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BEFORE THE UTAH COURT OF APPEALS

EASTERN UTAH BROADCASTING and WORKERS COMPENSATION FUND, Petitioners,	* * * * *	Appellate No. 2006370-CA
v	* *	
LABOR COMMISSION of UTAH and NANCY M. WOOD, Respondents.	* * * *	

REPLY BRIEF OF PETITIONERS

Petition for Review from the Order of the Appeals Board of the Labor Commission of Utah

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	*	
	*	
Petitioners,	*	
	*	Appellate No. 2006370-CA
v	*	
	*	Utah Labor Commission No.: 2001208
LABOR COMMISSION of UTAH and NANCY M. WOOD,	*	
	*	
	*	
Respondents	*	

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ARGUMENT

I.

A "CORRECTION-OF-ERROR" STANDARD OF REVIEW, NOT A "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW, IS APPROPRIATE IN REVIEWING THE LABOR COMMISSION'S INTERPRETATION OF "PREDOMINANTLY"

Respondent Nancy M. Wood (hereinafter "Wood") argues that Petitioners (hereinafter, collectively, "WCF") are subject to a "substantial evidence" standard of review as to the finding of the Labor Commission that Wood's mental stress was "predominant." Therefore, Wood contends, WCF must martial the evidence in support of that finding. In order for the Labor Commission to make a finding that Wood's mental stress was "predominant", however, it was required to interpret what "predominantly" means under Section 34A-3-106(2). Indeed, in this very case, this court has previously determined that before it could analyze whether the Labor Commission properly found that Wood's mental stress was not "extraordinary", it had to first determine whether the Labor Commission properly interpreted "extraordinary" within the meaning of Section 34A-3-106(2). *Wood v. Labor Commission*, (hereinafter "*Wood I*"), 2005 UT App 490, ¶¶ 5-6, 128 P.3d, 41, 43-44. This court went on to hold that the Labor Commission's interpretation of "extraordinary" within the context of Section 34A-3-106(2) was not discretionary: "The applicable terms of this statute are specific and mandatory, and do not connote any discretion whatsoever. Because the Commission and the Appeals Board are not granted any discretion to interpret or apply the terms of Utah Code section 34A-3-106(1) and (2), we review the Appeal's Board interpretation and application of those sections under the correction-of-error standard." *Id.*, ¶ 7, 128 P.3d at 44. *See also, Morton International, Inc. v. Auditing Division,* 814 P.2d 581, 585-86 (Utah 1991); *Horton v. Utah State*

Retirement Board, 842 P.2d 928, 932 (Utah App 1992), *Luckau v Board of Review*, 840 P.2d 811, 813 (Utah App. 1992) (interpreting Occupational Disease Act).

Both parties to this petition for review have relied upon In re *General Determination of Rights of the Use of Water*, 2004 UT 106, ¶ 18, 110 P.3d 666, 671 for the proposition that when interpreting a statute, the court must first look at the unambiguous and plain language of the statute. WCF has already urged that the plain language of Section 34A-3-106(2) requires that Wood show that the mental stress causing her mental condition arises predominantly from employment when compared to non-employment causes and that, therefore, the mental stress arising from her employment must be a more than fifty percent contributing cause to her mental condition.[1] The Labor Commission concluded, and Wood argues, that "predominant" only refers to the stress that arises from employment.[2] Stated another way, the Labor Commission apparently interprets Section 34A-3-106(2) to mean that the trier of fact determines what stressors arise predominantly and directly from employment only and then determines whether such stressors are extraordinary.[3] The effect of this interpretation is that it is not necessary to compare employment related stressors against non-employment related stressors so long as the employment related stressors are extraordinary. Such an interpretation renders meaningless the word "predominantly" in the statute. Under the Labor Commission's interpretation, so long as a Petitioner's stress is caused "directly" by employment and that stressor is extraordinary, legal causation is shown. Whether the employment related stressors are "predominant" is, thus,

[1] Wood apparently does not dispute that under this interpretation of "predominant", the mental stress must exceed fifty percent

[2] Order on Remand from the Court of Appeals, at 4

[3] Or perhaps, the Labor Commission means that the trier of fact first determine whether any stressors are "extraordinary" and then determine whether those stressors arise from employment Either way, the result of the analysis would be the same

irrelevant. The Utah Supreme Court has consistently held that statutes should be interpreted so as to render all parts relevant and meaningful and interpretations which render some part of the provision nonsensical are not favored. *See, Millett v. Clark Clinic Corporation,* 609 P.2d 934, 936 (Utah 1980); *Curtis v. Harmon Electronics, Inc.*, 575 P.2d 1044, 1046 (Utah 1978).

Even assuming there are two reasonable interpretations of Section 34A-3-106(2), when that is the case, then the statute should be interpreted "in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592, 597. Moreover, the statute should be interpreted with a primary goal of giving effect to the legislature's intent. In re *Kunz* 2004 UT 71, ¶ 8, 99 P.3d 793, 794. A review of Section 34A-3-106(2) in its entirety reveals that it was the legislature's intent to require a comparison between work related stressors and stressors in life in general. Indeed, in *Wood I*, this court specifically determined that such a comparison should be made. *Wood I*, ¶ 9. Thus, the obvious purpose of Section 34A-3-106(2) is to make a comparison between stressors from every day life and stressors from employment. When such comparison is made, not only should the employment related stress be something more extraordinary than encountered in every day life, but the employment related stress must be greater than stress encountered in every day life.

Except for the findings of the medical panel, which were adopted, without objection, by the Administrative Law Judge, nowhere in the Preliminary Determination of Permanent Total Disability and Order dated July 30, 2003, nor the Order on Remand from Utah Court of Appeals dated March 31, 2006 is there any analysis of and comparison between employment related stress[4] and non-employment stress. Thus, it would be impossible for WCF to "martial the evidence" when there is no finding, within a proper interpretation of Section 34A-3-106(2), for

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[4] As stated in its opening brief, WCF does not dispute the Labor Commission's findings that the work related stress was extraordinary

which the evidence must be marshaled.[5] On the other hand, under a proper interpretation of Section 34A-3-106(2), the only finding by the Labor Commission is the Administrative Law Judge's adoption of the medical panel report, which concludes that Wood's employment related stressors, though extraordinary, are equal, and therefore not predominant, in comparison with her non-employment related stressors.[6]

II.

PUBLIC POLICY CONSIDERATIONS DICTATE THE INTERPRETATION OF SECTION 34A-3-106(2) URGED BY WCF

Wood also contends that the case law interpreting statutes from Alaska, California, Maine and Massachusetts is not persuasive here. That argument is based upon Wood's interpretation of "predominant" under Section 34A-3-106(2), which was discussed above. Since the more appropriate interpretation is the one urged by WCF, WCF contends that such statutes and case law interpreting them are helpful to this court. Moreover, even assuming that Section 34A-3-106(2) is ambiguous, and resort to similar provisions and legislative intent is not helpful, then this court should look at public policy considerations in its interpretation of the statute. In re *Kunz*, 2004 UT 71, ¶ 8, 99 P.3d 793, 794 (citing In re *Worthen*, 926 P.2d 853, 866 (Utah 1996)). The aforesaid statutes, and the case law interpreting them as set forth in WCF's opening brief, mightily proclaim that public policy requires that, for psychological injuries, the stressors causing the same should exceed those found in every day life. Indeed, before the adoption of

[5] Interestingly, in *Wood I*, WCF took the position that Wood failed to properly marshal the evidence supporting the Labor Commission's finding that her stress was not extraordinary. Of course, this court determined that marshaling was not necessary because the Labor Commission had failed to properly interpret and/or make findings regarding "extraordinary" under Section 34A-3-106(2) *Wood I*, at ¶ 9

[6] Admittedly, the medical panel's report, by its very nature, addresses medical causation, not legal causation Still, it is the only finding that makes a comparison between employment related stressors and non-employment related stressors

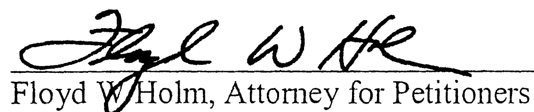
Section 34A-3-106(2), this court reasoned that "[a]n abnormal reaction to normal events, however, is not compensable where the abnormality is created by non-work related incidents". *Stokes v. Board of Review*, 832 P.2d 56, 61 (Utah App. 1992).[7]

If this court were to adopt the construction of Section 34A-3-106(2) urged by Wood, then a worker who has a history of mental illness that is primarily caused by non-employment related conditions and stressors would be entitled to compensation when an employment related stressor, though extraordinary, results in mental injury. Such a result would be inconsistent with the public policy considerations expressed by other jurisdictions and in *Stokes*.

CONCLUSION

Based upon the above discussion, the court should grant the relief requested in the conclusion of its opening brief.[8]

Respectfully submitted this 28th day of September, 2006.



Floyd W. Holm, Attorney for Petitioners

[7] Interestingly, in support of <u>this</u> public policy declaration, this court relied on the reasoning of appellate courts in Idaho, Oregon and New Jersey

[8] Wood argues that if WCF's interpretation of Section 34A-3-106(2) is correct then this court should at least remand the case for appropriate findings based upon that interpretation This contention ignores the ALJ's unambiguous adoption of the medical panel report, which, although it is for purposes of medical causation, <u>does</u> make a comparison of the extent of employment related stressors as against non-employment related stressors

MAILING CERTIFICATE

I hereby certify that on the 28th day of September, 2006, true and correct copies of the attached **Reply Brief of Petitioners** in the Nancy M Wood matter, Appellate Case No 2006370, Labor Commission Case No 2001208, was mailed, postage pre-paid to the following

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