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No. 72323-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CHARLES L. KIMZEY,

Respondent,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE
OF WASHINGTON,

Appellants.

RESPONDENT'S BRIEF

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I. INTRODUCTION

RCW 51.08.142 and WAC 296-14-300 promulgated thereunder does not exclude a mental condition or disability caused by the accumulation of workplace trauma. The Respondent, paramedic Lee Kimzey, had occupational PTSD which the record established was caused by the cumulative effects of workplace trauma. The controlling statute in this case is RCW 51.08.140, which defines "occupational disease" because Mr. Kimzey's PTSD was an occupational disease. This was supported by the record and found by the Superior Court.

An occupational disease is a disease that arises naturally and proximately out of employment. RCW 51.08.140 is not limited to only diseases caused by a single event, but merely requires that the disease arise naturally and proximately out of employment.

The Department incorrectly relies on WAC 296-14-300, which is misguided, as WAC 296-14-300 applies only to mental conditions caused by stress or stress from a single traumatic event. Mr. Kimzey's PTSD was found by the Superior Court to be caused by the cumulative effects of workplace trauma. If RCW 51.08.142 and WAC 296-14-300 are unambiguous, it would be in favor of Mr. Kimzey, because they do not address, let alone apply to, mental conditions caused by the accumulation of workplace trauma. In Mr.

Kimzey's case, the record supports and the court found that his PTSD was caused by the cumulative effects of workplace trauma. Even if there is ambiguity in the law on the issue before this Court, the Washington Supreme Court has made it clear that all doubts in the construction of the Industrial Insurance Act must be construed in favor of the injured worker.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error Assigned by the Department of Labor and Industries

1. The superior court erred in Finding of Fact 1.1, which determined that Kimzey sustained an occupational disease, namely, PTSD. CP238
2. The superior court erred in Finding of Fact 1.2, which determined that the findings and conclusions of the Board of Industrial Insurance Appeals were rebutted by a preponderance of the evidence. CP238
3. The superior court erred in Conclusion of Law 2.2, which determined that Kimzey's PTSD is an occupational disease. CP238
4. The superior court erred in Conclusion of Law 2.3, which determined Kimzey is entitled to coverage under the Industrial Insurance Act. CP 238
5. The superior court erred in Conclusion of Law 2.4, which determined that the findings and conclusions of the Board of Industrial Insurance Appeals had been rebutted by Kimzey by a preponderance of the evidence. CP 238
6. The superior court erred when it awarded attorney fees and costs to Kimzey. CP 239

III. STATEMENT OF THE CASE

The distinctive conditions of the job of a paramedic include attending to people with life threatening emergencies, provide *advanced* life support, attend to people having heart attacks or broken bones or diseases or hurt children or people who have stopped breathing. CABR Testimony Buchanan 7; CABR Testimony Brownell 63; CABR Testimony Kimzey 104:2-5. "Paramedics would only be sent on the most critically ill." CABR Testimony Brownell 63.

Respondent Charles "Lee" Kimzey graduated from the University of Washington in 1991, where he was certified in paramedic. CABR Testimony Kimzey 98:1-2; 99. He worked as a paramedic for 21 years. CABR Testimony Kimzey 98:1-2; 100:1-3. His career as a paramedic ended at Vashon Fire & Rescue in 2012. CABR Testimony Kimzey 102.

Battalion Chief of Emergency Medical Services Mark Brownell described this line of work in a raw and blunt way when he testified:

. . . No one will ever understand or appreciate the horror and devastation that you deal with, the busted children, the dead babies, the dead adults, the moaning of someone who lost their soulmate, the devastation that you see. . . . Every one of those puts a scar on you. CABR Testimony Brownell 76.

In the course of and as part of Mr. Kimzey's employment, he was exposed to dead children, nursing home fatalities, child anaphylaxis, life

support calls, sick and cardiac patients, calls that necessitated airlifting patients. CP 104:12-24; 121:22-23; 107:23-25; 109:14-26; 110:1-4; 110: 8-12; CABR Testimony Burgett 12-13; 23:3-10; 23:18-24. Mr. Kimzey has even had to cut a throat, which turned out unsuccessful. CABR Testimony Kimzey 109.

For Mr. Kimzey, the trauma was too much for him to bear, and he developed PTSD.

The Department does not challenge that paramedic Kimzey's PTSD was caused by his employment. CP 32:21-22; AB 10 - See also CP 50:17-18 ("He developed post-traumatic stress disorder and depression due to his work as a paramedic. . . .") and CP 50:22-23 ("The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . . .") and CP 50:18-19 ("Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment . . .")

The Department did not present any testimony in its case-in-chief to rebut mental health expert Rachell Burgett, who testified in Mr. Kimzey's case-in-chief. Mental Health expert Burgett's testimony clearly established that Mr. Kimzey's PTSD was caused by the cumulative effects of workplace trauma. CABR Depositions Burgett 11:18-22; 12:2; 12:4-9;

12:10-18; 12:25-13:2; 23:6-8; 23:11-17. Even when describing what PTSD

is, expert Burgett cited trauma as the cause:

A: Could you just tell me what that is?

Q: Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. . . . CABR Depositions Burgett 26:8-14.

She also discussed the symptoms:

Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. **And the cluster of symptoms includes avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflex, inability to face situations similar to the trauma.** CABR Depositions Burgett 26:10-18.

“Stress” was not even included in expert Burgett’s list of the cluster of symptoms.

When asked what it was about working at Vashon Fire & Rescue that made him believe he was not up to the task, he testified that, “Something just triggered. Something happened. And it was I could not stop catastrophizing.” CABR Testimony Kimzey 107:16-19.

The most traumatic calls for Mr. Kimzey were, what he referred to as “ped calls” – Pediatric calls. When asked if there was any particular type of

work activity or call that was causing him this sense of imminent catastrophe, Mr. Kimzey testified that it was pediatric calls. CABR Testimony Kimzey 104:8-11. He then testified,

I couldn't see another dead child. I just knew I couldn't do that again, just . . . CABR Testimony Kimzey 104:23-24.

Mr. Kimzey even used alcohol to self-medicate - until he eventually sought treatment and became sober:

Q: Was your inability to deal with pediatric cases a function of alcoholism?

A: No.

Q: Why were you drinking?

A: Self-medicating.

Q: Medicating what?

A: Stuff I didn't want to think about.

Q: What didn't you want to think about?

A: Kids, dead kids, failures. I said dead kids. CABR Testimony Kimzey 121.

In the last year that Mr. Kimzey worked for Vashon Fire & Rescue, he responded to about six calls involving a child named for purposes of privacy in this case "OC." CABR Testimony Kimzey 105. OC was close to Mr. Kimzey's heart, because OC was the son of a fellow Vashon Island firefighter. CABR Testimony Kimzey 3-5. OC also reminded Mr. Kimzey

of his own family. *Id.*

Mr. Kimzey was asked if there were any repeating scenarios, catastrophe that the focused on, and he testified that it was sick kids, and OC and another child named JS in particular. CABR Testimony Kimzey 107. He testified that “OC I took home with me.” When asked what that meant, he testified in part that “I couldn’t shake him. I couldn’t shake the call. I couldn’t put it to bed. I couldn’t leave work at work with OC.” CABR Testimony Kimzey 108. Mr. Kimzey’s last six calls with OC before his employment ended were all calls for child-anaphylaxis. He testified that, “. . . we would see him fo anaphylaxis. Severe peanut allergy. So, I mean, it’s almost to where if he even breathes it.” CABR Testimony Kimzey 127.

While he did not have a near-death experience on those calls with OC, he was asked , “What are the symptoms of anaphylactic shock that you had talked about in response to allergies that OC had?” His testimony was telling, in that it highlighted the main symptom of concern when responding to OC was his airway closing up and the child crashing hard. “Well, the main one we were concerned about is the airway closing up. And you get big histamine release, profuse edema. The thing with kids is they can maintain for a long time, but when they crash, they just sink fast and – yeah.” CABR Testimony Kimzey 132: 16-23.

As stated above, Mr. Kimzey was asked if there were any repeating scenarios, catastrophe that he focused on, and he testified that it was sick kids, and he also specifically identified a child named "JS". CABR Testimony Kimzey 107. JS is a special needs child, who has a seizure disorder. CABR Testimony Brownell 68:1-3. While working, Mr. Kimzey experienced a traumatic intubation on JS. Chief Battalion Brownell testified that he has personally had to incubate JS before, and that you have to give JS,

“so much sedative to reduce the seizure that they lose their ability to control the airway. So you have to put a tube down their throat to breathe for them to protect their airway, so they don't vomit and get that – aspirate those contents into their lungs. There's a real high risk of mortality if that occurs.” CABR Testimony Brownell 68:7-13.

Chief Battalion Brownell testified about JS' mother describing the traumatic intubation involving her son and Mr. Kimzey, where Mr. Kimzey struggled with the airway and that it was a difficult airway. CABR Testimony Brownell 68:14-26.

Mental health expert Burgett testified that there has been a body of research that shows that EMTs and paramedics and firefighters dealing with children is one of the more significant traumatic events in their career. CABR Testimony Burgett 12:4-9.

During his work for Vashon Fire & Rescue, Mr. Kimzey developed physical symptoms including projectile vomiting, diarrhea, violent illness,

and weight loss of approximately 15 pounds. CABR Testimony Kimzey 116, 123; CABR Testimony Burgett 12: 15-18; 15: 8-16. Testifying about a time during the last year of his employment with Vashon Fire & Rescue, he said:

Q: Did you ever consider suicide?

A: Yes.

Q: Tell us how far you went in that direction.

A: I loaded my gun. I put two bullets in in case I chickened out on the first round. When I discharged my weapon it shook me out of my grief enough to discharge my remaining round and give my guns to a friend.” CABR Testimony Kimzey 116.

Mr. Kimzey began having horrible nightmares, where he would replay old calls, which were all bad, but that the “little ones that were still alive were being replaced with dead ones.” CABR Testimony Kimzey 114:25-26; 115:1-2. He used OC as an example, and testified that, “It would be, I would be having a repeat of a dead kid call in town. Only when I got there, it wasn’t the actual kid; it was OC.” CABR Testimony Kimzey 115:4-10.

Mr. Kimzey’s PTSD, caused by his work, rendered him unable to work as a paramedic. CABR Testimony Burgett CABR Depositions Burgett 21: 17-25; 22:103; CABR Testimony Kimzey 102:23; 103:1-25.

Mr. Kimzey filed a timely claim with the Department of Labor and Industries seeking benefits for industrial injury and disease. CABR Report of

Industrial Injury or Occupational Disease. The Department denied his claim on August 3, 2012. CABR Proposed Decision and Order 15-24

The Department rejected Mr. Kimzey's claim based on the mistaken belief that mental conditions or disabilities caused by stress are excluded from coverage by the Industrial Insurance Act. CABR Proposed Decision and Order 15-24 .

Mr. Kimzey appealed to the Board of Industrial Insurance Appeals. CABR Notice of Appeal of Dep't of Lab and Indus Decision dated 8/3/2012 26-27.

Mr. Kimzey presented medical expert testimony from mental health expert Rachell Burgett. CABR Depositions Burgett at 4. Mr. Kimzey also presented testimony from several lay witnesses. CABR Testimony Buchanan 4; Warren 18; Brownell 59; Kimzey 97. Family physician Dr. Koch also testified in Mr. Kimzey's case-in-chief, but Dr. Koch was not a PTSD expert or mental health professional, and admitted this in his testimony. CABR Depositions Koch 17:6-7; 11:21.

The testimony from the only mental health expert in this case, Rachell Burgett, clearly established that Mr. Kimzey's PTSD was caused by workplace **trauma**. CABR Depositions Burgett at 11:18-22; 12:4- 18; 23:6-8; 23:11-17; 12:25-13:2; 26:8-14. The record supported objective physical

reactions by Mr. Kimzey from his workplace trauma. See for example CABR Transcripts Kimzey 116, 123; CABR Depositions Burgett 12: 15-18; 15: 8-16.

The hearing judge affirmed the Department's denial of Mr. Kimzey's claim, incorrectly concluding that "claims based on mental conditions or mental disabilities cause by stress are specifically excluded from coverage by law;" CABR Proposed Decision and Order dated August 1, 2013, pg 15. Mr. Kimzey appealed to the King County Superior Court. CP 1-2. After a bench trial, where there was not a single witness or expert by the Department to rebut Mr. Kimzey's witness testimony, the Court found that Mr. Kimzey's disease was caused by the cumulative effects of **workplace trauma**. CP 238. Accordingly, the Court concluded that Mr. Kimzey's condition of PTSD is an occupational disease. *Id.*

IV. ARGUMENT

Standard of Review.

1. Superior Court

In an appeal of a BIIA decision, the superior court holds a de novo hearing but does not hear any evidence of testimony other than that included in the BIIA records. RCW 51.52.115. The findings and decisions of the Board are prima facie correct and the burden of proof is on the party

challenging them. RCW 51.52.115.

2. Court of Appeals

For claims under the Industrial Insurance Act, “review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court’s *de novo* review, and whether the court’s conclusion of law flow from the findings.” *Young v. Dept. of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996) (citations omitted). *See also Ruse v. Dept. of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

B. Trauma was the cause of paramedic Kimzey’s Post-Traumatic Stress Disorder. The Department’s attempt to label the cause as stress, at the exclusion of trauma, is not supported by the record, nor by the law that there can be more than one proximate cause of a disease.

1. RCW 51.08.142 and WAC 296-14-300 do not exclude or even address mental conditions or diseases caused by the accumulation of workplace trauma – and are incorrectly relied upon by the Department in this case.

Claims based on mental conditions or mental disabilities caused by the accumulation of workplace trauma are not excluded from the definition of “occupational disease” by WAC 296-14-300. Rather, WAC 296-14-300(1) refers to mental conditions or disabilities “caused by stress” – not trauma. WAC 296-14-300(2) refers to stress, which results from a single traumatic event – Mr. Kimzey had PTSD resulting from the *cumulative*

effects of trauma.

Further, even if *stress* was a cause of a claim based on mental conditions or mental disabilities, the mental condition or disability is not excluded from the definition of “occupational disease” if *trauma* was also a cause.

There may be one or more proximate causes of a condition. For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. **The law does not require that the work conditions be the sole proximate cause of such condition.** *WPI 155.06.01 - Proximate Cause - Rejected Claim.*

Even if the disease was caused by the combined effects of trauma and stress, the Court in *Wendt v. Department of Labor and Industries* held that it is error not to give an instruction on multiple proximate causes when there is evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions. SEE *Wendt v. Department of Labor and Industries*, 18 Wn. App. 674, 571 P.2d 229 (1977).

Further, whether or not paramedic Kimzey’s PTSD was caused by a single workplace trauma or an accumulation of workplace trauma, both fit within the definition of occupational *disease* and are not excluded by WAC 296-14-300. “Occupational Disease” is defined by RCW 51.08.140 as follows:

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

The legislature did not narrow the scope of an "occupational disease" to only a disease caused by a sudden and tangible happening or a single event. Rather, on occupational *disease* need only arise naturally and proximately out of employment. Mental conditions or disabilities where trauma was a cause, are occupational diseases regardless of whether they were from a single event or an accumulation of traumatic events, so long as the disease arises naturally and proximately out of employment.

In this case, by the Department's own admission, paramedic Kimzey developed post-traumatic stress disorder and depression caused by his work as paramedic with Vashon Fire & Rescue. CP 32. (Dept's Trial Brief). Further, the Department admitted that,

"He developed post-traumatic stress disorder and depression due to his work as a paramedic. Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment. . . The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . ." CP 50. [emphasis added].

The Superior Court found, correctly, that paramedic Kimzey's post-traumatic stress disorder was an occupational *disease*.

The Department's entire basis for appeal hinges on its insistence that

“workplace stress” caused paramedic Kimzey’s PTSD. In its appellate brief, the Department ignores the record - and instead repeatedly uses its own term, “stress,” to characterize the cause of paramedic Kimzey’s PTSD. However, as will be discussed under subsection 2 below and as discussed in the above Statement of the Case, the record before the Superior Court shows that paramedic Kimzey’s mental disease was caused by caused by accumulation of workplace trauma.

The Department’s interpretation of the Industrial Insurance Act undermines the policy of the Industrial Insurance Act as well as the Supreme Court’s directive in how to construe the Act. The legislature mandated that the Act, that is, Title 51,

“shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.”
RCW 51.12.010.

The above policy was echoed by the Washington Supreme Court,

“It has been repeatedly stated by this court that the Workmen's Compensation Act is highly remedial in character and, as such, is to be liberally construed with a view to the accomplishment of its beneficent purposes.” *Hastings v. Dep't of Labor & Indus.*, 24 Wash. 2d 1, 12, 163 P.2d 142 (1945). Citing *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.2d 865; *Campbell v. Department of Labor and Industries*, 2 Wash.2d 173, 97 P.2d 642; *Nelson v. Department of Labor and Industries*, 9 Wash.2d 621, 115 P.2d 1014; *Berry v. Department of Labor and Industries*, 11 Wash.2d 154, 118 P.2d 785, 140 A.L.R. 392.

This Court has furthered this strong public policy favoring injured workers by holding that when construing the Act, **all doubts be resolved in favor of the injured worker.**

“To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, **with doubts resolved in favor of the worker.**” Dennis v. Dep't of Labor & Indus. of State of Wash., 109 Wash. 2d 467, 470, 745 P.2d 1295 (1987). [emphasis added].

It is *the Department* that attempts to create ambiguity in the law, by claiming that a mental disease caused by accumulation of workplace trauma fits within the exclusion of WAC 296-14-300. It does not. WAC 296-14-300 does not exclude mental conditions or diseases caused by accumulation of workplace trauma. WAC 296-14-300(1) only refers to diseases caused by stress. Even WAC 296-300-14(2) refers to stress, and addresses only stress from a single event. Mr. Kimzey's PTSD was caused by an *accumulation of* trauma. Even if stress was a symptom, it would be a symptom *of the disease*, but the *disease* itself is the result of *the cumulative effects of workplace trauma*. Regardless, when defining PTSD, expert Burgett outlined the cluster of symptoms included in PTSD, and stress was not even listed:

Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the

person or the person is involved in the harm or the death or dismemberment of other people. And **the cluster of symptoms includes avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflex, inability to face situations similar to the trauma.**
CABR Depositions Burgett 26:10-18.

The Department attempts to avoid the mandate to construe the Act liberally with all doubts in favor of the injured worker by arguing that the law is unambiguous. This is an unsustainable position. Any argument that the law is unambiguous would fall *in favor of Mr. Kimzey*, as RCW 51.08.142 and WAC 296-14-300 does not even address, let alone exclude, mental conditions caused by the accumulation of workplace trauma. In this case, the evidence established and the Court found that Mr. Kimzey's mental disease was caused by the cumulative effects of workplace trauma.

The Department attempts to inject into RCW 51.08.142 and WAC 296-14-300 an exclusion for cumulative-trauma-caused diseases, when RCW 51.08.142 and WAC 296-14-300 have no such exclusion. Even if there is ambiguity in RCW 51.08.142 and WAC 296-14-300, the Act is to be construed liberally, and the Washington State Supreme Court has directed that any doubt is to be ruled in the injured worker's favor.

2. The Record in This Case Establishes the Cause of Mr. Kimzey's workplace PTSD as TRAUMA.

The Superior Court correctly found that paramedic Kimzey's PTSD

was an occupational *disease* – as it was caused by the cumulative effects of workplace *trauma*. (opposed to an occupational injury or a disease caused by stress). This was consistent with the record. Superior Court Judge Mertel stated:

“ . . . it’s a conclusion of this Court based on this record and the medical testimony, that - now I’m looking at nurse Burgett’s testimony specifically, that this condition, the occupational disease we’ve defined as PTSD, arose, was caused by, **proximately caused by the cumulative affects of trauma** in his very unique work environment . . .” VRP 5-6.

. . . the court would have to find – does find that Mr. Kimzey, over his career in dealing with **traumatic events**, life and death situations that were stressful to him, at some point in the process became symptomatic of a disease, which the Court would find, would hold, **to be in the nature of a trauma.**” VRP 6.

In his employment, Mr. Kimzey was exposed to the trauma of dead children, nursing home fatalities, child anaphylaxis, life support calls, sick and cardiac patients, calls that necessitated airlifting patients. CP 104:12-24; 121:22-23; 107:23-25; 109:14-26; 110:1-4; 110: 8-12; CABR Depositions Burgett 12-13; 23:3-10; 23:18-24. Mr. Kimzey has even had to cut a throat, which turned out unsuccessful. CABR Testimony Kimzey 109.

Paramedic Kimzey’s work experiences were not the “workplace stress” contemplated by the examples given by the legislature in WAC 296-

14-300 (i.e. change of employment duties, conflict with a supervisor, ... personnel decisions etc. . .) Rather, paramedic Kimzey was repeatedly exposed to life-and-death emergency situations of a traumatic nature and emergency responses involving child-anaphylaxis where the concern is the child's airway closing up, and responses where child-intubation occurs (not always successfully). *See Statement of Case, above.*

The Department cites appellate cases, such as *Rothwell v. Nine Mile Falls Sch. Dist.*, but the overriding fact in Mr. Kimzey's case, supported by the record before the Superior Court, is that *his* PTSD was caused by workplace *trauma* – not stress. Mental health expert Burgett's testimony clearly gave the Court overwhelming evidence that *trauma* caused Mr. Kimzey's disease. The Superior Court relies exclusively on the certified board record. *Cantu v. Dep't of Labor & Indus.*, 168 Wash. App. 14, 20, 277 P.3d 685, 689 (2012). The Department failed to call its own medical experts to opine that "stress" caused his PTSD rather than accumulation of workplace trauma. The Department failed to call its own medical experts to rebut expert Burgett's explanation of PTSD, where she clearly explained that PTSD is caused by trauma (not stress) and where she did not even include "stress" when she listed the symptoms.

Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from**

specific trauma in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. And **the cluster of symptoms includes avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflex, inability to face situations similar to the trauma.**
CABR Depositions Burgett 26:10-18.

The Superior Court found that Mr. Kimzey's PTSD arose naturally and proximately from the cumulative effects of workplace *trauma*. CP 238. RCW 51.08.142 and WAC 296-14-300 do not exclude mental conditions or disabilities caused by accumulation of workplace trauma— and in this case paramedic Kimzey's disease was caused by the accumulation of workplace trauma.

The record showed the objective and highly compelling affects to paramedic Kimzey from his traumatic workplace conditions. For example, paramedic Kimzey testified:

Q: Did you ever consider suicide?

A: Yes

Q: Tell us about how far you went in that direction?

A: I loaded my gun. I put two bullets in in case I chickened out on the first round. When I discharged my weapon it shook me out of my grief enough to discharge my remaining round and give my guns to a friend. 116.

Another example of objective results of trauma were the horrible nightmares he would have. He testified that "It would be, I would be having a repeat of

a dead kid call in town. . .” CABR Testimony Kimzey 114:25-26; 115:1-2.

Dr. Koch’s chart note documented paramedic Kimzey’s suffering from intrusive graphic visual images, and he testified:

Q: One of the things that you put in your July 5th, 2012 chart note is on the second paragraph, under “Subjective” findings there at the beginning of that chart, you state, “He suffers from many intrusive graphic visual images that have registered over his lengthy career. What are we talking about here Dr.Koch?”

A: My interpretation was about work-related scenes he had witnessed, whether they be traumatic scenes, or deaths, or bad situations in general. CABR Depositions Koch 9:9-18.

Another example was the gastrointestinal conditions associated with his work-related PTSD. Specifically, he had projectile vomiting, nausea, diarrhea, and terrible illness. He lost more than 15 pounds.

Mental health expert Burgett was the director of nursing at Crestwood Manor from December, 1988 until March, 1994, which was a long-term psychiatric facility in California. CABR Depositions Burgett 6: 14-20. Expert Burgett was also the patient care supervisor at Harrison Medical Center from August 1996 through December 1998, a short-term psychiatric treatment facility. CABR Depositions Burgett 7: 11-14. Expert Burgett was a psychiatric nurse practitioner at the Washington Correction Center for Women from December 1998 to June, 2004. CABR Depositions Burgett 8. At the time of her perpetuation deposition for this case, Expert Burgett was

a psychiatric mental health nurse practitioner at Abraxas Counseling, which began December, 2008. CABR Depositions Burgett 9: 5-9. Expert Burgett was also paramedic Kimzey's treating psychiatric mental health nurse practitioner. CABR Depositions Burgett 9: 21-24.

The Department did not present any testimony in its case-in-chief to rebut mental health expert Burgett's testimony that paramedic Kimzey's PTSD was caused by trauma. To that end, expert Burgett, testified:

Q: Looking at the first sentence under your Discussions, Recommendations and Treatment Plan, where did you think the post-traumatic stress disorder was coming from?

A: Clearly from the cumulative effects of trauma in his work environment. CABR Depositions Burgett 11:18-22.

Expert Burgett testified that for paramedic Kimzey, the most troubling events involved children. CABR Depositions Burgett 12:2. She then testified:

Q: And Is it unusual for firefighter paramedics to have issues dealing with sick or dying children?

A: It is not unusual. In fact, there has been a body of research that shows that EMTs and paramedics and firefighters dealing with children is one of the more significant traumatic events in their career. CABR Depositions Burgett 12:4-9.

She further testified: "He had some significant gastrointestinal complaints, such as nausea, vomiting, diarrhea, generally precipitating thoughts of going to work or reminders of traumatic events that he had experienced." CABR

Depositions Burgett 12:10-18. Referring to paramedic Kimzey, expert

Burgett testified,

The majority of events which involved any kind of **trauma** or death, dismemberment, would have been a factor in the buildup of his symptoms. . . CABR Depositions Burgett 23:6-8.

She also testified:

Q: You had referenced literature relating to paramedics responding to **traumatic** incidents involving death and dismemberment. In your professional opinion as a psychiatric mental health practitioner, are those types of reposes that Lee Kimzey made a cause of his diagnoses of post-traumatic stress disorder?

A: Yes. CABR Depositions Burgett 23:11-17.

Referring to paramedic Kimzey, Expert Burgett testified:

He has had multiple incidents of **trauma** at work involving death and dismemberment and other emotionally charged events. CABR Depositions Burgett 12:25-13:2.

Even when describing the disorder itself, mental health expert Burgett cited trauma as the cause:

A: Could you just tell me what that is?

Q: Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. . . . CABR Depositions Burgett 26:8-14.

It was undisputed by the Department that Paramedic Kimzey's PTSD was caused by his employment. AB 10; CP 32:21-22; 50:17-18; 50:22-23; 50:18-19.

The Superior Court correctly found that paramedic Kimzey's PTSD was an occupational *disease* caused by *trauma*. (opposed to an occupational injury or a disease caused by stress). This was consistent with the record before the Superior Court.

3. The Court Found, correctly, that Mr. Kimzey's PTSD was an occupational disease – the Court did not find that it was an occupational injury.

The Department claims that “no evidence supports coverage of Kimzey's claim as an industrial *injury*.” [emphasis added]. While Mr. Kimzey disagrees, the Superior Court's ruling was that Mr. Kimzey's PTSD was an occupational *disease*.

RCW 51.08.142 and WAC 296-300-14(2) are not on point. Superior Court Judge Mertel found that paramedic Kimzey's PTSD arose naturally out of and was caused by *the cumulative effects of traumatic incidents* during his job as a paramedic during his career. CP 238. Even the Department argues that paramedic Kimzey's PTSD was caused by *an accumulation* of workplace events *opposed to a single event*. Mental Health expert Burgett testified that she thought the PTSD was *clearly coming from the cumulative effects of*

trauma in his work environment and she also testified that paramedic Kimzey has “had *multiple incidents of trauma at work* involving death and dismemberment and other emotionally charged events.” CABR Depositions Burgett 11:18-22; 12:25-13:2.

Any attempt by the Department to rely on WAC 296-14-300(2) is misguided because WAC 296-14-300(2) is not on point. WAC 296-14-300(2) refers to *stress* resulting from *a single traumatic event*. Mr. Kimzey’s mental health expert opined, and the Superior Court found, that Mr. Kimzey’s PTSD was caused by the *cumulative effects of workplace trauma*.

The logic is simple: If Mr. Kimzey does not experience his workplace trauma, then he does not get PTSD. It is not “stress” that caused his disease, but trauma that caused his disease. Even if stress was a symptom, it would be a symptom *of the disease*, but the disease itself is the result of workplace trauma. Regardless, when defining PTSD, expert Burgett outlined the cluster of symptoms included in PTSD, and stress was not even listed:

Post-traumatic stress disorder is a cluster of symptoms defined by the DSM-IV which **generally results from specific trauma** in where there is a potential for harm to the person or the person is involved in the harm or the death or dismemberment of other people. And **the cluster of symptoms includes avoidance, severe anxiety, reexperiencing of the trauma, nightmares, easy startle reflex, inability to face situations similar to the trauma.** CABR Depositions Burgett 26:10-18.

4. Causes of occupational mental conditions or disabilities other than stress are not only relevant but dispositive in favor of the injured worker.

The Department, under the auspices of RCW 51.08.142 and WAC 286-14-300, argue the exclusion of traumatically-caused mental diseases if traumas are also stressful. This is a contortion of the law and inconsistent with policy and guiding principals in construing the Industrial Insurance Act liberally with all doubts in favor of the injured worker.

The Department argues that “it is irrelevant that stress events that caused Kimzey’s PTSD were traumatic because RCW 51.08.142 and WAC 296-14-300 bar any stress-related mental health condition caused by a serious of events.” AB 24. This is wordsmithing, but not an accurate recitation of the law. The Department fails to accept what the Court found, and what the record supported – that paramedic Kimzey’s PTSD was caused by the cumulative effects of workplace **trauma**. CP 238 ; see also the mental-health expert testimony supra.

By arguing that RCW 51.08.142 and WAC 296-14-300 apply to this case, the Department advances an interpretation that not only runs contrary to the public policy for construing the act with all doubts in favor of the injured worker, but it also runs contrary to the long-standing canon of statutory construction that,

Whenever possible, we must read statutes in harmony and give each effect.” *State v. Flowers*, 154 Wash. App. 462, 466, 225 P.3d 476 (2010).

It is well settled law that:

There may be one or more proximate causes of a condition. For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. The law does not require that the work conditions be the sole proximate cause of such condition. *WPI 155.06.01 - Proximate Cause - Rejected Claim.*

RCW 51.08.142 and WAC 296-14-300 do not have an exclusion for a mental condition or disability caused by the accumulation of workplace trauma. Interpreting RCW 51.08.142 and WAC 296-14-300 to exclude mental conditions caused by the accumulation of workplace trauma simply because stress may also exist in a traumatic event is inconsistent – rather than harmonious – with WPI 155.06.01.

Courts cannot add words or clauses to unambiguous statutes when the legislature has chosen not to include that language. *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318 (2003). Moreover, the Washington Supreme Court avoids readings that produce absurd results. “. . . in construing a statute, ‘a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.’” *Id.*

The Department did not put on any witnesses to rebut mental health

expert Burgett's opinion that paramedic Kimzey's PTSD was caused by the cumulative effects of workplace trauma.

“When deciding an appeal from a decision of the Board of Industrial Insurance Appeals, the superior court conducts a *de novo* review of the board's decision but **relies exclusively on the certified board record**”. *Cantu v. Dep't of Labor & Indus.*, 168 Wash. App. 14, 20, 277 P.3d 685, 689 (2012). [emphasis added]. What the Department must acknowledge, but fails to acknowledge, is the content of the record before the Superior Court. The Superior Court heard the un-rebutted testimony in paramedic Kimzey's case-in-chief, which unequivocally established the cause of his PTSD as the cumulative effects of workplace trauma.

The Department does not challenge that paramedic Kimzey's condition was occupational (arises naturally and proximately out of employment). CP 32:21-22; AB 10 - See also CP 50:17-18 “He developed post-traumatic stress disorder and depression due to his work as a paramedic. . .” and CP 50:22-23 “The Department does not dispute that Mr. Kimzey has the conditions alleged or that these conditions were caused by his work as a paramedic. . .” and CP 50:18-19 “Both of Mr. Kimzey's medical witnesses agreed that his conditions were caused by the cumulative effects of trauma in his work environment . . .”

The hearing in the superior court shall be de novo. *Gorre v. City of Tacoma*, 180 Wash. App. 729, 754, 324 P.3d 716 (2014), as amended on reconsideration in part (July 8, 2014), as amended (July 15, 2014). Having heard Mr. Kimzey's evidence, and with no evidence presented by the Department, the Court was correct in finding Mr. Kimzey's PTSD to be an occupational disease because the record showed that Mr. Kimzey's workplace PTSD was caused by caused by the accumulative effects of workplace trauma.

There is no exclusion in the Act for mental diseases caused by accumulation of workplace trauma. RCW 51.08.142 and WAC 296-300-14 are clear on their face, that is, they have no exclusion for cumulative-trauma-caused mental disorders. Even if they were ambiguous, all doubts in construing the Act must be in favor of the injured worker.

The 1971 Legislature also codified a principle already long recognized by our courts: "This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. In other words, **where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:**

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be **liberally construed** in order to achieve its

purpose of providing compensation to all covered employees injured in their employment, **with doubts resolved in favor of the worker.**

Cockle v. Dep't of Labor & Indus., 142 Wash. 2d 801, 811, 16 P.3d 583, 587-88 (2001) citing *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987) (citing cases both predating and postdating the 1971 codification of this principle); see also *Double D Hop Ranch v. Sanchez*, 133 Wash.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997). [emphasis added].

B. Attorney's Fees

1. The reasonableness of the Court's fee award is clear from the record.

The Superior Court was provided with comprehensive materials on which to analyze and give a ruling on Mr. Kimzey's attorney's fees and costs, and the Court's ruling clearly showed how much time he awarded, what rate he awarded per attorney, and the total amount of fees awarded – and all of this is in the record on appeal to this Court.

Paramedic Kimzey's counsel submitted a comprehensive Declaration of Ron Meyers to support and explain the attorney's fees and costs sought for recovery in this case. CP 128-149. The supporting documents included the Declaration of Paul L. Stritmatter (CP 132-133), the Declaration of Washington State Counsel of Fire Fighters' President Kelly Fox (CP 135-137), the Declaration of Pat McElligot - former President of the Tacoma Professional Fire Fighter's Union and current member of the Washington

State Council of Fire Fighters Standing Pension Committee (CP 139-141), and a Seven (7) page spreadsheet entitled "Timesheet re Charles "Lee" Kimzey (CP 143-149). The seven page time sheet was broken-down into columns for the date of work, the type of work performed, the attorney time, the staff time, attorney's fees, and the staff's fees.

CP 143- 149.

Paramedic Kimzey's counsel also submitted a proposed Order Granting Plaintiff's Motion for Attorney's Fees and Costs, which detailed the hourly rates and the total hours sought for co-counsel and staff as well as the costs sought. CP 123-124.

The Department filed a twelve page response brief. CP 150. Paramedic Kimzey's counsel filed a five page reply brief. CP 228. The Court then made its ruling, and stated in writing as follows:

3. Attorney's Fees. Mr. Meyers **billing records reflect 84.30 hours**. The Court **finds** and allows 66 hours and further **finds a \$400.00** per hour rate reasonable for Mr. Meyers based on his experience and expertise in the field of Workman's compensation litigation. Total: 426,400.00.

Mr. Friedman appeared before trial court. **Billing records show 34.4 hours and** the court has allowed 34 hours and an hourly rate of \$300. Total: \$10,200.

See Appendix 1 attached hereto - to be supplemented to Clerks Papers - Letter from Judge Mertel dated June 11, 2014 re: Post-Trial Motion of Award

of Costs and Fees

A Judgment Summary, Finding of Fact and Conclusions of Law and Order on Judgment was then entered, which based on the Court's written finding above, stated after the Findings and Conclusions that,

It is further ordered that Plaintiff have judgement against the Department of Labor & Industries pursuant to RCW 51.32.130 for attorney's fees in the amount of \$36,000.00. CP 239.

The Court's Judgment Summary, Finding of Fact and Conclusions of Law and Order on Judgment, where it pertained to attorneys' fees, was a reflection of the fee materials provided to the Court by Kimzey's counsel, along with the Court's written finding and ruling on the fees, whereby it found that 66 hours for Ron Meyers (less than what was sought) and 34 hours for Tim Friedman (less than what was sought), with an hourly rate of \$400 and \$300 respectively. The Department was in possession of all of this information, and it is in the record on appeal.

2. RCW 51.52.130. Attorney and witness fees

(1) If, on appeal to the superior or appellate court *from the decision and order of the board*, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, *a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the*

director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary 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, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, 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. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer. [emphasis added].

The purpose of the Industrial Insurance Act is to make certain an employee's relief, and to provide for all recovery regardless of fault or due care on the part of either the employee or employer. *Monloya v. Greenway Aluminium Co., Inc.* 10 Wash.App 630, 519 P.2d 22 (1974). The longstanding public policy mandating "sure and certain relief for workers" set forth in RCW 51.04.010 favors the injured worker. *See e.g., Flanigan v. Department of Labor and Industries*, 123 Wash.2d 418, 869 P.2d 14 (1994).

"All doubts as to the meaning of the Act are to be resolved in favor

of the injured worker.” *Taylor v. Nalley's Fine Foods*, 119 Wash. App. 919, 923, 83 P.3d 1018 (2004). The guiding principal in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the injured worker.” *Dennis v. Dep't of Labor and Indus.*, 109 Wn.2d 467, 470 (1987).

“The very purpose of allowing an attorney’s fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the *incurring of legal expense or the diminution of his award . . .*” [bold italic emphasis added] *Harbor Plywood Corp. v. Dept. of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Dept. of Labor & Indus.*, 26 Wn.2d 51, 57, 173 P.2d 164 (1946)).

The Department cites various case law, but this issue should be scrutinized under the application of the principals and policies outlined above.

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V. CONCLUSION

Based on the foregoing, and the record before this Court, paramedic Kimzey respectfully requests that this Court affirm the Superior Court's rulings and uphold the Court's Findings, Conclusions and Judgment.

DATED: January 21, 2015.

RON MEYERS & ASSOCIATES PLLC

By: 

Ron Meyers, WSBA No. 13169
Matthew Johnson, WSBA No. 27976
Tim Friedman, WSBA No. 37983
Attorneys for Respondent

APPENDIX #1

APPENDIX #1

Superior Court of the State of Washington
for the County of King

The Honorable Charles Mertel (retired)

King County Courthouse
Seattle, Washington 98104

June 11, 2014

Dear Counsel:

Re: Kimzey v. Department of Labor & Industries (13-2-32765-1 SEA)
Post-Trial Motion of Award of Cost and Fees

The Court having reviewed the motions, briefs, affidavits, and time slips of counsel for Mr. Kimzey makes the following award.

1. Costs. None having been documented, none will be awarded except for statutory costs allowed, if any.
2. Staff Fees. None will be awarded.
3. Attorney Fees. Mr. Meyers billing records reflect 84.30 hours. The court finds and allows 66 hours and further finds a \$400 per hour rate reasonable for Mr. Meyers based on his experience and expertise in the field of Workman's compensation litigation. Total: \$26,400.

Mr. Friedman appeared before the trial court. Billing records show 34.4 hours and the court has allowed 34 hours and an hourly rate of \$300. Total: \$10,200.

4. Multiplier Allowed. None.

Finally, the award of attorney fees, per statute, are due payable when the accident/medical expenses fund is affected. The court now asks Ms. What and Mr. Friedman to meet and confer in drafting a final Judgment, Findings and Conclusions of Law consistent with the above.

Respectfully,



Honorable Charles Mertel