to possibly, caused by the employment." *Dennis*, 109 Wn.2d at 477; *Saylor v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966) (same). The causal link must be removed "from the field of speculation and surmise." *Ruse v. Dep't of Labor & Indus.*, 90 Wn. App. 448, 454, 966 P.2d 909 (1998), *aff'd*, 138 Wn.2d 1 (1999).

For example, in a personal injury case involving a worker's claim of MCS allegedly caused by her work exposure to paint at an accounting firm, the Kansas Supreme Court upheld the dismissal of her claim for lack of evidence of causation. See *Kuxhausen v. Tillman Partners, L.P.*, 241 P.3d 75, 81 (Kan. 2010). The court pointed out that the worker's examinations and tests "revealed no abnormalities," and there was no "data concerning the level or amount of chemicals to which [she] was exposed." *Kuxhausen*, 241 P.3d at 81. Her doctor "testified only that there were materials listed on the MSDS that can make people sick and

lead to health problems” with “no supporting basis for concluding that those substances did make [her] sick in this case.” *Id.* The court held the doctor’s opinion was “based on nothing more than *post hoc ergo propter hoc* logic: “the symptoms follow the exposure; therefore, they must be due to it.” *Id.* “Such reasoning is nothing more than speculation.” *Id.*

Here, like the situation in *Kuxhausen*, there is no evidence Potter was exposed to any chemicals at any significant level in her office. She points out the MSDS as “circumstantial evidence of the chemicals” in her office. Appellant’s Brief 38. But industrial hygienist Beaudet’s unrefuted testimony is that the MSDS do not tell “what necessarily is going to be offgassing from the material.” Beaudet 85-86. Dr. Keifer testified only that the chemicals listed on the MSDS “would *potentially* cause illness *if* people were exposed to them *in any substantial concentration.*” Keifer 47 (emphasis added). But there is no evidence of any substantially concentrated off-gassing chemical. The only evidence is a smell in the blinds, but there is no measurement of any off-gassing from the blinds or any other furnishings, and there is a difference between a smell and chemical off-gassing in a significant level. Stumpp 35-36.⁶

⁶ Potter states Beaudet identified “significant chemical odor emanating from the vinyl blinds.” Appellant’s Brief 10 (citing Beaudet 76). But Beaudet did not describe the odor as either “significant” or “chemical.” Beaudet 76. Potter’s assistant Sharon Sheridan described the smell as “terrible,” Sheridan 95, but facilities manager Wabik described the smell as “faint,” Wabik 29.

Also, like the situation in *Kuxhausen*, a number of Potter's examinations and tests all turned out normal. Shuhart 11, Keifer 21-25, 27, 30-31, 38, 62-63, 65, 67-68, 70, 72; Stumpp 20; FF 1.7. Dr. Stumpp pointed out that Potter "really had no underlying physiologic disease process documented in spite of her extensive workups." Stumpp 25. As Dr. Keifer, her attending physician, noted in his January 14, 2008 chart:

She has undergone a number of different tests by a number of different groups. She was evaluated by Pulmonary with cardiopulmonary exercise testing and pulmonary function. She underwent a methacholine challenge test. She also underwent a stress test by physicians at Swedish Hospital. *All of which turned out to be normal.*

Keifer 67 (emphasis added).

Potter claims her office was "defectively ventilated." Appellant's Brief 1, 26, 39, 40. But her claim is refuted by other testimony and rejected by the trier of fact. FF 1.8; BR 10 ("ventilation was adequate"). Although the industrial hygienist Beudet testified that the return in the ventilation system in Potter's office "looked like" erroneously ducted as a supply, she quickly qualified that she was not an "architectural ventilation person" and might not characterize it as "error" in front of lawyers. Beudet 74. The building engineer, who assessed the air flow and the ventilation duct system in Potter's office in June 2007, confirmed there was a return working "just fine." Wabik 43. Also, the CO2 measured in

Potter's office was within the normal range, which indicated adequate ventilation. Beaudet 82-83; Stumpp 32.

In addition, before her disputed chemical exposures, Potter reported chemical sensitivities and similar symptoms in non-work areas. In November 2003, she reported similar symptoms developed at her friend's house, in old book stores, and when she drank coffee or caffeine. Keifer 73-74. In August 2004, she reported her concern about chemical sensitivity to Dr. Shuhart, reporting being "fuzzy," distracted, forgetting names, having difficulty recalling nouns, nasal stuffiness, and scratchy throat, and attributing those symptoms to her exposures to chemicals, such as copied materials at work. Shuhart 23-24, 50; Stumpp 38-39; Potter 26. She was concerned about exposure to carcinogens, which she thought might be in the copy toner. Shuhart 26. Before the 2007 office move, Potter had complained of air flow and her proximity to the coffee rooms where there were coffee and fax machines. Wabik 35-36.

Further, Potter's symptoms continued for over a year and a half after her complete removal from her office. Keifer 72-73; FF 1.6. Dr. Stumpp believed these facts, along with her history of anxiety, "argue against any kind of a workplace relatedness to her symptoms." Stumpp 24. Dr. Stumpp and Dr. Hamm believed Potter's condition was more likely than not based on her subjective perceptions of (as opposed to

actual) chemical exposure related to her anxiety. Stumpp 23, 40; Hamm 33. Dr. Hamm and Dr. Stumpp believed Potter's condition was not caused or aggravated by her alleged work exposures. Hamm 33; Stumpp 23-24.

These facts sufficiently support the finding that Potter's condition was not caused by her disputed chemical exposures at work but by her subjective perceptions of chemicals related to her anxiety. FF 1.10.

Potter's reliance on *Intalco* is misplaced. Appellant's Brief 39; *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992). In *Intalco*, this Court upheld a jury's finding of occupational disease when three workers, who worked in the same aluminum reduction pot room for at least 12 years, developed a similar neurologic disease. *Intalco*, 66 Wn. App. at 648-53. The pot room was at times "so dusty and gassy" the workers could not see 100 to 200 feet ahead, and they were covered with carbon and ore dust by the end of their work day. *Id.* at 649. An industrial hygienist found fluoride toxin above the threshold limits in the pot room and "identified several toxins in the pot room, some of which have been associated with neurologic disease." *Id.* at 649, 655. Further, the workers' "medical and work histories revealed no other likely cause of their disease." *Id.* at 656.

This Court concluded that these facts sufficiently supported the finding that the workers' workplace exposures to neurotoxins caused their

neurologic disease. *Intalco*, 66 Wn. App. at 656. The workers' doctors' inability to firmly identify the specific toxin that caused the workers' disease did not preclude a finding of proximate cause. *Id.* at 655-56.

Here, 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 14. Also, unlike the *Intalco* workers, whose medical histories revealed no other likely cause, Potter's medical history provided an alternative diagnosis of a generalized anxiety disorder. Hamm 22, 24, 33; Stumpp 23. Further, *Intalco* affirmed the finding of causation as supported by the evidence, whereas Potter asks this Court to reverse the finding that her condition was not caused by chemical exposures, but by her subjective perceptions of chemicals. FF 1.10; CL 2.3. *Intalco* is inapposite here.

Nor does *Kehoe* support Potter here. Appellant's Brief 32-34; *Appeal of Kehoe*, 648 A.2d 472 (N.H. 1994). Contrary to Potter's claim, the *Kehoe* court did *not* hold the worker there "presented sufficient testimony that conditions of her employment caused her MCS." Appellant's Brief 33-34. There, New Hampshire's workers' compensation board denied benefits to the worker on the ground she failed to prove she suffered from occupational asthma, although she did not base her claim on occupational asthma but on MCS. *Kehoe*, 648 A.2d at 474. The court

thus held the “board should have determined *whether the evidence warrants a finding* that the effects on this claimant of exposure to chemicals in the workplace constituted a compensable disease.” *Kehoe*, 648 A.2d at 474 (emphasis added). The court did not decide whether the evidence warranted such a finding but remanded to the board to decide whether she suffered from MCS and, if so, “whether the workplace caused or contributed to” it. *Id.* *Kehoe* is thus also inapposite here.

Potter failed to prove her condition arose “proximately” out of her employment and thus failed to prove an occupational disease. CL 2.4.

B. Potter’s Condition Was Not an Occupational Disease, Because It Did Not Arise “Naturally” Out of Her Employment

Potter’s occupational disease claim failed also because she failed to prove her condition arose “naturally” out of her employment. FF 1.11, 1.12. To meet the “naturally” prong of occupational disease, Potter “must establish that [her] occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of [her] particular employment.” *Dennis*, 109 Wn.2d at 481.

“The conditions need not be peculiar to, nor unique to, [Potter’s] particular employment,” and the focus is on “conditions giving rise to the occupational disease,” not on “whether the disease itself is common to that particular employment.” *Id.* However, Potter “must show that [her]

particular work conditions more probably caused [her] disease or disease-based disability than conditions in everyday life or all employments in general.” *Dennis*, 109 Wn.2d at 481. Her condition “must be a natural incident of conditions of [Potter’s] particular employment.” *Id.* “Finally, the conditions causing [Potter’s disease or disability] must be conditions of *employment*, that is, conditions of [Potter’s] particular occupation as opposed to conditions coincidentally occurring in [her] workplace.” *Id.*

For example, sufficient evidence supported an inference that a sheet metal worker’s condition arose “naturally” out of his employment, where he repetitively used tin snips four to five hours a day over 38 years at work and developed osteoarthritis shown to be worse in his wrists. *Dennis*, 109 Wn.2d at 483. This meant the Department “may argue against the inference” upon remand. *Id.* Similarly, sufficient evidence supported the “naturally” element, where an intensive care unit nurse contracted hepatitis, and the uncontradicted evidence showed none of her other activities in her daily life involved such exposure. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 637, 600 P.2d 1015 (1979).

On the other hand, where a slaughterhouse plant worker contracted spinal meningitis after his co-worker coughed in his face at work, the worker did not satisfy the “naturally” element, because his exposure was “merely coincidental and not a result of any distinctive condition of his

employment.” *Witherspoon v. Dep’t of Labor & Indus.*, 72 Wn. App. 847, 851, 866 P.2d 78 (1994). This is because there was “no showing that the conditions of [the worker’s] employment caused him to be in contact with the bacteria any more than he would be in ordinary life or other employments.” *Witherspoon*, 72 Wn. App. at 80.

Also, in a case involving a claim of emotional trauma resulting from sexual and other workplace harassment, this Court held the evidence did not support the “naturally” element, because the “conditions [the worker] encountered were not particular to her occupation,” but “could just as easily have occurred in any other workplace.” *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 566-68, 880 P.2d 29, *rev’d in part on other grounds*, 124 Wn.2d 634 (1994). Likewise, “rumors, innuendos, and inappropriate comments by co-workers are not distinctive conditions of employment” but “unfortunate occurrences in everyday life or all employments in general,” because their “occurrence at a specific workplace is coincidental and not a natural consequence or incident of distinctive employment conditions.” *Gast v. Dep’t of Labor & Indus.*, 70 Wn. App. 239, 243, 852 P.2d 319 (1993).⁷

⁷ *Wheeler* and *Gast* were decided on facts occurring before the 1988 effective date of RCW 51.08.142 and WAC 296-14-300, which, as shown below, exclude “mental conditions or mental disabilities caused by stress” from the definition of occupational disease.

Here, Potter failed to show her claimed chemical exposures at her remodeled law office are distinctive conditions of her “particular employment,” as opposed to “conditions coincidentally occurring in [her] workplace.” *Dennis*, 109 Wn.2d at 481; FF 1.11, 1.12; BR 15. As shown above, there is no evidence, other than her subjective perceptions, that she was exposed to any chemicals at any significant levels in her office. FF 1.8-1.10. Further, before the alleged chemical exposures, Potter reported chemical sensitivities and developed symptoms in non-work places. Shuhart 23-24, 50; Keifer 73-74; Potter 26; Stumpp 38-39; Wabik 35-36.

As Dr. Stumpp pointed out, low-level chemicals do exist in our daily life environment. There is “no such thing as no chemical exposure,” because the “air we’re breathing always has chemicals in it if you have a sensitive-enough measuring device.” Stumpp 48. As the Board said, “Remodels are everywhere, and by no means limited to law officers, or to work for that matter.” BR 15. Potter failed to show “she was exposed to low levels of chemicals not found in everyday life.” BR 15. These facts sufficiently support the finding that Potter’s claimed chemical exposures are not distinctive conditions of her employment. FF 1.11, 1.12; CL 2.4.

Unlike the sheet metal worker in *Dennis* and the intensive care unit nurse in *Sacred Heart Medical Center*, who showed their *particular* work conditions more probably caused their respective osteoarthritis and

hepatitis than conditions in everyday life or all employments in general, Potter failed to show her alleged low-level chemical exposures were distinctive conditions of her employment, as opposed to conditions in everyday life or all employments in general. FF 1.11, 1.12. Her alleged exposures are more analogous to the slaughterhouse worker's coincidental workplace exposure to spinal meningitis in *Witherspoon*, because there is “no showing that the 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.” *Witherspoon*, 72 Wn. App. at 80.

Potter failed to prove her condition arose “naturally” out of her employment and thus failed to prove an occupational disease. CL 2.4.

C. Potter’s Anxiety Resulting from Her Subjective Perceptions or Fear of Chemicals Does Not Constitute an Occupational Disease under RCW 51.08.142 and WAC 296-14-300

Finally, the superior court correctly concluded that Potter’s mental condition resulting from her subjective perceptions or fear of chemicals does not constitute an occupational disease. FF 1.10; CL 2.3; BR 12, 14; RCW 51.08.142; WAC 296-14-300.

The Industrial Insurance Act excludes from the definition of occupational disease mental conditions or disabilities caused by stress:

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. “The Department adopted WAC 296-14-300 to comply with the legislature’s directive.” *Elliott v. Dep’t of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009); WAC 296-14-300 (“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.”).⁸

The rule sets forth a non-exclusive list of examples of excluded mental conditions caused by stress, including subjective perceptions of employment conditions or environment and fear of chemical exposure:

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 . . .

*

(g) Subjective perceptions of employment conditions or environment;

*

(i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;

WAC 296-14-300(1)(g), (i).

For example, this Court has held that a worker’s “depression and post-traumatic stress syndrome related witnessing the other worker’s

⁸ Potter never challenged below, and does not challenge here, WAC 296-14-300, which is presumptively valid and binding. See *Ass’n of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005) (citation omitted). An administrative rule made pursuant to delegated statutory authority has “the force of law.” *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (citation omitted).

death” fell within “stress resulting from exposure to a single traumatic event” and were thus not compensable as an occupational disease. *Elliott*, 151 Wn. App. at 449-50 (worker’s claim was untimely for an injury); WAC 296-14-300(2) (“Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100 [defining an injury].”). This Court rejected the worker’s request to liberally construe the statute, stating, “But it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.” *Elliott*, 151 Wn. App. at 450 (citation omitted).

Here, Potter had a long-standing history documented from 1998 of anxiety, fear, and panic-type symptoms. Shuhart 12, 17-19, 23-24, 30-33; Keifer 73-74; Stumpp 37-38, 43-44; Hamm 17. Dr. Hamm, the only psychiatrist expert in this case, diagnosed Potter with a chronic anxiety disorder and testified that she had “preexisting psychiatric problems” not aggravated by workplace exposure. Hamm 22, 24, 33. He explained that anxiety is based on perceived danger, and Potter’s “fear of the environment is something that had been her perception, but not based on any objective or scientific data.” Hamm 22, 24, 27, 33. Dr. Keifer’s opinion as of October 2007 was that a “good deal of [Potter’s] brain fog” was likely “an additional panic-like reaction or anxiety-like reaction.” Keifer 59. Dr. Stumpp consistently testified that Potter’s symptoms are

due to a generalized anxiety disorder, and the trigger was “her perception that she’s being exposed to chemicals that might be hazardous.” Stumpp 23, 40. Potter “really had no underlying physiologic disease process documented in spite of her extensive workups.” Stumpp 25.

These facts support the finding that Potter suffered from a mental condition caused by stress, namely, anxiety resulting from her “[s]ubjective perceptions of employment conditions or environment” or “[f]ear of exposure to chemicals.” WAC 296-14-300(1)(g), (i); FF 1.10; CL 2.3. Such condition does not constitute an occupational disease. RCW 51.08.142; WAC 296-14-300(1)(g), (i); CL 2.3.

Potter argues RCW 51.08.142 and WAC 296-14-300 do not apply, because “MCS is not a condition caused by stress or predicated upon fear of exposure to chemicals.” Appellant’s Brief 45. But the issue is not whether MCS is a physiological disease but whether *Potter’s condition* was a mental disorder caused by stress. Dr. Hamm and Dr. Stumpp testified that her perceptions and fear of chemicals acted as anxiety stressors, causing her to develop symptoms. Hamm 22, 24, 27; Stumpp 23, 40. Anxiety resulting from subjective perceptions of environment or fear of chemical exposure are within the plain language of excluded condition under WAC 296-14-300(1)(g) and (i). Potter’s argument to the

contrary is an attempt to invite this Court to re-weigh the evidence in her favor, which this Court may not do. *See Benedict*, 63 Wn.2d at 16.

Potter cites several of her exhibits submitted in her response to the Department's *Frye* motion, including Governor Gregoire's proclamation. Appellant's Brief 43-45. But the superior court ruled, and Potter did not appeal that ruling, "Proclamations and requests for study proposals by governmental entities are inadmissible as immaterial evidence." CP 86. This unappealed ruling is the law of the case, and Potter may not inject her rejected exhibit in this appeal. *Detonics*, 97 Wn.2d at 353.⁹

In any event, the Governor's proclamation addresses some governmental policies addressing MCS in general, not the specific cause of Potter's condition. For example, unlike workers' compensation, social security disability benefits do not require proof that the claimed disability is causally related to work; the inquiry is whether the claimant is disabled. *See, e.g.*, 20 CFR § 404.1520; *See In re Canavan*, 733 N.E. 2d 1042, 1052 n.9 (Mass. 2000) ("[I]n a Social Security proceeding, the only issue is whether the defendant has suffered a disability, not whether the disability was caused at work."). The social security administration's treating MCS

⁹ In the unappealed ruling, the superior court also ruled, "Bibliographies, summaries, and abstracts of studies . . . are not sufficient evidence to be probative, substantive evidence to support Potter's claims regarding MCS." CP 86. "Documents (public and private) and articles relating to toxic environmental exposure identified chemicals known to be hazardous are inadmissible as irrelevant to MCS." CP 86.

as a disability does not show Potter's symptoms are caused by chemical exposures as distinctive conditions of her employment.

Further, contrary to Potter's claim, Oregon's *Kennedy* court did not acknowledge that the science relied upon by Dr. Stumpp that suggests MCS is not generally accepted is "simply outdated." Appellant's Brief 32-33; *Kennedy v. Eden Advanced Pest Techs.*, 193 P.3d 1030 (Or. Ct. App. 2008). The court agreed with the defendant there that "virtually all courts that have considered the issue have refused to allow expert testimony . . . on the diagnosis of chemical sensitivity." *Kennedy*, 193 P.3d at 1041. But the court concluded the "proper inquiry is not whether MCS or chemical sensitivity is a 'valid' diagnosis or is recognized by other jurisdictions" but "whether truth finding is better served by admission or exclusion." *Id.* In holding that the disputed MCS opinion was admissible, the court said, "In Oregon, we trust juries to be able to find the truth in the classic 'battle of the experts.'" *Id.* at 1040, 1042.

Kennedy thus illustrates that the admissibility of the MCS evidence means the trier of fact may decide what weight to give to such evidence. *See also Elshaug v. Workforce Safety & Ins.*, 671 N.W.2d 784, 788, 790 (N.D. 2003) (upholding the finding that the worker's compensation claimant's claimed MCS was not fairly traceable to her employment).

Potter argues that Dr. Keifer's and Dr. Shuhart's opinions should be given special consideration. Appellant's Brief 35-37. But "special consideration" for attending physicians does not mean the trier of fact must give "more weight or credibility" to their opinions, but give them careful thought. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988); *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967) ("testimony of the treating physician is not conclusive"). As the fact-finding authority, the Board and the superior court had "the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence." *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975); *In re Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993) (trier of fact may assess the value of an asset by adopting a "compromise" figure between the values testified to by two experts).

The record does not support any claim that the Board or the superior court did not carefully consider Dr. Keifer's or Dr. Shuhart's opinions. No authority supports Potter's suggestion that this Court may substitute its own view of the evidence for that of the trier of fact.

D. Potter Is not Entitled to Attorney Fees

Potter requests attorney fees, citing RCW 51.52.130. Appellant's Brief 46. She is not entitled to attorney fees.

The statute provides for attorney fees for a worker who prevails in court. RCW 51.52.130(1). However, the attorney fees are for the “services before the court only” and are payable from the Department only if (1) the Board decision is “reversed or modified” *and* (2) the result of the litigation affected the Department’s “accident fund or medical fund”:

If in a worker . . . appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation . . .* the attorney’s fee fixed by the court, *for services before the court only*, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

RCW 51.52.130(1) (emphasis added); *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 406, 239 P.3d 544 (2010); *Piper v. Dep’t of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231 (2004).

For Potter to receive attorney fees, she must show she is entitled to additional relief from the Department’s fund. As shown above, the superior court correctly concluded with substantial evidence that Potter’s condition does not constitute an occupational disease. Thus, Potter does not prevail in this Court and is not entitled to any additional relief. Accordingly, she is not entitled to any attorney fees.¹⁰

¹⁰ Even if this Court decides to remand this case to the superior court for a new hearing, this Court may not award attorney fees from the Department under RCW 51.52.130, until and unless Potter ultimately receives additional benefits on remand.

VI. CONCLUSION

For the reasons stated above, the Department asks this Court to affirm the superior court judgment in this case.

RESPECTFULLY SUBMITTED this 14th day of February 2012.

ROBERT M. MCKENNA

Attorney General



Masako Kanazawa, WSBA #32703

Assistant Attorney General

Attorneys for Respondent

Appendix A

Superior Court Judgment (CP 106-109)

Superior Court Ruling on *Frye* (CP 85-87)

Board Decision (BR 2-17)

Department Claim Rejection Order (BR 247)

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ORIGINAL

JANE E. POTTER,

NO. 10-2-37553-8 SEA

Plaintiff,

~~[DEPARTMENT'S PROPOSED]~~
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

v.

Revised - see page 2

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Clerk's Action Required

*cc-3
7-8-11*

Defendant.

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|--|--|
| 1. Judgment Creditor: | State of Washington Department of Labor and Industries |
| 2. Judgment Debtor: | Jane E. Potter |
| 3. Principal Amount of Judgment: | - 0 - |
| 4. Interest to Date of Judgment: | - 0 - |
| 5. Statutory Attorney Fees: | \$200.00 |
| 6. Costs: | \$730.00 |
| 7. Other Recovery Amounts: | \$0 |
| 8. Principal Judgment Amount shall bear interest at 0% per annum. | |
| 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum. | |
| 10. Attorney for Judgment Creditor: | Beverly Norwood Goetz, Senior Counsel |
| 11. Attorney for Judgment Debtor: | James C. Causey, Jr. |

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[DEPARTMENT'S PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740



1 This matter came on regularly before the Honorable Suzanne Barnett, in open court on
2 the 6th of June, 2011. The Plaintiff, Jane E. Potter, appeared by her
3 counsel, James C. Causey, Jr.; the Defendant, Department of Labor and Industries
4 (Department), appeared by its counsel, ROBERT M. MCKENNA, Attorney General, per
5 Beverly Norwood Goetz, Senior Counsel. The Court reviewed the records and files herein,
6 including the Certified Appeal Board Record, the Department's Trial Brief and Motion for
7 Judgment as a Matter of Law, and Ms. Potter's Response to the Department's Trial Brief and
8 Motion for Judgment as a Matter of Law. Therefore, being fully informed, the Court makes
9 the following:

10 I. FINDINGS OF FACT

11 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on February
12 11 and 17, 2010 and the testimony of other witnesses was perpetuated by deposition.

13 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on June
14 18, 2010 from which the Department filed a timely Petition for Review. The Board,
15 having considered the Department's Petition for Review, granted review and issued its
16 Decision and Order on October 4, 2010..

17 Ms. Potter thereupon timely appealed the Board's October 4, 2010 order to this Court.

18 1.2 Jane E. Potter filed an application for workers' compensation benefits with the
19 Department of Labor and Industries on February 6, 2008. Ms. Potter claimed that she
20 developed a chemically-related illness from low level exposure to chemicals in the
21 course of her employment with Davis Wright Tremaine LLP on September 7, 2007.

22 The Department allowed Ms. Potter's claim, by order dated February 24, 2009, for a
23 temporary exacerbation of allergic rhinitis due to off-gassing of vinyl-coated polyester
24 roller blinds in her newly remodeled office.

25 The Department closed Ms. Potter's claim by order dated February 25, 2009. Ms.
26 Potter timely protested both the February 24 and 25, 2009 orders.

27 On May 6, 2009 the Department issued an ^{order} cancelling its prior orders. On May 7, 2009
28 the Department issued an order rejecting Ms. Potter's February 6, 2008 claim on the
29 basis that she had not sustained an industrial injury and did not have an occupational
30 disease.

31 Ms. Potter timely appealed the Department's May 7, 2009 order to the Board of
32 Industrial Insurance Appeals.

1 1.3 Ms. Potter was employed as a patent attorney by Davis Wright Tremaine LLP from
2 August 2002 to December 2008.

3 1.4 Davis Wright Tremaine LLP moved its offices from the Century Square Building to
4 newly renovated office space in the Washington Mutual Tower in June, 2007. Ms.
Potter moved into her new office on the 23rd floor of the Washington Mutual Tower on
June 17, 2007.

5 1.5 Ms. Potter reported noticing a strong chemical smell in her new office. She reported
6 symptoms including a metallic taste in her mouth, problems breathing, a bleeding nose,
disorientation, and fatigue, within weeks of moving into her new office.

7 1.6 Ms. Potter began working entirely from home in early September, 2007 but her
8 reported symptoms progressed, except for the metallic taste in her mouth, even away
from the workplace.

9 1.7 Ms. Potter underwent thorough medical examinations and testing in 2007 and 2008.
All her examinations and tests were normal.

10 1.8 A January 24, 2008 air quality assessment performed in Ms. Potter's office did not
11 reveal elevated levels of carbon monoxide or carbon dioxide.

12 1.9 Material Safety Data Sheets do not contain information about what chemicals may be
13 present in remodeling situations but are designed to protect workers in production
facilities or where large quantities of chemicals are used.

14 1.10 There is no evidence, but only Ms. Potter's subjective perception, that she was exposed
15 to chemical fumes or off-gassing from new furniture or interior remodeling at levels
sufficient to cause physical harm during the course of her employment with Davis
Wright Tremaine LLP.

16 1.11 Offgassing can occur in office, residential, and other settings.

17 1.12 An exposure to interior remodeling or new furniture is not a distinctive condition of
18 employment in a law office. Exposures to interior remodeling and new furniture are
common occurrences in every day life.

19 Based upon the foregoing Findings of Fact, the Court now makes the following
20

21 II. CONCLUSIONS OF LAW

22 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

23 2.2 Ms. Potter did not sustain an industrial injury, within the meaning of RCW 51.08.100,
in the course of her employment at Davis Wright Tremaine LLP.

24 2.3 Per RCW 51.08.142 and WAC 296-14-300, to the extent that subjective perceptions of
25 employment conditions or the employment environment, or a fear of exposure to
chemicals, are mental, not physical, conditions, they do not fall within the meaning of
26 RCW 51.08.140.

1 2.4 Ms. Potter did not sustain an occupational disease, within the meaning of RCW
2 51.08.140, in the course of her employment at Davis Wright Tremaine LLP.

3 2.5 The Board's October 4, 2010 Decision and Order is correct and should be affirmed.

4 2.6 The May 7, 2009 Department order is correct and should be affirmed.

5 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
6 judgment as follows:

7 **III. JUDGMENT**

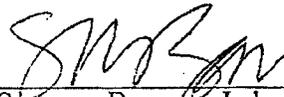
8 3.1 The October 4, 2010 Board of Industrial Insurance Appeals Decision and Order, which
9 affirmed the Department of Labor and Industries' May 7, 2009 order, be and the same
10 is hereby affirmed.

11 3.2 The Department is awarded, and Ms. Potter is ordered to pay, costs and disbursements
12 herein in the amounts of \$720.00 for transcription of depositions used at trial, and
13 \$10.00 for the statutory witness fee for the appearance of witness Lisa Wabik, per
14 RCW 4.84.010.

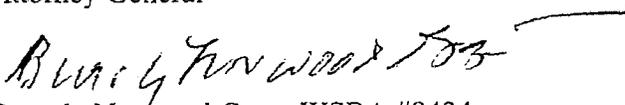
15 3.3 The Department is awarded, and Ms. Potter is ordered to pay, a statutory attorney fee of
16 \$200.00.

17 3.4 The Department is awarded interest from the date of entry of this judgment as provided
18 by RCW 4.56.110.

19 DATED this 1st day of September, 2011.

20 
21 Suzanne Barnett, Judge

22 Presented by:
23 Robert M. McKenna
24 Attorney General

25 
26 Beverly Norwood Goetz WSBA #8434
Senior Counsel

Copy received,
Approved as to form and
notice of presentation waived:

James C. Causey, Jr. WSBA # 8019
Attorney for Jane E. Potter

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SUPERIOR COURT OF THE STATE OF WASHINGTON
For King County

JANE E. POTTER,
Plaintiff,

vs.

DEPARTMENT OF LABOR &
INDUSTRIES,
Defendant.

Cause No. 10-2-37553-8 SEA

RULING ON *FRYE* MOTION
RELATING TO MULTIPLE
CHEMICAL SENSITIVITIES

THIS MATTER came before the court on a motion *in limine* filed by the defendant Department of Labor & Industries (Department), seeking exclusion of evidence presented to and admitted by the Board of Industrial Insurance Appeals (Board). The only issue presented at this stage of the proceedings is whether evidence relating to MCS proffered by Ms. Potter is admissible under the standards established by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The Department made and preserved this issue in the proceedings before the Board. On June 18, 2010, the Board issued a Proposed Decision and Order. On October 4, 2010, the Board issued its Decision and Order in this matter. In both instances, the Board admitted evidence of MCS.

In the Proposed Decision, the Board found that Ms. Potter sustained an industrial injury when she was exposed to chemicals in her work environment, which

1 chemicals proximately caused her diagnosed condition of Multiple Chemical
2 Sensitivities (MCS). In its final Decision and Order, the Board admitted evidence
3 relating to MCS proffered by Ms. Potter under the standards established by *Frye v.*
4 *United States*, 293 F. 1013 (D.C. Cir. 1923). The Board concluded in its final
5 Decision and Order, however, that Ms. Potter's MCS did not fit the definition of an
6 "occupational disease."

7 This court adopts the findings of the Board relating to the admissibility of Ms.
8 Potter's evidence regarding MCS, but limits admissible evidence to that which is
9 substantive. Bibliographies, summaries, and abstracts of studies may identify
10 recognition of MCS as a health syndrome, they are not sufficient evidence to be
11 probative, substantive evidence to support Ms. Potter's claims regarding MCS.
12 Documents (public and private) and articles relating to toxic environmental exposure
13 identified chemicals known to be hazardous are inadmissible as irrelevant to MCS.
14 Proclamations and requests for study proposals by governmental entities are
15 inadmissible as immaterial evidence. The following exhibits proffered by Ms. Potter
16 are admissible: Exhibits 1, 3, 5*, 6*, and 44. **(The marked exhibits are admissible*
17 *insofar as the declarants make assertions based upon their experience, knowledge,*
18 *training, and education. Objections regarding the attachments to the declarations go*
19 *to weight, not admissibility of the experts' opinions).* Exhibits 7 and 14 are admitted
20 as instructive, but not conclusive evidence.

21 Although the specific etiology of this disorder remains in dispute, the condition
22 itself is a recognized condition, diagnosable by a differential diagnosis. The accepted
23 working definition of MCS is that of Dr. M.R. Cullen: "an acquired disorder
24 characterized by recurrent symptoms, referable to multiple organ systems, occurring
25 in response to demonstrable exposure to many chemically unrelated compounds at

1 doses far below those established in the general population to cause harmful effects.”
2 Scientific literature has established the syndrome, and has measured reactions to
3 chemical stimuli in patients diagnosed with MCS.

4 Much of the scientific literature analyzes the correlation between MCS and
5 other diagnoses, particularly psychological diagnoses. Those committed to a
6 physical origin for the disorder conclude most of their studies with recommendations
7 for further study or questions left unanswered. Whether the disorder is psychogenic
8 or physical in its etiology, however, it is a recognized disorder.

9 For purposes of this motion *in limine* the court admits the evidence as noted
10 above. As Division I of the court of appeals concluded,

11 [W]e need not resolve the scientific debate concerning the
12 etiology of DID; that DID is a generally accepted mental
13 disorder, regardless of its cause, is sufficient for purposes of
Frye.

14 *State v. Greene*, 92 Wash. App. 80, 99 (1998), citing *State v. Cauthron*, 120 Wash.2d
15 879, 887 (“Because judges do not have the expertise required to decide whether a
16 challenged scientific theory is correct, we defer this judgment to scientists. This
17 inquiry turns on the level of recognition accorded to the scientific principle
18 involved....”).

19 The parties shall contact the court to schedule hearing on the underlying
20 appeal, or in the alternative, notify the court of a waiver of oral argument to allow the
21 appeal to move forward.

22 SIGNED this 28 day of June, 2011.

23 
24 _____
25 Suzanne M. Barnett, Judge

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: JANE E. POTTER) DOCKET NO. 09 15086
2 CLAIM NO. AF-25636) DECISION AND ORDER

3 APPEARANCES:

4
5 Claimant, Jane E. Potter, by
6 Causey Law Firm, per
7 James C. Causey, Jr.

8 Employer, Davis Wright Tremaine, LLP
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Masako Kanazawa, Rachael E. Feldstein and Maureen Mannix, Assistants

13 The claimant, Jane E. Potter, filed an appeal with the Board of Industrial Insurance Appeals
14 on May 8, 2009, from an order of the Department of Labor and Industries dated May 7, 2009. In
15 this order, the Department rejected the claimant's Application for Benefits. The Department order is
16 **AFFIRMED.**

17 **DECISION**

18 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
19 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
20 Order issued on June 18, 2010, in which the industrial appeals judge reversed and remanded the
21 Department order dated May 7, 2009.

22 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
23 no prejudicial error was committed. The rulings are affirmed.

24 Jane Potter is 58 years old. She has a B.A., an M.S., and a Ph.D. in biochemistry. She
25 obtained two post-doctoral appointments at the Sloan-Kettering Institute; one in biochemistry, the
26 other in immunobiology. In 1988, she graduated from the University of Maine School of Law. In
27 1996, she moved to Seattle and obtained work as a patent attorney at Seed and Barry, where she
28 stayed until 2002, when she went to work at Davis Wright Tremaine (hereafter, DWT).

1 Shortly after the 9/11 twin trade towers attack, Ms. Potter began to have anxiety about being
2 in elevators. Seed and Barry was located in the Columbia Tower, and although Ms. Potter did not
3 testify as such, the inference is that she sought employment elsewhere in part due to her fear of
4 going up in elevators. She had also apparently been caught in the elevator at the time of the large
5 earthquake that took place in Washington some time ago, and thereafter would not get on an
6 elevator without a flashlight and anti-anxiety drugs.

7 Ms. Potter testified that as of 2007, she was in the best health she had ever been. She had
8 been a vegetarian of longstanding, she did a lot of hiking, cross country skiing, and she wrote
9 fiction. In June of 2007, however, DWT moved to what was then the Washington Mutual Tower. At
10 the time, DWT did a complete remodel of the space, with all new furniture and interiors. At the time
11 of the move, work was still ongoing and continued through September 2007.

12 During the first few weeks she occupied her new office, Ms. Potter noticed very specific
13 symptoms that she had not heretofore felt; there was a strong smell of chemicals and she felt as
14 though she could not get a full breath of air. She noticed a metallic taste in her mouth, and she
15 began to feel disoriented and confused. When she would arrive at home, she felt extremely
16 fatigued. She began to have a chronic bloody nose. She had lived in her home for three years
17 prior to the DWT remodel, and had never before lived through remodeling.

18 During this time she observed other employees coughing a lot, and many would go outside
19 frequently to get fresh air, or would go to work elsewhere. Ms. Potter noticed that the chemical
20 smell was stronger in her office, and spoke to the facilities manager, complaining that she was
21 feeling ill from her office. She left the premises frequently, and made arrangements to work off the
22 premises. Her assistant would bring her work so she could work in the ground floor atrium of the
23 building to avoid going into her office entirely. By September 2007 she was working from her home
24 almost entirely, and in October 2007 her firm provided the additional equipment required for her to
25 work at home. Ms. Potter's usual practice was to meet her assistant, Sharon, in DWT's parking
26 garage with files, and then work at home.

27 By August of 2007 Ms. Potter had sought medical treatment for her condition. By
28 October 2007, she was ill 24 hours a day. She had trouble even getting out of bed, and climbing
29 stairs would cause her heart to race. She was so fatigued that she could accomplish only one thing
30 a day, such as grocery shopping or another errand. There had also been an episode where she
31 had gone hiking on Mt. Rainier with some friends, and she became extremely disoriented, so much

1 so that her friends considered taking her to the Emergency Room. When she arrived home from
2 that hiking trip, she slept for 14 hours.

3 In 2004, Ms. Potter had had a previous episode with a runny nose, one that she had traced
4 to a photocopier that was placed near her office. She resolved this issue by purchasing an air filter.
5 Although the copier and toner had given her a runny nose, it did not cause nearly the problems she
6 experienced in 2007.

7 Ms. Potter asked her family physician, Dr. Shuhart, to investigate the materials used in the
8 DWT remodel, and her physician wrote to Lydig Construction, the builder, for the Material Safety
9 Data Sheets (hereafter, MSDS). In October 2007, Dr. Shuhart also referred Ms. Potter to
10 Dr. Keifer, an occupational medicine physician at Harborview whom Ms. Potter had seen in 2004.

11 Also in October 2007, Ms. Potter took a long-planned trip to Tuscany, which was very difficult
12 as she became very fatigued each day. In January, 2008, she and Dr. Keifer filled out and filed an
13 Application for Benefits with the Department of Labor and Industries for an occupational disease.

14 In December 2007, Ms. Potter realized that because no doctor had been able to help her
15 with her symptoms, she determined to examine her situation herself, as a biochemist. She knew
16 that in June 2007 she had been in good health, with no limitations. She was then exposed to a
17 huge array of chemicals, the identity of which she did not at that time know because she had not
18 yet gotten the MSDSs. She realized that when she went to her office, she became extremely
19 fatigued, and reasoned that when she exerted herself, she caused accumulated chemicals to
20 circulate again and cause problems. She educated herself as to liver detoxification, and put herself
21 on a detoxification program. Over the course of the first three days of her detoxification program,
22 she felt her acute symptoms abate.

23 In January of 2008, Ms. Potter attempted to return to the office space, but immediately felt
24 the return of the symptoms, so she returned to working at outside locations. She also noted, as she
25 began resuming her normal patterns of life, the places she had gone to or shopped in since 1996
26 caused her to have a reaction. She testified:

27 So I began resuming my normal life in West Seattle, basically, and I began
28 to notice the places I had gone to or shopped in since 1996. I now had a
29 quite serious reaction to what I believed were breathing paint or pesticides,
30 or, you know, the variety of smells and chemicals that are in the air and
31 various commercial establishments. And I would find that if I – If I went to
32 the hardware store, did some shopping, I would find that I was confused
when I was trying to drive home, and then would get fatigued again. I had
never experienced that until the beginning of 2008.

1 It was also at this time that Ms. Potter realized she would need to work at another law firm,
2 and went through a three-hour interview with another firm. After this three-hour interview, however,
3 she had a recurrence of her symptoms, requiring her to spend the next three days in bed. It was at
4 that time that she noticed that her reaction would recur. Typically, her symptoms would vary with
5 the degree of indoor air quality.

6 In the summer or fall of 2008, Ms. Potter received the MSDS sheets for the Lydig Company's
7 remodel project at DWT, which were incorporated into the record as Exhibit No. 1. By the end of
8 2008, she terminated her relationship with DWT. Since that time, Ms. Potter has found that she is
9 unable to be in any type of setting where there are chemicals. Her symptoms will reappear if she
10 goes to a hardware store, or to a store such as OfficeMax, where there is copying being done.
11 After exposures at these types of stores, she finds herself disoriented and unable to function or
12 drive properly. Her ability to think productively is vastly reduced, and she gets confused and
13 extremely fatigued. Most importantly, she felt that she had lost mental ability, her cognitive
14 reasoning and her ability to concentrate. This gravely affected her ability to work at DWT.
15 However, in 2009 she published three short books on detoxification through diet.

16 Nancy Beaudet is an industrial hygienist who works at Harborview. Her role is to assist the
17 Harborview physicians in the Occupational Medicine Division by performing exposure assessments.
18 In 2007, she undertook an assessment of the air quality issue in the recently remodeled offices of
19 DWT in the Washington Mutual Tower. To do this, she spoke to the facilities manager, Lisa Wabik,
20 as well as to co-workers of Ms. Potter. She performed an on-site inspection of the premises in
21 January 2008, spending the majority of her time in Ms. Potter's office.

22 While Ms. Beaudet was there, she did not notice any unusual odors, but when she pulled the
23 blinds down, she noticed an odor, even though the blinds had been installed for seven months.
24 While checking the air flow, she noted that the air return had mistakenly been ducted as a supply
25 duct, which would cause a slightly positive air pressure. Ambient levels of carbon monoxide and
26 carbon dioxide were within normal limits, which indicate that ventilation is good. There was also no
27 evidence of water infiltration, and there was limited dust accumulation. She did not measure any
28 levels of off-gassing.

1 Susan Sheridan is a 69 year old woman who was employed by DWT from April 2006 through
2 December 2008. She had known Ms. Potter previously at Seed and Barry, and began working with
3 Ms. Potter in 2006 as her assistant.

4 Just after the remodel, Ms. Sheridan noticed what she described as a "very, very bad smell."
5 2/11/10 Tr. at 72. In fact, the smell caused her to contact the facilities manager at DWT.
6 Co-workers would often leave the office in order to get air, and Ms. Sheridan noted that Ms. Potter's
7 office had a closed in feeling and smelled worse.

8 Christopher Shuhart, M.D., is a physician certified as a specialist in family practice.
9 Currently, he specializes in bone health and osteoporosis. Dr. Shuhart has been Ms. Potter's
10 primary care physician for some time. On September 5, 2007, Ms. Potter presented complaining of
11 multiple symptoms, specifically burning eyes, shortness of breath, fatigue, headache, mental
12 confusion and cough. She reported that she had been in a new office.

13 At this point, Dr. Shuhart noted that there had been numerous issues in Ms. Potter's life,
14 including the acrimonious ending of a relationship and problems at work. In 2002, she had had a
15 fear of elevators, such that she delayed taking the job at the Columbia Tower because she did not
16 want to work on the 63rd floor. Dr. Shuhart characterized Ms. Potter as having a long-standing
17 intermittent problem with anxiety and fear. Much of this was alleviated, however, when she
18 accepted a job that was not in the Columbia Tower.

19 Over the years that Dr. Shuhart treated Ms. Potter, she complained of problems with anxiety.
20 In August of 2004, she was concerned about chemical sensitivity and possible exposures at her
21 workplace. She complained that her nose would drip if she had not washed her hair prior to going
22 to bed, and attributed this to remnants of chemical materials in her hair. She also reported feeling
23 fuzzy in the head, and further noted that she had had similar symptoms when she entered a store
24 containing photocopiers. In 2006, she presented with symptoms of depression, and although
25 Dr. Shuhart prescribed antidepressants, Ms. Potter never took them.

26 As of May 2009, Ms. Potter provided a list of chemicals and the known health reactions to
27 the chemicals. In Dr. Shuhart's opinion, Ms. Potter's condition was occupational in nature.

28 However, Dr. Shuhart testified that Ms. Potter had complained of persistent fatigue and chest
29 discomfort in 2002, and that she had a fear of elevators such that he diagnosed a phobic reaction to
30 elevators. Although he had, at one point, wondered whether some of her symptoms were
31 hypomanic, he nonetheless disagreed with Dr. Hamm's explanation that her symptoms are caused
32 by an anxiety disorder.

1 Matthew Keifer, M.D., is a physician certified as a specialist in occupational medicine. His
2 heaviest emphasis is on pesticides and the neurobehavioral effects of pesticides. Dr. Keifer had
3 previously treated Ms. Potter in November 2002 for symptoms related to being near a photocopier.

4 Ms. Potter was referred to Dr. Keifer by Dr. Shuhart. The referral was made for fuzziness in
5 thought, irritation, headache, burning eyes and shortness of breath. Dr. Keifer reviewed testing
6 done after the incident on Mt. Rainier, which did not substantiate an exposure to carbon monoxide
7 or carbon dioxide. Indeed, Ms. Potter's history as presented to Dr. Keifer was significant in that it
8 was quite normal. Similarly, her physical examination was normal. Given these facts, Dr. Keifer did
9 not believe Ms. Potter had been exposed to carbon monoxide. Because, however, he was
10 concerned that there were issues of air quality, he recommended that Nancy Beaudet, an industrial
11 hygienist who works at Harborview, evaluate the workplace. At this point, his assessment was:

12 Well, my assessment here, and this really goes more to my belief, is that
13 what she described to me in the anxiety – or the brain fog that she
14 described I interpret in the case of patients who have similar conditions
15 to be an anxiety-induced state of concern triggered by the physical
16 symptoms of exposure and the concern about the chemical hazard that
17 that presents. And that has become my understanding, my mental
18 construct around this, that that brain fog itself is similar to the same kind
19 of disorientation that happens under extreme stress reactions.

18 Q. At that point, were you ruling out the possibility of some sort of more
19 biological basis for her fuzzy thinking, or fog, or were you just
20 constructing this?

20 A. That was merely a construct that I used to understand it when I -- once
21 I've understood that a situation is at a low level of exposure, unlikely to
22 cause true neurological interference. Solvents can interfere with central
23 nervous system function the same way alcohol can because they cause
24 a type of inebriation. But, generally speaking, at the levels that people
25 are exposed in office environments, it's unusual that they've been
26 around and get to the point of true intoxication, and, instead, we have to
27 look for another explanation for why people are feeling this fuzziness of
28 thought, and we do know that fuzziness of thought is something that
29 does accompany anxiety events, and people can develop them.

27 Keifer, Dep. at 22-23.

1 Because Ms. Potter complained of shortness of breath, and of a high heart rate on exertion,
2 Dr. Keifer had numerous tests performed, all of which were normal. When Dr. Keifer saw
3 Ms. Potter on January 14, 2008, he was awaiting the results of a request for the MSDSs related to
4 the remodel. In February 2008, he filled out the paperwork for an Application for Benefits for an
5 occupational disease, listing as a diagnosis "upper respiratory tract irritation". Keifer Dep. at 34.

6 When Dr. Keifer saw Ms. Potter in September 2008, she reported that she had started a
7 cleansing diet and had enjoyed substantial recovery. However, she also reported that she had
8 started noticing symptoms to chemicals, which she identified as pesticides, formaldehyde, the
9 off-gassing of paint fumes, and fumes from new remodel situations. She had obtained naturopathic
10 treatment. At this point, Dr. Keifer believed that Ms. Potter's symptoms were the result of her
11 exposures at the workplace and the concentration that she was exposed to in the office. He
12 believed that she met the criteria for multiple chemical sensitivity.

13 Dr. Keifer explained that Mark Cullen, an academic at Yale, identified the condition of
14 Multiple Chemical Sensitivity as generally starting with an overexposure event which causes illness
15 and then recurrent episodes of somewhat non-specific symptoms. These symptoms often involve
16 central nervous system confusion and a feeling of fuzziness, as well as potentially upper respiratory
17 and mucous membrane irritant symptoms, with exposure to multiple chemicals, and not specifically
18 responding to the single chemical, but then to an expanding number of different chemicals that
19 bring back the experience. Keifer Dep. at 40. Dr. Keifer noted that there is usually a substantial
20 amount of anxiety associated with the symptomatic presentation of Multiple Chemical Sensitivity,
21 and he usually does not separate those two entities. He observed that he was unable to find any
22 other physiological explanation for Ms. Potter's symptoms. It was likely that she had irritation, but
23 the extension of the symptoms into the central nervous system, with cloudiness, fuzziness, and
24 fatigue, which do not necessarily follow just an exposure to irritants, led him to posit Multiple
25 Chemical Sensitivity, as it is a paradigm that helps him to understand what is going on.

26 As of May 2009, Dr. Keifer noted that Ms. Potter had improved following her detoxification
27 diet, although she continued to have regular episodes in response to chemicals in her environment.
28 She reported working about 50 percent of the time, and that she was limited due to fatigue. In
29 Dr. Keifer's opinion, Ms. Potter had responded to some chemicals in her workplace, and some of
30 her symptoms were almost certainly triggered by the physical nature of the chemicals themselves.
31 Dr. Keifer did not believe the symptoms were associated with anxiety disorder but were directly
32 related to her exposure. Ultimately, he believed that she suffered from central nervous system

1 symptoms and generalized fatigue in response to a variety of exposures, largely associated with
2 new construction. But for her exposure at her workplace, he does not believe the symptoms would
3 have been present. Keifer Dep. at 52.

4 As of the last time Dr. Keifer saw her, Ms. Potter asked him to fill out a form for disability.
5 Because he wanted something other than her historical report of symptoms upon which to base his
6 statement, Dr. Keifer asked that Ms. Potter undergo neuropsychological testing. This has not yet
7 occurred.

8 On cross-examination, Dr. Keifer admitted that Ms. Potter had had similar symptoms in other
9 locations, such as areas where there is mold, wet carpets, or animals.

10 Lisa Wabik has worked for DWT as a facilities manager for the last 14 years, and was very
11 involved in the move to the Washington Mutual Tower. She is familiar with Ms. Potter, and noted
12 that Ms. Potter had been concerned about the proximity of her office to the copier, fax, and coffee
13 room even in the Century Square Building.

14 After the move, Ms. Wabik recalled that Ms. Potter complained about chemical smells in the
15 office. When Ms. Wabik went to Ms. Potter's office, she could smell a faint plastic-like smell, which
16 she associated with the blinds. Otherwise, Ms. Wabik did not notice any particular smell on that
17 floor. Ms. Potter and Ms. Wabik spoke about leaving the blinds down so that they could air out.
18 Ms. Potter and her assistant, Ms. Sheridan, were the only employees to complain about the smell,
19 although others had mentioned the smell.

20 Ms. Wabik met with Ms. Beaudet and made sure that the ducting was changed. Also,
21 Ms. Wabik had the blinds removed based on Ms. Beaudet's recommendation.

22 Dennis A. Stumpp, M.D., is a physician certified as a specialist in occupational medicine.
23 Dr. Stumpp examined Ms. Potter at the request of the Department on November 17, 2008. In so
24 doing, he reviewed medical records and met with Ms. Potter. At the outset, he noted that his
25 examination of her was completely normal. He believes that she suffers from an anxiety disorder,
26 and that while she may, indeed, have symptoms, they are mediated by a psychiatric cause, and not
27 an organic one.

28 It is important to note that Dr. Stumpp rejects the opinion that Multiple Chemical Sensitivity is
29 a disease. He stated it is an unexplained medical condition reflecting symptom complexes
30 involving multiple organ systems. More recently, medicine has referred to the condition as
31 Idiopathic Environmental Intolerance, due to the fact that scientific investigation has not found any
32 convincing evidence of any kind of immunologically and medically defined sensitivity. In addition,

1 he believes that there is no evidence that the condition is related to exposures to chemicals. In
2 fact, he believes that it is a sociologic phenomenon. He further believes that while patients suffer
3 from real symptoms, there is no evidence that there is an underlying disease process related to
4 chemical exposure.

5 Dr. Stumpp testified that carbon dioxide levels are essentially a surrogate for adequacy of
6 ventilation; if the ventilation is sufficient carbon dioxide levels will be at appropriate levels. There
7 was no evidence that Ms. Potter was exposed to elevated levels of carbon dioxide at DWT. Thus,
8 even though there was a ducting error, the ventilation was adequate. Also, even though there may
9 have been some formaldehyde off-gassing, there is no evidence that Ms. Potter was exposed to a
10 substantial concentration of formaldehyde, or any other chemical.

11 Dr. Stumpp noted that Ms. Potter has complained of cognitive difficulties even before her
12 exposure in June 2007. In 2002, she had complained of symptoms, and at that time Dr. Shuhart
13 had attributed her symptoms to anxiety. Similarly, she reported the same symptoms in connection
14 with being placed near a photocopier. In Dr. Stumpp's opinion, this dovetails with Dr. Keifer's
15 explanation that the brain fog is an anxiety-induced state of concern triggered by the physical
16 symptoms associated with perceived exposure to chemical hazard, and that there is a substantial
17 amount of anxiety associated with the symptomatic presentation of multiple chemical sensitivity.
18 Dr. Stumpp believes that Ms. Potter's symptoms are primarily anxiety mediated, and the trigger for
19 the anxiety is her perception that she is being exposed to chemicals, whether or not the perception
20 is warranted.

21 The Department's final witness was John E. Hamm, M.D., a physician certified as a
22 specialist in psychiatry. Dr. Hamm examined Ms. Potter on October 23, 2008, as part of an
23 independent medical examination.

24 After examining medical records, Dr. Hamm observed that Ms. Potter had problems with
25 anxiety going back many years. In August 1998, a Dr. Druckman made reference to panic-like
26 symptoms, motion symptoms, panic in elevators, confined spaces, and a sense of dizziness. In
27 2002, Dr. Shuhart noted breathlessness, chest discomfort, fatigue, and dizziness. Also in 2002,
28 Ms. Potter reported a fear of elevators.

29 In Dr. Hamm's opinion, Ms. Potter has an anxiety disorder, and it is chronic. He bases this
30 on her history of generalized anxiety symptoms and history of phobic symptoms. He observed that
31 when a person has an anxiety disorder, he or she perceives their environment as being dangerous
32 when it really is not. This, he believes is the cause of her symptoms.

1 Our industrial appeals judge did a thorough job of reviewing the evidence, and she reversed
2 the Department order, and allowed the claim for MCS. The Department has petitioned this decision
3 for review and argues several-fold: first and foremost, that expert testimony concerning the
4 diagnosis of Multiple Chemical Sensitivity should not be admitted because it does not meet the
5 legal standard enunciated in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). Further, the
6 Department argues that Ms. Potter does not suffer from an occupational disease, as there is no
7 evidence of chemical exposure at medically significant levels, and there is no evidence the
8 chemical exposure was a natural incident of her work.

9 Although we agree with our industrial appeals judge that expert testimony concerning
10 Multiple Chemical Sensitivity should be permitted, we determine that Ms. Potter has not proved that
11 exposure to workplace chemicals has proximately caused her condition within the meaning of
12 *Intalco Aluminum v. Department of Labor & Indus.*, 66 Wn. App. 644 (1992) and RCW 51.08.140.
13 In conclusion, we do not believe Ms. Potter has proved that her exposure, if any, was a distinctive
14 condition of her employment.

15 At trial, the claimant sought to present evidence that she suffered from Multiple Chemical
16 Sensitivity. The Department moved in limine, contending that evidence that the claimant has
17 Multiple Chemical Sensitivity is not admissible under *Frye*. We have in the past observed that:

18 [c]ourts will go a long way in admitting expert testimony deduced from a well
19 recognized scientific principle or discovery. The thing from which the deduction
20 is made must be sufficiently established to have gained general acceptance in
the particular field in which it belongs.

21 *Frye*, at 1014; *In re Mark A. Lolkus, Jr.*, Dckt. No. 98 21630 (May 2, 2000). We have carefully
22 reviewed documentation submitted relative to the *Frye* motion, and we are satisfied that while there
23 remains controversy as to MCS, it is generally accepted within the scientific community, at least
24 insofar as admissibility under *Frye*.

25 However, the simple fact that opinion evidence relative to MCS is admissible is not
26 dispositive in this matter. We are free to reject MCS as an occupational disease within the meaning
27 of RCW 51.08.140 or even as a disease entity. However, because we do not believe that Multiple
28 Chemical Sensitivity, as it is diagnosed in the facts of this case, meets the definition of an
29 occupational disease, we need not reach the issue of whether we accept this condition as an
30 occupational disease.

31 As a preliminary matter, we analyze this matter within the context of an occupational
32 disease, and not as an industrial injury. Certainly, every claimant is entitled to the benefit of

1 analysis of the claim as either an industrial injury or an occupational disease; however, an industrial
2 injury is defined as "a sudden and tangible happening, of a traumatic nature, producing an
3 immediate or prompt result, and occur from without, and such physical conditions as result
4 therefrom." RCW 51.08.100. In this matter, however, there is no contention that there was a
5 sudden and tangible happening. Ms. Potter contends that she was exposed to low levels of
6 chemicals over the course of days and weeks. Thus, this matter must be analyzed as an
7 occupational disease.

8 However, analysis of this matter as an occupational disease brings with it certain
9 ramifications as to compensability, first and foremost being RCW 51.08.142, which directs the
10 Department to adopt a rule that claims based on mental conditions or mental disabilities caused by
11 stress do not fall within the definition of occupational disease. Indeed, WAC 296-14-300(1) states,
12 in pertinent part, that

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

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

17 (g) Subjective perceptions of employment conditions or environment;

18 . . .

19 (i) Fear of exposure to chemicals, radiation biohazards, or other perceived
20 hazards

21 Thus, Ms. Potter's subjective perception that she was exposed to harmful substances,
22 causing her to have an anxiety disorder (as urged by the Department) would not be compensable
23 pursuant to RCW 51.08.142 and WAC 296-14-300.

24 In order to find Ms. Potter's claim compensable as an occupational disease, we must
25 determine that she sustained a medical condition (as opposed to a psychiatric condition)
26 proximately caused by exposure to [a] chemical agent(s), and not just her perception that she was
27 exposed to [a] chemical agent(s). Also, we must be able to determine that the exposure was
28 distinctive to her employment and not something she would encounter in life generally.

1 Part of the difficulty in analyzing this matter is that by definition, Multiple Chemical Sensitivity
2 involves low level exposure to chemicals, known or unknown, which causes the sufferer to become
3 disoriented and fatigued (as well as further sensitized). When the levels of chemicals are so low as
4 to be virtually undetectable, and the ensuing medical conditions are as vague as fatigue and
5 disorientation, we do not think that Ms. Potter's condition meets the definition of an occupational
6 disease.

7 There is no evidence that Ms. Potter was exposed to high levels of any chemicals. Air
8 quality samples tested only for carbon monoxide and carbon dioxide, both of which were within
9 permissible limits. Ms. Potter's only proof of exposure to any type of substance is contained in
10 Exhibit Nos. 1 and 2. Exhibit No. 1 is a summary of the individual Material Safety Data Sheets that
11 was compiled by Ms. Potter. Exhibit No. 2 is the Material Safety Data Sheets themselves. Our
12 industrial appeals judge admitted both exhibits over the Department's objection that was that there
13 was no foundation for the admission of the documents, nor were they relevant. The Department's
14 foundation objection was based on the fact that there was no medical testimony that Ms. Potter was
15 ever actually exposed to the chemicals contained in the exhibit.

16 We agree that both Exhibit Nos. 1 and 2 should be admitted, given that the only objection
17 interposed was that of foundation and relevance. As for foundation, the claimant testified that she
18 received a notebook from a DWT employee, Mr. Barry, which contained a full set of the MSDS
19 sheets from the Lydig Company's remodel project. We believe that this adequately provides a
20 foundation for admission of these two exhibits.

21 With the admission of these two exhibits, the claimant asks that we infer that she was
22 exposed to the referenced chemicals, causing the condition of Multiple Chemical Sensitivity.
23 Ms. Potter argues that pursuant to *Intalco* she need not identify a specific toxin. We believe,
24 however, that this represents an overly simplistic view of *Intalco*, and that while it could be inferred
25 that there was some level of the chemicals referenced in the Material Safety Data Sheets, this does
26 not meet the requirements set forth in the *Intalco* case.

27 The *Intalco* matter involved aluminum plant workers, each of whom had worked for at least
28 12 years in the aluminum reduction "potline" at Intalco. An industrial hygienist, Arvin Apol, testified
29 that

30 In 1973, NIOSH did an air pollution survey of gasses and particulates at the
31 Intalco plant. At that time, Intalco was in the process of retrofitting the pots with
32 hoods. Apol testified that the air on the unhooded potline was at least twice as
dirty as the air on the hooded potline. The survey, which focused primarily on
fluoride emissions, found that the threshold limits for that toxin were exceeded

1 on both the hooded and unhooded potlines. However, NIOSH did not measure
2 all of the chemicals present in the Intalco pot room atmosphere, such as
3 aluminum particulates. Apol testified that numerous toxins, including
4 aluminum, benzene solubles, petroleum pitch volatiles, and carbon monoxide
5 . . . and petroleum pitch volatiles had been associated with neurologic disease.

6 *Intalco*, at 649.

7 In addition, the claimants themselves underwent extensive testing over a two-year period.
8 *Intalco*, at 651. This testing showed that each claimant had neurological impairment as evidenced
9 by tremors, lack of coordination, and unsteady gait. In addition, all three claimants underwent
10 extensive neuropsychological testing that showed impaired cognitive functioning and short term
11 memory loss. Expert testimony established that these symptoms were commonly seen in patients
12 exposed to a number of neurotoxins, especially heavy metals and solvents. *Intalco*, at 651.

13 While the claimants were unable to show that they were exposed to a specific toxin that
14 caused their symptoms, they did establish exposure to known neurotoxins as well as measured and
15 quantified evidence of physical and neurological damage, such as tremors, and testing showing
16 impaired cognition.

17 In this case, we have evidence of use of certain chemicals in the remodel, some of which
18 can cause neurological symptoms in certain quantities, but no evidence of exposure to anything
19 other than permissible limits. Additionally, there is evidence that the claimant felt disoriented and
20 confused, but there is no neuropsychological or other testing that quantifies or otherwise specifies
21 the nature of her difficulties. This case is thus clearly distinguishable from the *Intalco* matter.

22 Ms. Potter asks that we draw the same conclusions that the *Intalco* court drew in this fact
23 pattern. However, but we do not think this is warranted by the evidence. While the expert
24 witnesses in *Intalco* admitted that they were unable to directly relate the physical findings to the
25 known exposures, there was testimony that there was exposure to impermissibly high levels of
26 known neurotoxins resulting in identifiable, diagnosed, physical and neurologic symptoms. In this
27 matter, there is no evidence of exposure to toxins in excess of permissible levels, and there is no
28 evidence of neurologic deficits, only subjective reporting of "brain fog." This is simply insufficient to
29 warrant the same inference drawn by the *Intalco* court. By introducing evidence of Multiple
30 Chemical Sensitivity as an organic disease process, the claimant seeks to somehow bootstrap it
31 into the same type of situation as *Intalco*. Be that as it may, the "brain fog" is still so vague that we
32 are not unconvinced that the exposures were the cause.

We observe that Dr. Keifer's explanation of Multiple Chemical Sensitivity (Keifer Dep. at 23)
sounds very much like a psychiatric condition, and not a physical condition. The fine line between a

1 psychiatric condition and a physical condition is very blurry indeed, and becomes almost
2 indiscernible with regard to certain conditions. Ordinarily, this is not an issue, but it does indeed
3 matter because of RCW 51.08.142, which prohibits allowance of occupational disease claims
4 based on stress.

5 Finally, we do not believe that Ms. Potter has established that the conditions at her
6 employment satisfy the "naturally" prong of RCW 51.04.140. *In Dennis v. Department of Labor and*
7 *Industries*, 109 Wn. 2d 457 (1987) the court held:

8 The Board's formulation of the "naturally" requirement is from the decision by Division
9 Two of the Court of Appeals in *Department of Labor & Indus. v. Kinville*, 35 Wn. App.
10 80, 664 P.2d 1311 (1983). There the court held that to satisfy the "naturally"
11 requirement of RCW 51.08.140, "the worker has the burden of establishing that the
12 conditions producing his disease are peculiar to, or inherent in, his particular
13 occupation." (Footnote omitted.) *Kinville*, at 87. The court also said that
14 RCW 51.08.140 "requires a showing by the claimant that the job requirements of his
particular occupation exposed him to a greater risk of contracting the disease than
would other types of employment or nonemployment life." (Footnote omitted.) *Kinville*,
at 88.

15 *Dennis* at 478.

16 Remodels are everywhere, and by no means limited to law offices, or to work for that matter.
17 New blinds, new carpets, and new furniture are encountered in all of everyday life. Indeed,
18 Ms. Potter testified that she had felt this way when exposed to the smell of coffee many years
19 earlier – possibly causing sensitization at that time. Ms. Potter would need to establish that she
20 was exposed to low levels of chemicals not found in everyday life, and the simple fact that she was
21 exposed to low levels of these chemicals at her work is not sufficient to satisfy the "naturally" prong
22 required by RCW 51.08.140.

23 After careful review of this record as a whole, we affirm the Department decision rejecting
24 this Application for Benefits.

25 FINDINGS OF FACT

- 26 1. On February 6, 2008, the claimant, Jane E. Potter, filed an Application
27 for Benefits with the Department of Labor and Industries, in which she
28 alleged she sustained a pulmonary and eye injury in the course of her
29 employment with Davis Wright Tremaine LLP on September 7, 2007.
On August 7, 2008, the Department issued an order in which it allowed
the claim for an industrial injury and paid benefits.

30 On August 8, 2008, the Department issued an order in which it closed
31 the claim. On August 21, 2008, Ms. Potter protested the Department's
32 August 8, 2008 order.

1 On February 23, 2009, the Department issued an order canceling its
2 August 8, 2008 order and keeping the claim open for authorized
3 treatment and benefits. On February 24, 2009, the Department issued
4 an order allowing the claim for a temporary exacerbation of allergic
5 rhinitis due to off-gassing of vinyl-coated polyester roller blinds in an
6 office with reduced air flow during a remodel on September 7, 2007.

7 On February 25, 2009, the Department issued an order closing the
8 claim. On April 23, 2009, Ms. Potter protested the Department orders
9 dated February 24, 2009 and February 25, 2009.

10 On May 6, 2009, the Department issued an order canceling its orders
11 dated August 7, 2008, February 24, 2009, and February 25, 2009.
12 On May 7, 2009, the Department issued an order in which it rejected
13 Ms. Potter's claim filed on February 6, 2008, as neither an industrial
14 injury nor an occupational disease. On May 8, 2009, Ms. Potter
15 appealed the Department's May 7, 2009 rejection order. On May 18,
16 2009, the Board granted Ms. Potter's appeal, under Docket
17 No. 09 15086, and agreed to hear the appeal.

- 18 2. Jane E. Potter is 57 years old. Ms. Potter has a Ph.D. in biochemistry,
19 which included two years of medical school. Ms. Potter also has a law
20 degree and has practiced law since 1988, specializing in patent law, and
21 more specifically, biotechnology.
- 22 3. From August 2002 until December 2008, Ms. Potter was employed as a
23 patent lawyer at Davis Wright Tremaine LLP. On June 17, 2007,
24 Ms. Potter relocated with her firm to a newly remodeled space on the
25 23rd floor of the Washington Mutual Tower. Within weeks of that move,
26 over the course of weeks, Ms. Potter developed symptoms including a
27 metallic taste in her mouth, problems breathing, a strong chemical smell,
28 bleeding nose, disorientation, and fatigue. Her symptoms progressed to
29 the point that she experienced these symptoms (except the metallic
30 taste) even while away from her workplace.
- 31 4. There is no evidence that Ms. Potter was exposed to fumes or
32 off-gassing caused by new furniture or interior remodeling at levels
sufficient to cause physical harm during the course of her employment.
5. Exposure to fumes or off-gassing caused by new furniture or interior
remodeling is not a distinctive condition of employment, as opposed to
incidents of daily life.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the
parties to and the subject matter of this appeal.
2. Ms. Potter did not sustain an industrial injury within the meaning of
RCW 51.08.100.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
PO BOX 44291
OLYMPIA, WA 98504-4291

MAILING DATE 05/07/2009
CLAIM NUMBER AF25636
INJURY DATE 09/07/2007
CLAIMANT POTTER JANI

EMPLOYER DAVIS WRIGH
UBI NUMBER 601 735 941
ACCOUNT ID 320, 413-01
RISK CLASS 5301
SERVICE LOC Seattle

JANE POTTER
% CAUSEY LAW FIRM
401 2ND AVE S STE 303
SEATTLE WA 98104-2862

NOTICE OF DECISION

This claim for benefits filed on 02/06/2008 while working for DAVIS WRIGHT TREMAINE LLP is hereby rejected as an industrial injury or occupational disease for the following reasons(s):

The claimant's condition is not the result of exposure alleged.

Claims based on mental conditions or mental disabilities caused by stress are specifically excluded from coverage by law.

That the claimant's condition pre-existed the alleged injury and not related thereto.

That no personal injury was sustained by the claimant.

That the claimant's condition is not an occupational disease as contemplated by section 51.08.140 RCW.

Any and all bills for services or treatment concerning this claim rejected, except those authorized by the department.

Supervisor of Industrial Insurance
By Karen K Lewis
Claims Manager
(360) 902-5611

|| THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS
|| COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE
|| A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR
|| FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE
|| APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE
|| REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO:
|| DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA
|| 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.
|| IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE
|| APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON
|| ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).
