IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RODOLFO M. APOSTOL, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 39370-1-II ORDER CORRECTING CAPTION

The unpublished opinion for this appeal was filed on December 8, 2009. Due to an inadvertent error, the incorrect respondent was named in the filed opinion. The correct respondent is Department of Labor & Industries. It is hereby

ORDERED that respondent Board of Industrial Insurance Appeals is removed from the caption of the filed opinion and Department of Labor and Industries is inserted as respondent.

IT IS SO ORDERED.

DATED this _____ day of _____, 2010.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RODOLFO M. APOSTOL, Appellant, v. BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondent.	No. 39370-1-II UNPUBLISHED OPINION

Armstrong, J. – Rodolfo Apostol appeals the superior court's decision rejecting his claim for workers' compensation benefits because he neither sustained an industrial injury nor suffered from an occupational disease. We affirm.

Facts

Apostol began working as a maintenance technician for Ronald Wastewater District in 1994. On September 21, 2005, at 4:25 pm, his immediate supervisor called him into the general manager's office. Apostol requested the presence of a union representative, but management denied his request because the meeting was not an investigation. Rather, the general manager presented Apostol with a letter instructing him to improve his work performance. Apostol denied the allegations and refused to sign for receipt of the letter.

Apostol decided to leave but was instructed to stay and complete the meeting. When he insisted on leaving, he was told the meeting would continue the next morning. Apostol went to his car, left a message for his union representative, called his attorney, and then "broke down." Administrative Record (AR) at 10. He did not return to work and eventually was fired.

Apostol then filed a claim for workers' compensation benefits based on his psychological condition. The Department of Labor and Industries rejected Apostol's claim because there was no proof of a specific injury at a definite time and place in the course of employment and because his condition was not the result of an occupational disease. Apostol appealed to the Board of Industrial Insurance Appeals, stating in his notice of appeal that he could not tolerate the trauma received "at my workplace environment from co-workers['] abuse, assau[l]ts, and being shot at." AR at 9, 17-19.

Apostol appeared pro se at the Board hearings, and the industrial appeals judge devoted considerable time to ensuring that he understood the proceedings and the issues that needed resolution.[1] Apostol presented his own testimony and the testimony of a former coworker and manager. He also presented the testimony of a psychologist, David M. Dixon, who evaluated Apostol after the industrial appeals judge continued the hearing so that Apostol could secure the medical evidence required to support his claim.

Apostol alleged that for several years before he left the District in the fall of 2005, his coworkers continuously harassed him and management did not interfere. He also alleged that management took unwarranted disciplinary actions against him during that time. Apostol described the September 21 meeting at the hearing and to Dixon, but did not report any yelling, shouting, physical contact, or threatening behavior. Apostol characterized the September 21 meeting as a single, traumatic event that caused his mental health condition, yet he also maintained that his mental disability was the result of long-term and repeated abuse, hostility, and retaliation.

[1] Apostol has represented himself at every stage of this case.

Dixon concluded that Apostol has suffered from an anxiety disorder for some time and that his distinctive personality contributed to his response to his work environment. Dixon agreed with the industrial appeals judge that Apostol suffers from a pre-existing symptomatic condition; "the affective disorder with the depressive and anxiety features." AR (Feb. 20, 2007) at 15, 32. Dixon opined that the September 21 meeting was the culmination of a series of events that Apostol considered traumatic. The meeting exacerbated his underlying anxiety disorder, which then became more flagrant, more pronounced, and more disabling.

The industrial appeals judge issued a proposed decision explaining that to prevail on appeal, Apostol was required to demonstrate that a single traumatic event occurred on September 21, 2005, resulting in his mental health condition. The judge found it clear that Apostol suffers from several mental health conditions but noted that his only expert witness had opined that they resulted from a series of events that Apostol considered traumatic.

> By itself, the meeting of September 21, 2005, was nothing more than a permitted disciplinary action by Mr. Apostol's management; the conversation was verbal, nonviolent, and not vulgar or abusive; and when Mr. Apostol insisted he needed to leave, he was permitted to do so with the understanding the meeting would continue the next morning.

AR at 12. The judge entered the following key findings:

> 2. The September 21, 2005 meeting . . . was a verbal exchange that was not violent, vulgar, abusive, or constituted a physical threat to Mr. Apostol's safety or well-being. This meeting was held to present Mr. Apostol with a letter requesting improvement in his work performance and management's desire for Mr. Apostol to improve his work performance.
>
> 3. On September 21, 2005, Rodolfo M. Apostol did not experience a sudden and tangible happening of a traumatic nature, which produced an immediate result in the course of his employment with Ronald Wastewater District. Mr. Apostol's stress-related mental health condition is not the result of the alleged September 21, 2005 meeting.

> 4. Rodolfo M. Apostol's mental health condition diagnosed after September 21, 2005, was a culmination of a series of events that Mr. Apostol considered traumatic, exacerbating an underlying anxiety disorder, which then became more flagrant, more pronounced, and more disabling to Mr. Apostol.

AR at 13. The judge concluded that Apostol did not sustain an industrial injury on September 21, 2005, and that his claim for a stress-related mental condition from a culmination of a series of events was not an occupational disease. The judge recommending affirming the Department's dismissal of Apostol's claim.

In his petition for review, Apostol argued that he had provided sufficient evidence to support his claim and that the industrial appeals judge had erred:

> The ploy used by my employer for over eleven and a half years of employment consisted of constant threats of false write-ups and false accusations, verbal and physical abuse, demotions, denied opportunity for advancement, and threats of my firing. . . . The physical and mental injuries I suffered during my course of employment culminated on September 21, 2005 which [sic] my employer made false accusations and threats which were precursors of me being fired.

AR at 3-4. The three-member Board denied his petition and adopted the proposed decision and order as its final decision and order. Apostol then appealed to the Thurston County Superior Court. Following a bench trial, the superior court affirmed the Board's decision and adopted its findings and conclusions. Apostol petitioned for direct review to the Washington Supreme Court, which transferred his case here.

ANALYSIS

I. Recovery for Industrial Injury and Occupational Disease

A. Standard of Review

The decision of the Board of Industrial Insurance Appeals is prima facie correct, and a party attacking that decision must support its challenge by a preponderance of the evidence.

RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). On review, the superior court may substitute its own findings and decision for the Board's only if it finds, from a preponderance of the evidence, that the Board's findings and decision are incorrect. *Ruse*, 138 Wn.2d at 5. Appellate review is limited to examining 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. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986). Where there is disputed evidence, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. *Garrett Freightlines, Inc.*, 45 Wn. App. at 340.

The superior court adopted the Board's findings of fact. Apostol appears to challenge findings 3 and 4 in his opening brief to this court. We will examine the record to determine whether substantial evidence supports these findings and whether they, in turn, support the conclusions that Apostol did not sustain an industrial injury or occupational disease for which he can recover workers' compensation benefits under the Industrial Insurance Act, chapter 51 RCW.

B. Industrial Injury and the September 21 Meeting

An industrial injury is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. Finding of fact 3 alludes to this definition in stating that Apostol

did not experience a sudden and tangible happening of a traumatic nature on September 21, which produced an immediate result in the course of his employment, and in adding that Apostol's stress-related mental health condition was not the result of the September meeting. Finding of fact 4 adds that Apostol's mental health condition after September 21 was the result of a series of events that he considered traumatic.

Apostol does not challenge an earlier finding stating that the September 21 meeting was not violent, vulgar, abusive, or physically threatening to Apostol's safety or well-being, and that it was held only to present a letter requesting improvement in his work performance. Apostol testified that the meeting left him in a state of emotional trauma, but he admitted that he was on antidepressants beforehand. He also described a series of traumatic events that occurred at work before the September 21 meeting that caused his mental health to deteriorate. Dixon stated that the experiences over the last two to five years had caused Apostol's preexisting depression and generalized anxiety to develop into post-traumatic stress disorder. He testified that the September 21 meeting was the culmination of a series of events that Apostol experienced as traumatic and that the meeting made his anxiety disorder more flagrant, more pronounced, and more disabling.

Despite this testimony, Apostol insists that the September 21 meeting constituted a traumatic event sufficient to cause industrial injury, and he cites as support *Boeing Co. v. Key*, 101 Wn. App. 629, 5 P.3d 16 (2000). In *Boeing*, the court approved a jury instruction stating that:

> A worker may not receive benefits for a mental disability caused by stress resulting from relationships with supervisors, co-workers, or the public, unless she has a mental disability caused by stress which is the result of exposure to a sudden and tangible happening of a traumatic nature producing an immediate and prompt result.

Boeing Co., 101 Wn. App. at 632. The evidence showed that stress between Key and a coworker had been building up for some time before Key became distraught after a meeting in which she allegedly received death threats from the coworker. *Boeing Co.*, 101 Wn. App. at 634. Key sought workers' compensation benefits for the post-traumatic stress disorder caused by her employment, but the jury rejected her claim. *Boeing Co.*, 101 Wn. App. at 631-32. Division One affirmed, reasoning that the jury could have found that Key's claim did not meet the definition of an industrial injury because her emotional distress resulted from a result of events that unfolded gradually over a period of time, rather than from a sudden, tangible, traumatic incident that produced an immediate result. *Boeing Co.*, 101 Wn. App. at 634.

Here, the superior court found that Apostol's claim did not meet the definition of an industrial injury because his emotional distress was the result of events that unfolded over a period of time. Substantial evidence supports the superior court's finding that the September 21 meeting did not constitute a sudden and tangible happening of a traumatic nature, and this finding supports the conclusion that Apostol did not sustain an industrial injury.

C. Occupational Disease

The findings of fact cited above also led the superior court to conclude that Apostol did not suffer from an occupational disease for which he may recover workers' compensation benefits. The Industrial Insurance Act defines "occupational disease" as "such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140. In 1988, the legislature directed the Department to adopt a rule stating that claims based on mental conditions or mental disabilities caused by stress

do not fall within the statutory definition of occupational disease. RCW 51.08.142. The resulting rule, WAC 296-14-300, provides:

> (1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140.
>
> Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from:
>
> (a) Change of employment duties;
>
> (b) Conflicts with a supervisor;
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> (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;
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> (d) Relationships with supervisors, coworkers, or the public;
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> (e) Specific or general job dissatisfaction;
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> (f) Work load pressures;
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> (g) Subjective perceptions of employment conditions or environment;
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> (h) Loss of job or demotion for whatever reason;
>
> (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;
>
> (j) Objective or subjective stresses of employment;
>
> (k) Personnel decisions;
>
> (l) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers.
>
> (2) Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.

Although there are no stress-related exclusions for industrial injury claims, RCW 51.08.142 and WAC 296-14-300 proscribe claims for occupational disease based on stress-caused mental conditions or mental disabilities. *Boeing*, 101 Wn. App. at 632. The rule expressly excludes relationships with supervisors and coworkers as well as actual or perceived threats of disciplinary action as grounds for a stress-related occupational disease claim. WAC 296-14-300(1)(c),(d); *Boeing*, 101 Wn. App. at 632.

As the industrial appeals judge observed, most if not all of Apostol's complaints about his

working environment fall within the examples in WAC 296-14-300. The superior court agreed, noting that Apostol's claim of occupational disease might have succeeded before the rule's adoption in 1988. Under current law, however, Apostol's claim could not succeed as either an occupational disease or an industrial injury because it was based on long-term employment stress. The court explained to Apostol the narrow exception currently allowed for stress-related injury:

> We're going to leave a small room where if there's a single traumatic event that kicks off something like post-traumatic stress syndrome, we'll look at that. An example might be say you're an ironworker and you're working on the job and somebody drops a big steel girder right at your feet, and that causes you from that point on to have post-traumatic stress disorder and you can no longer [work] the steel work because of what they did to you. That might qualify you for an industrial injury of post-traumatic stress syndrome. But that's different than the occupational disease. . . . [T]he legislature has said we're not going to compensate for work-related stress conditions any more since 1988. And that's where you're caught.

Report of Proceedings (Jan. 25, 2008) at 36.

The superior court's findings support its conclusion that Apostol did not suffer from an occupational disease sufficient to support a claim for workers' compensation benefits.

D. Other Claims

Apostol raises several claims related to the two issues already discussed. He first contends that the industrial appeals judge erred in failing to give a jury instruction on the "lighting up" theory. *See McDonagh v. Dep't of Labor & Indus.*, 68 Wn. App. 749, 751 n.1, 845 P.2d 1030 (1993) (where a pre-existing dormant or latent condition is activated or "lighted-up" by an industrial injury or occupational disease, the worker is entitled to benefits for the disability resulting therefrom). This claim fails for several reasons. First, there was no jury to instruct during the hearing before the industrial appeals judge. Apostol could have requested a jury trial in

the superior court, but he did not. RCW 51.52.115. Second, Apostol did not mention this theory in his petition for review to the Board, so he cannot raise it now. *See Garrett*, 45 Wn. App. at 346 (employee waived claim that injury was occupational disease by failing to raise issue in appeal to Board); RCW 51.52.070. Finally, even if this claim of error were preserved, it would not succeed. Apostol's pre-existing condition was symptomatic rather than dormant, and he did not suffer any industrial injury or occupational disease.

Apostol's related argument that the industrial appeals judge did not assist him in presenting his claim is inaccurate and misplaced. The judge held several discussions with Apostol about the law and how he needed to present his case. Moreover, pro se litigants are held to the same standard as attorneys in putting on their cases. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Apostol also argues that refusing him workers' compensation benefits would be unconstitutional and that RCW 49.60.030, which prohibits employment discrimination, supports his case. Apostol fails to provide either reasoned argument or citation of authority for these arguments, and we do not consider them further. *See* RAP 10.3(a)(6). Apostol also asserts that he is seeking a remedy for the emotional distress suffered during the proceedings related to his claim, apart from the distress he suffered during his employment. The Industrial Insurance Act provides the exclusive remedy for workers injured in the course of employment and does not authorize the tort recovery Apostol seeks. *Rushing v. ALCOA, Inc.*, 125 Wn. App. 837, 841, 105 P.3d 996 (2005); RCW 51.04.010. Finally, Apostol asserts in his reply brief that his real complaint is with the Department's inadequate investigation of his claim. We do not consider a

claim of error raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.