NO. 43621-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EDWARD O. GORRE;

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR & INDUSTRIES FOR THE STATE OF WASHINGTON,

Respondents.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

ROBERT M. MCKENNA
Attorney General

ANASTASIA SANDSTROM
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-7740

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Appendices

I. INTRODUCTION

This is a substantial evidence case arising out of a workers' compensation appeal. When certain statutory requirements are met, firefighters receive a rebuttable evidentiary presumption that the condition he or she has is an occupational disease. It is rebuttable by the preponderance of the evidence. RCW 51.32.185(1).[1] If rebutted, or if the presumption does not apply, the worker has to prove that the distinctive conditions of his or her employment caused the occupational disease. Here the rebuttable presumption does not apply, but even if it did apply, it was rebutted.

Edward Gorre contracted "valley fever," a disease not native to Washington. After considering the testimony of 16 witnesses, the superior court found that Gorre had the infectious disease of valley fever and not the separate disease of eosinophilia lung disease. The superior court correctly concluded that Gorre did not have a condition that was subject to the rebuttable evidentiary presumption in RCW 51.32.185.

The superior court also found that Gorre was exposed to the organism that causes valley fever when he went on a golfing trip in Las Vegas in 2005. The superior court correctly concluded that Gorre did not have an occupational disease under RCW 51.08.140 because he did not

[1] Appendix A contains the full text of RCW 51.32.185.

incur any disease that arose from the distinctive conditions of employment.

Gorre asks this Court to weigh the evidence in order to determine whether the superior court's findings were supported by substantial evidence. Appellant's Opening Brief (AB) 34. But the well-established standards for the substantial evidence review provide that the appellate court shall not reweigh the evidence. That is true regardless of whether this Court determines that the rebuttable presumption created by RCW 51.32.185 is applicable here. When taking the evidence in the light most favorable to the prevailing parties (here, the City of Tacoma and the Department of Labor and Industries), ample medical testimony shows that Gorre had valley fever and did not have the separate disease of eosinophilia lung disease, and the medical testimony shows that he contracted valley fever on his trip to Las Vegas in 2005, not while at work. Thus, substantial evidence supports the determination that the distinctive conditions of employment did not cause an occupational disease; this is true whether the presumption applied or did not.

II. ISSUES

1. Does substantial evidence support the superior court's finding that Gorre contracted the infectious disease of valley fever and not a separate respiratory disease, when three medical experts testified to these facts?

2. Does substantial evidence support the superior court's determination that Gorre did not develop any disabling medical condition that RCW 51.32.185 presumes to be an occupational disease, when medical experts testified that valley fever is an infectious disease, and when RCW 51.32.185(4) contains an exhaustive list of infectious diseases that are subject to a presumption and valley fever is not included in that list?

3. Does substantial evidence support the superior court's determination that Gorre did not incur any disease that arose naturally and proximately from distinctive conditions of his employment with the City of Tacoma Fire Department, when two medical witnesses testified Gorre contracted valley fever while golfing in Las Vegas, not while he was at work?

4. Did the superior court err in denying the City of Tacoma its deposition costs; when RCW 4.84.010 makes such costs awardable to a prevailing party, and when the City prevailed in the superior court matter?[2]

III. STATEMENT OF THE CASE

In April 2007, Gorre applied for industrial insurance benefits. BR Ex. 4.[3] He reported that "doctors found evidence of inhalation exposure upon biopsy of lungs." BR Ex. 4. Evidence later showed that he had coccidioidomycosis (valley fever), a disease not native to Washington.

[2] The City of Tacoma also raises an issue regarding the superior court's failure to strike inadmissible testimony. City of Tacoma's Respondent/Cross-Appellant's Brief 4, 45-49. The Department agrees the trial court erred and relies on the City of Tacoma's briefing in this regard. The City of Tacoma also asserts that substantial evidence does not support the finding that Gorre is a smoker. City of Tacoma's Respondent/Cross-Appellant's Brief 4, 43-45. The Department has no opinion on this issue.

[3] The certified appeal board record is cited as "BR." Witness testimony is referenced by the witness's name.

BR Ayars 100-02; BR Bardana 33; BR Fallah 74.[4] The Department denied his application for benefits. CP 942 (adopting Board's findings); BR 8 (findings of fact). Gorre appealed to the Board. CP 942; BR 8. The Board, and later the superior court, considered whether Gorre had valley fever only, or whether he also had a separate condition, and then considered whether Gorre suffered from any condition that was caused by an occupational exposure in Washington. BR 2-9; CP 942.[5]

Gorre presented the testimony of Dr. Christopher Goss, a doctor specializing in pulmonary and critical care medicine, and Dr. Royce Johnson, a doctor specializing in infectious disease, with a focus on valley fever. BR Goss 5; BR Johnson 9, 11. Both doctors had separate theories on why Gorre had a work related condition. To refute Gorre's theories, the City of Tacoma and the Department presented the testimony of several doctors, including Dr. Garrison Ayars, a doctor specializing in allergies and clinical immunology; Dr. Emil Bardana, a doctor specializing in allergies and immunology; and Dr. Paul Bollyky, a doctor specializing in infectious diseases, who treated Gorre. BR Ayars 88; BR Bardana 12; BR Bollyky 5-6; BR 160.

---

[4] The testimony of the mycologist, Dr. Payam Fallah Moghamdam, is referenced by the name Fallah because that is his preference. BR Fallah 72-73.

[5] Appendix B contains the Board decision. Appendix C contains the superior court decision.

A. Valley Fever Is Found In the Sonoran Desert And Other Endemic Areas And Is Not Found In Washington

Coccidioidomycosis is caused by an infectious organism, coccidioides immitis and posadasii. BR Ayars 92, 153. It lives in the soil, producing spores that become airborne and can be breathed into lungs and cause disease in humans. BR Ayars 92. Valley fever is considered an infectious disease, and it is treated as such. BR Ayars 100; BR Bardana 11; *see* BR Ayars 93; BR Johnson 16-18, 11, 20; BR Goss 50-51; BR Bollyky 8. It can cause respiratory symptoms. BR Ayars 100.

The organism causing valley fever lives in a desert climate with sterile soil. BR Ayars 92; BR Fallah 74. It cannot withstand fire. BR Fallah 76. It is endemic to the Sonoran Desert, California (as far north as Red Bluff, which is about 120-150 miles north of Sacramento), Southern Nevada, Arizona, New Mexico, Texas, Southwest Utah, Mexico, and South America. BR Ayars 93, 136; *see also* BR Bardana 10; BR Fallah 79; BR Johnson 22.

The organism causing valley fever does not live in Washington, according to Dr. Fallah, the mycologist. BR Fallah 74. (Mycologists study the organism that causes valley fever. BR Fallah 73.) There has never been a confirmed case of a person acquiring valley fever from soil in Washington. BR Ayars 100, 99 (discussing Department of Health

records); BR Goldoft 87 (Department of Health witness). There are case reports of people who came down with coccidioidomycosis outside the endemic region, but none acquired it in Western Washington. BR Bollyky 13.

B. Valley Fever Generally Has An Onset Of A Few Weeks But Can Have A Delayed Onset Of Up To Several Years

Valley fever manifests itself differently in different people. Approximately 60 percent of the people who are infected with the organism have only minimal or no symptoms. *See* BR Ayars 92; BR Bollyky 10. Of the 40 percent of the infected people who do develop significant symptoms, they generally begin by developing pulmonary symptoms, which may include coughs, fever, and malaise. BR Ayars 92. This generally is self-limiting and resolves spontaneously. BR Ayars 92; *see also* BR Goss 52. That type of syndrome generally occurs within one or two weeks of exposure. BR Ayars 92.

Dr. Johnson and Dr. Ayars disagreed, at least in part, as to the onset of coccidioidomycosis. Dr. Johnson thought the onset was generally two to six weeks, but acknowledged that it was possible that a later onset would occur. BR Johnson 21, 44-45, 48. Dr. Ayars agreed that a typical case would make itself known in a one to three week period after exposure. BR Ayars 137. However, he noted that the medical literature

shows non-typical cases. BR Ayars 137, 138. According to Dr. Ayars, in some cases there have been delayed onsets of symptoms of up to 20 years after the initial exposure to the disease-causing organism. BR Ayars 92; *see also* BR Fallah 82 (onset is anywhere from two to three weeks to 12 years or so). Most people who develop symptoms experience them within first two years of the exposure. BR Ayars 93. Dr. Goss and Dr. Bardana also believed the latency could be delayed. BR Goss 29, 24; BR Bardana 33.[6]

C. Gorre Traveled To California And Las Vegas

Gorre lived in the Sacramento area from 1970 to 1988, and he traveled around California. BR Gorre 172-74. He joined the Army in 1988, returning to Sacramento in 1990, where he stayed until 1993. BR Gorre 173. He moved to Long Beach, California in 1994, and stayed there until he moved to Tacoma in 1997. BR Gorre 173, 176. He presently lives in Lake Forest Park and commutes to Tacoma. BR Gorre 176-77. He reported having been to California in 2004 and 2009 and Mexico in 2008. BR Gorre 181-82.

---

[6] Gorre references testimony that Gorre's ethnicity affects the course of valley fever. AB 17 (citing BR Ayars 110); *see also* BR Bardana 58 ("the literature commonly cites a Filipino background as causing a person to have 175 percent greater propensity to develop disseminated coccidioidomycosis."). Gorre states correctly that his ethnic status does not affect his ability to obtain industrial insurance benefits.

Darrin Rivers is a colleague of Gorre. *See* BR Rivers 10, 35-36. He traveled with Gorre to Las Vegas a couple of times and testified that was in the early 2000s, not later than 2005. BR Rivers 36. During the trips to Las Vegas, they went golfing, walking around, and sight seeing. BR Rivers 51. They golfed outside the city limits about 20 miles away. BR Rivers 54. They also traveled together in California in 2001 and 2002. BR Rivers 36.

D. Gorre Was Not Originally Diagnosed With Valley Fever, But By April 2008, Testing Confirmed He Had It

In December 2005, Gorre had a three or four day episode during which he had an acute febrile (fever) illness demonstrated by a fever, muscle pains, sweats, sore throat, and headache. BR Bardana 21. The symptoms recurred in January and May 2006. BR Bardana 22. In June 2006, Gorre sought medical treatment for these symptoms and he may also have sought treatment for a few respiratory symptoms. BR Bardana 22. His muscle aches continued, as well as joint pain. *See* BR Bardana 22.

In February 2007, he developed hives, sweats, muscle pain, and a temperature. BR Bardana 22. He was treated with steroids for a tapered seven day course. *See* BR Bardana 22. Between February 2007 and March 2007, he continued to have a fever, chills, night sweats, fatigue, and shortness of breath. BR Bardana 22. In March 2007, he presented

with significant illness and various diagnostic tests were performed. *See* BR Bardana 22. A pulmonary function test showed a small airway obstruction, blood testing showed an IgE of over 10,000 count and 40 percent eosinophilia in his blood count, and a CT examination of the chest showed abnormalities. *See* BR Bardana 22. IgE is an antibody that is involved in allergic diseases, and his count was extraordinarily high. BR Bardana 8, 22. Eosinophilia is an abnormality associated with allergic inflammation. BR Bardana 8. Dr. Bardana found the eosinophil count of 40 percent "quite striking." BR Bardana 22-23.

A biopsy of the lung was done in April 2007, and Evergreen Hospital interpreted it as possibly demonstrating hypersensitivity pneumonitis. BR Bardana 23. A pathologist at the University of Washington did not call it hypersensitivity pneumonitis, and he suggested, on the contrary, that it might be a fungal infection. *See* BR Bardana 23. The pathologist had seen a spherule, a circular object that looked like coccidioides immitis. BR Bardana 23. He suggested some special stains. BR Bardana 23. Unfortunately, no one followed up on this clue regarding coccidioidomycosis. BR Bardana 50, 24.[7]

---

[7] Dr. Bollyky explained that tests, serologies, had been sent off for coccidioidomycosis but had returned negative. BR Bollyky 9. A negative result on a test does not necessarily mean that the person did not have coccidioidomycosis. BR Bollyky 9. Regarding the fact that earlier cultures were negative, Dr. Ayars explained that it would be common not to biopsy the correct area. BR Ayars 119.

In May 2007, Gorre started seeing Dr. Goss. BR Goss 38. Despite the pathological evidence to the contrary, Dr. Goss adopted the diagnosis of hypersensitivity pneumonitis. BR Bardana 23; BR Goss 18, 22. Dr. Goss thought Gorre had an eosinophilic lung disease that responded to steroids and labeled it hypersensitive pneumonitis for lack of anything better to call it. BR Goss 22, 53. There were a number of diagnoses that were still being considered, however. BR Bardana 25-26; BR Ayars 105.[8]

After the diagnosis of hypersensitive pneumonitis was made, Gorre was treated with steroids. BR Bardana 23-24. He responded. *See* BR Goss 23. Within two weeks of taking steroids, he developed a rash on his temple. BR Bardana 24. He did not see a physician for almost a year, and then, at a social event in March 2008, a dermatologist noticed his rash and suggested he get it biopsied. BR Bardana 24, 34; BR Goss 23. An April 2008 biopsy showed the presence of coccidioidomycosis. BR Bardana 34, 24. He was then referred to the infectious disease clinic at the University of Washington. BR Bollyky 8; BR Johnson 18. Further tests that were done in July 2008 were also positive for coccidioidomycosis, and Gorre then received anti-fungal treatment. BR Bardana 34. He responded to the treatment. BR Bollyky 12, 23.

---

[8] These were later ruled out. BR Ayars 106.

E. Gorre Thought He Had Inhalation Exposure

Gorre thought he had an inhalational exposure. BR Gorre Ex. 4. He provides no information about a specific event. BR Gorre Ex. 4. Gorre has worked at the Tacoma Fire Department since 1997. BR Gorre 107. He said that in the course of his work he was exposed to smoke, fumes, and toxic substances. *E.g.*, BR Gorre 115. He claimed that he was called to numerous fires from January 2006 through the end of July 2007, including 300 residential fires, 60 commercial fires, 13 grass fires, and 250 other types of fires (vehicle, dumpster, electrical, and hazardous). BR Gorre 159-61.

Although Gorre testified to 623 fire calls, Tacoma Fire Department records document that he was called to 44 fire calls between January 2006 and December 2007. BR Davis 162-63.

F. Dr. Goss's Theory At Hearing Was Disputed By Dr. Ayars, Dr. Bardana, and Dr. Johnson

At the hearing, Dr. Goss gave his theory why Gorre had an occupational disease related to his work as a firefighter. He thought Gorre had two, separate diseases, eosinophilic lung disease and dissemination of coccidioidomycosis. BR Goss 25. Dr. Goss testified that Gorre presented with eosinophilic lung disease and that he was treated with steroids that caused dissemination of coccidioidomycosis, which Dr. Goss thought

Gorre may have acquired as a young man while he lived in California. BR Goss 24. Dr. Goss thought the eosinophilic lung disease was related to multiple occupational exposures, which led to the treatment of steroids, which led to the dissemination of cocci that may have been in his lung at all times. BR Goss 25, 56. He did not know when any occupational exposure had occurred. BR Goss 57. He relied on Gorre's description of his occupational exposure in concluding that such occupational exposure occurred. BR Goss 57-58.

However, Dr. Johnson, who was also Gorre's witness, disagreed with Dr. Goss's proposition that Gorre had dormant cocci that were disseminated by steroids that were given to treat eosinophilia. BR Johnson 33. Rather, Dr. Johnson said it was absolutely clear that the diagnosis was coccidioidomycosis. BR Johnson 20, 28. Dr. Johnson said it was the cocci that caused the pneumonia with eosinophilia to develop. BR Johnson 33. He opined, on a more probable than not basis, that the theory of progression was not true. BR Johnson 33.

Dr. Ayars likewise disagreed with Dr. Goss's theory that Gorre had a respiratory condition treated with steroids, which, in turn, caused his valley fever to disseminate. BR Ayars 101, 104-05. Dr. Ayars testified that Gorre had coccidioidomycosis only, with no separate respiratory disease. BR Ayars 101-02, 104-05, 111, 119-20, 144-45. Dr. Ayars

opined that Gorre had coccidioidomycosis initially and he did not have another disease that resulted in coming out with coccidioidomycosis, it was:

> unequivocal that this gentleman had coccidioidomycosis as his initial, and only disease, and it is a farfetched stretch without clinical data to support that he had another disease that resulted in him getting treated with Prednisone that immunosuppressed him more so he came out with coccidioidomycosis. For him to come out with coccidioidomycosis he already had it. It is clear it was present before.

BR Ayars 104-05.

Dr. Bardana similarly opined that Gorre's only diagnosis is valley fever and "[t]here is no other disease." BR Bardana 18, 68. According to Dr. Bardana, eosinophilia lung disease is not a diagnosis, rather it is a generic term—an umbrella type of classification of a number of disorders, not a specific disease. BR Bardana 9.

Dr. Bardana noted that other tentative diagnoses had been given, including hypersensitivity pneumonitis, but those occurred before learning of the coccidioidomycosis. *See* BR Bardana 26. Gorre became allergic to coccidioides immitis, the organism that caused his valley fever. BR Bardana 33. His allergy developed over about a year (during the time period between June 2006 and February 2007), and the fungus caused an

allergic reaction with the development of high levels of IgE and the development of eosinophilia. BR Bardana 34, 22, 68.[9]

Dr. Bollyky testified that Gorre had coccidioidomycosis. BR Bollyky 12. Dr. Bollyky did not know whether the initial presentation that brought Gorre into see Dr. Goss was due to coccidioidomycosis, but his educated guess was that coccidioidomycosis "had very much to do with that initial presentation." BR Bollyky 12. He said the pathology on the CT reports and other tests was explained in large part by coccidioidomycosis. BR Bollyky 12. He noted Gorre responded to the anti-fungal treatment. BR Bollyky 12, 23-24; BR Bardana 34.

Both Dr. Ayars and Dr. Bardana ruled out occupational inhalational exposure. BR Ayars 106, 111; BR Bardana 67-68. Dr. Ayars said that the last fire Gorre had gone to was several months before he had symptoms. BR Ayars 125. Gorre would have been able to tell Dr. Ayars about specific exposures but he was unable to do so. BR Ayars 125. As to whether Gorre's increased eosinophilia rate came from exposure to smoke, fumes, toxic substances, or dust in the course of working for Tacoma Fire Department in the 16 months before April 2007, Dr. Ayars said it was "incredibly unlikely" with the probability "approaching 0

[9] He thought with the treatment of the steroids, the coccidioidomycosis became disseminated. BR Bardana 34. He did not think steroids Gorre received in February 2007 were for an occupational exposure. BR Bardana 24-25.

percent." BR Ayars 127-28. Even assuming Gorre's testimony about the numbers of times he had been exposed to fires, fumes, and chemicals was correct, Dr. Ayars opined that Gorre's types of exposures "are not causes of eosinophilic pulmonary syndromes, . . . rather coccidioidomycosis is the diagnosis." BR Ayars 131; *see also* BR Ayars 128-29.

Dr. Bardana said that eosinophilic lung disease in firefighters was a non-issue because it is exceedingly rare for exposure to smoke to cause increased eosinophilic counts. *See* BR Bardana 57, 56, 50. Dr. Bardana said any exposure from smoke, chemicals, dust, soot, mold, and other contaminants was irrelevant to Gorre's medical condition. BR Bardana 67-68, 26, 47. Acute exposure at work results in symptoms that are reported to urgent care or other medical providers. BR Bardana 26. This was not done here. *See* BR Bardana 26. Moreover, the exposures would not cause a hypersensitivity reaction to eosinophilia in the blood or lungs. BR Bardana 57.

G. Dr. Johnson's Theory That Gorre Acquired Valley Fever In Washington Was Refuted By Dr. Ayars, Dr. Bardana, And Dr. Bollyky

Dr. Johnson thought the onset of valley fever was generally two to six weeks and that if Gorre had not left Washington in the six weeks before the onset of his symptoms, then he acquired valley fever in Washington. *Id.* at 21-22. Dr. Johnson thought that there was a "spread of

cocci via the importation of some substance from the endemic zone to Washington that he had been exposed to by virtue of his work . . . . " BR Johnson 23, 51-52.

Dr. Ayars, Dr. Bardana, and Dr. Bollyky disagreed that Gorre acquired valley fever in Washington. BR Ayars 121, 139, 149; BR Bardana 35; BR Bollyky 14-15. Dr. Ayars testified that the exposure to coccidioidomycosis came from Gorre's trip to Las Vegas in 2005, as the best choice, or from living in Sacramento. *See* BR Ayars 111-12, 121, 137, 139, 149-50. Dr. Bardana also testified, on a more probable than not basis, that Gorre did not acquire valley fever in Washington. BR Bardana 35. Dr. Bardana believed it occurred sometime in the fall of 2005 on the golfing trip, or earlier, as the fungus can lay latent for a long period. BR Bardana 21, 33.

Dr. Bollyky thought that it was "conceivably possible" that the spores could be transported from the endemic area and windblown in Western Washington. BR Bollyky 20. But he testified that given that Gorre has lived in central California and traveled around to places where coccidioidomycosis is endemic, the most probable likelihood is that he would have acquired it in those places rather than in Washington. *See* BR Bollyky 14-17, 25. Dr. Bollyky concluded that it was not probable that he acquired it in Western Washington. BR Bollyky 24-25. Dr. Goss thought

Gorre was exposed to coccidioidomycosis as a young man while living in California. BR Goss 24.

H. The Board And Superior Court Found That Gorre Had The Infectious Disease Valley Fever Only And Concluded He Did Not Have An Occupational Disease

The Board found that Gorre had valley fever and that it was an infectious disease. BR 8. The Board also found that Gorre did not contract any respiratory condition naturally and proximately caused by the distinctive conditions of occupation as a firefighter for the City of Tacoma. BR 8. The Board concluded that Gorre did not develop a disabling medical condition presumed to be an occupational disease under RCW 51.32.185. BR 9. Finally, the Board concluded that Gorre did not incur any disease that arose naturally and proximately from the distinctive conditions of his employment. BR 9.

Gorre appealed to superior court, and the court affirmed the Board. CP 1, 940-43. In addition to adopting the Board's findings and conclusions as its own, the trial court also found that Gorre was not a smoker, that he had coccidioidomycosis, that Gorre did not have the separate diseases of eosinophilia or interstitial lung disease, and that his symptoms were manifestations of his coccidioidomycosis. CP 942. The City of Tacoma requested that it, as a prevailing party, be awarded its

deposition transcription costs, but the trial court denied this request. CP 922-29, 942; 6/18/12 VRP 61-65.

Gorre appeals to this Court. CP 944. The City of Tacoma cross-appeals. CP 951.

IV. STANDARD OF REVIEW

In a workers' compensation case, the superior court reviews the decision of the Board of Industrial Insurance Appeals de novo on the certified appeal board record. RCW 51.52.115; *Raum v. City of Bellevue*, __ Wn. App. __, 286 P.3d 695, 703, *review pending* (2012). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *Raum*, 286 P.3d at 703. The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *Id.* at 703.

The Court of Appeals reviews the superior court's decision under the ordinary civil standard of review: the superior court's findings of fact are reviewed only to determine if they are supported by substantial evidence, while any issues of law are considered de novo. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 10, 931 P.2d 907 (1996); RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."). In his assignments of error, Gorre appears to seek

review of the decisions of the Board at summary judgment and at the hearing (AB 2), however, this Court reviews only the superior court's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009). Gorre also appears to argue that RCW 51.32.185 was not applied correctly at the claim management level. *See* AB 34, 48.[10] However, claim management is not relevant to determining whether the superior court order was correct. *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (the processes the Department employed in reaching its ultimate decision is irrelevant).

The Court of Appeals does not reweigh the evidence. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009). Rather, the Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Id.* at 206. "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person

[10] Gorre asserts that "The Department and employers continue to refuse to apply the firefighters' presumption statute in violation of the legislative directive." AB 48. This is incorrect. The Department follows the law as directed by the Legislature.

of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Unchallenged findings of fact are verities on appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). Gorre has not assigned error to any of the findings of fact.

On issues of law, this Court may substitute its judgment for that of the agency, but great weight is accorded to the agency's view of the law it administers. *Allen*, 100 Wn. App. at 530.

V. ARGUMENT

A. The Rebuttable Evidentiary Presumption In Firefighter Cases Does Not Apply To Gorre Because He Does Not Have A Qualifying Disease

Gorre offers three theories in support of his argument that the rebuttable evidentiary presumptions in RCW 51.32.185 apply to his case. First, he argues that valley fever is an infectious disease covered under RCW 51.32.185(1)(d). AB 32. Second, he argues that valley fever is a respiratory disease subject to a presumption of coverage under RCW 51.32.185(1)(a). AB 32. Third, he argues that he has both valley disease and a separate eosinophilia/interstitial lung disease, and that the eosinophilia/interstitial lung disease is a respiratory disease subject to a presumption of coverage under RCW 51.32.185(1)(a). AB 29. None of these theories have merit, and no presumption applies here.

1. Valley Fever Is Not An Infectious Disease That Is Entitled To A Presumption Of Coverage Under RCW 51.32.185(4)

RCW 51.32.185(1) provides that for firefighters there is a presumption that certain diseases are occupational diseases:

> [T]here shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140.

The statute generally lists infectious diseases in RCW 51.32.185(1)(d), and then further defines what infectious diseases constitute:

> (4) The presumption established in subsection (1)(d) of this section shall be extended to any firefighter who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

Gorre argues that valley fever is a covered infectious disease, presumably based on language in RCW 51.32.185(1)(d). *See* AB 32. But this language cannot be read in isolation. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Rather the court gives effect to all of the statute's words and construes the statute as a whole. *Id.* at 624. Here the Legislature defined the circumstances when the infectious disease provision applies, namely the presumption is "extended" to

HIV/AIDS, hepatitis, meningococcal meningitis, or mycobacterium tuberculosis. RCW 51.32.185(4). The court interprets statutes to give effect to the Legislature's intent by considering the plain language of the statute. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). The Legislature does not engage in meaningless acts. *State v. Wanrow*, 88 Wn 2d 221, 228, 559 P.2d 548, *superceded by statute on other grounds* (1977). Here, the Legislature's intent was to provide that only certain diseases are subject to a presumption of coverage, which is why it specially listed infectious diseases in RCW 51.32.185(4).

Further, RCW 51.32.185 is not ambiguous. A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). It is not reasonable to interpret RCW 51.32.185 as allowing any infectious disease to be subject to a presumption of coverage because that interpretation would render RCW 51.32.185(4) meaningless.

Even if it was considered ambiguous, the interpretation that best furthers the Legislature's intent is that RCW 51.32.185 provides the exclusive list of specific infectious diseases that are subject to a presumption of coverage. RCW 51.32.185(1)(d) is a general statute and RCW 51.32.185(4) is a specific statute, and as such, the latter controls. *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979).

RCW 51.32.185(1)(d) provides the exclusive list of diseases covered. Where a statute specially lists things upon which it operates, there is a presumption that the legislating body intended all omissions. *See Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000).

The legislative history also shows that RCW 51.32.185(4) provides the exclusive list of the infectious diseases that are entitled to a presumption of coverage. As originally proposed, RCW 51.32.185 contained no limitation on which infectious diseases fell within the statute's presumption. *See* House Bill 2663 (Wash. 2002). The diseases were ultimately limited to only those listed. Laws of 2002, ch. 333, § 2. Valley fever is not one of those conditions.

The doctrine of liberal construction does not aid Gorre as it cannot be used to distort the meaning of the statute. *See Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243-44, 943 P.2d 1358 (1997).

2. Valley Fever Is An Infectious Disease And Its Respiratory Symptoms Do Not Make It A Respiratory Disease

Alternatively, Gorre argues that valley fever is a respiratory disease under RCW 51.32.185(1)(a). AB 29, 32. Gorre's argument appears to be that because valley fever involves respiratory symptoms, it is

also a respiratory disease. *See* AB 29, 32. But the Legislature did not provide that all conditions with respiratory *symptoms* are covered, rather it covers "Respiratory disease." This is in contrast to the coverage for "heart *problems*," which is more general than "heart disease." *Compare* RCW 51.32.185(1)(a) *with* .185(1)(b). In the case of heart problems, the Legislature deliberately chose a broader term than the term it chose in the respiratory context. The Legislature did not intend for every condition with a respiratory symptom to be included; if it had, it would have so specified.[11] Instead it used the term respiratory disease. RCW 51.32.185(1)(a). It is a medical question as to whether a condition is a respiratory disease or an infectious disease and the trial court properly relied on such testimony. *See* ER 702; *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979) ("medical testimony forms a vital part of a claimant's proof, particularly where it involves matters which are beyond the knowledge and understanding of laymen.").

The trial court found that valley fever was an infectious disease. CP 942; BR 8. This is supported by substantial evidence. Gorre asserts that Dr. Johnson indicated that coccidioidomycosis is a respiratory disease. AB 32 (citing BR Johnson 28). He cites to BR Johnson 28, for

[11] Gorre's interpretation leads to absurd results as there are hundreds of infectious diseases that have respiratory symptoms. BR Ayars 100.

this proposition; however, Dr. Johnson does not say this. BR Johnson 4-56.[12]

With no citation to the record, Gorre asserts that "[i]t has already been conceded by the Employer's experts that Coccidioidomycosis is a respiratory disease." AB 32. There is no such concession. Dr. Ayars and Dr. Bardana testified that valley fever is considered an infectious disease. *See* BR Ayars 100; BR Bardana 11. Doctors, including Dr. Johnson, an infectious disease expert in coccidioidomycosis, treat it as an infectious disease. *See* BR Johnson 9, 11, 16-18, 20; BR Goss 50; BR Bollyky 8; BR Ayars 93. While it can cause respiratory symptoms, this does not mean it is a respiratory disease.

Dr. Ayars's and Dr. Bardana's testimony that valley fever is an infectious disease provides substantial evidence in support of the trial court's finding. In any event, even assuming for the sake of argument that Dr. Johnson's testimony can somehow be construed as supporting the notion that valley fever is a respiratory disease, there is, indisputably, substantial evidence to the contrary, and the superior court committed no error in finding that valley fever is not a respiratory disease.

---

[12] What Dr. Johnson says is that there is proof of disseminated coccidioidomycosis, "[a]nd that's almost always eventuated from either symptomatic or asymptomatic pneumonic disease." BR Johnson 28.

3. Substantial Evidence Supports the Finding That Gorre Had the Infectious Disease Of Valley Fever Only

Gorre also claims that he has the respiratory disease of "eosinophilia\interstitial lung disease," in addition to coccidioidomycosis. AB 29-31. However, the trial court found that Gorre had only one condition—valley fever—and that he "did not have the separate diseases of eosinophilia or interstitial lung disease." CP 942. The trial court found "Mr. Gorre's symptoms were manifestations of his coccidioidomycosis." CP 942. Gorre nonetheless continues to argue that he had "eosinophilia\interstitial lung disease" that led to him having a comprised immune system and made him more likely to acquire coccidioidomycosis. AB 30-31.

Whether Gorre suffered from one separately diagnosable disease or two is a question of fact. Thus, to show that the superior court erred in finding that the only disease he suffered from was valley fever, Gorre would have to show that the superior court's finding was not supported by *any* competent medical evidence. *See Bering*, 106 Wn.2d at 220 (substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the matter). Gorre does not, and cannot, make such a showing here, and, as such, he fails to show that the

superior court erred in finding that he only suffered from one disease, valley fever.

Gorre argues he has eosinophilic lung disease based on Dr. Goss's diagnosis and based on Dr. Bollyky's testimony. *See* AB 30-31. But substantial evidence supports the trial court's finding that Gorre had only one disease—valley fever—and not the separate disease of eosinophilic lung disease. *See* CP 942. Dr. Bollyky did not testify that Gorre had eosinophilic lung disease. BR Bollyky 1-35. Dr. Ayars testified that Gorre had valley fever and no other disease. BR Ayars 104-05. Dr. Bardana similarly testified there was only valley fever and no other disease. BR Bardana 18. Dr. Johnson thought Gorre had valley fever. BR Johnson 20. Dr. Johnson disagreed with Dr. Goss's proposition that he had a dormant cocci that was caused to disseminate by the use of steroids. BR Johnson 33. Substantial evidence supports the trial court's finding.

Gorre also argues that he has interstitial lung disease. AB 30. He relies on Dr. Bollyky's testimony that interstitial lung disease responds to steroid treatments. AB 30 (citing to BR Bollyky 29). Dr. Bollyky, however, did not testify that Gorre had interstitial lung disease. BR Bollyky 1-35. Gorre's theory that he may have had an interstitial lung disease is speculative and unsupported by medical testimony, and, in any

event, there is ample medical testimony that Gorre suffered from only one disease, valley fever. The trial court committed no error when it rejected Gorre's theory that he had an interstitial lung disease, and this Court should uphold that finding.

B. Substantial Evidence Supports The Trial Court's Determination that Gorre Did Not Incur Any Disease That Arose Naturally And Proximately From His Employment

The presumption in RCW 51.32.185 does not apply here. But in any event, whether it applies or not, substantial evidence supports the determination that Gorre did not have an occupational disease that is related to his employment.

To prove the existence of an occupational disease, the worker has to prove that the condition arose naturally and proximately out of distinctive conditions of employment. RCW 51.08.140; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 476, 745 P.2d 1295 (1987). To prove a condition arose "naturally" out of the employment, the worker must show that "his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease must be a natural incident of the worker's particular employment." *Id.* at 481. To prove the condition "proximately" arose out of employment, the worker must prove that the disease would not have been contracted "but for" the conditions existing

in employment. *Simpson Logging Co. v. Dep't of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448 (1949). The causal connection between a claimant's condition and his or her employment must be established by competent medical testimony that shows that the condition is probably, not merely possibly, caused by the employment. *Raum*, 286 P.3d at 704 (citing *Dennis*, 109 Wn.2d at 477).[13]

1. RCW 51.32.185 Does Not Require Any Particular Type Of Evidence To Rebut The Presumption

Gorre makes a number of arguments about the meaning of the rebuttable evidentiary presumption in RCW 51.32.185 and the type of evidence that is necessary to rebut the presumption. He argues that he is entitled to "presumptive occupational disease and occupational disease benefits." AB 34. He claims that the "firefighter presumption of occupational disease sits on top of the [Industrial Insurance Act] and grants additional benefits in favor of firefighters." AB 43.

Gorre essentially argues that there are two different types of claims, a RCW 51.32.185 presumptive claim, and a RCW 51.08.140 occupational disease claim. The court in *Raum* rejected a similar argument: "RCW 51.32.185(1) creates no new cause of action—it

[13] *See also Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49-50, 163 P.2d 133 (1945) (holding that testimony that "a condition might have, or could probably have, been brought about by a certain happening" is insufficient as a matter of law to present a case to a jury, since evidence merely establishing that something is possible, as opposed to probable, is, at best, "conjectural and speculative").

establishes a '*presumption*' that applies to certain firefighter claims. . . . RCW 51.32.185 does nothing more than create a rebuttable evidentiary presumption. We conclude the statute creates no occupational disease claim different from that defined in RCW 51.08.140." *Raum*, 286 P.3d at 705-06 (emphasis in original).[14]

Gorre argues that there must be certain kinds of evidence to rebut the presumption, asserting the employer "must prove by a preponderance of admissible evidence that Lt. Gorre's occupational disease was acquired by some specific cause outside his career employment as a firefighter." AB 35; *see also* AB 36, 44. He asserts "[t]he presumption was created to impose a *high* burden on the Employer or the Department when attempting to defeat the presumption." AB 35 (emphasis added).

Gorre is mistaken that there is a particular type of evidence unique to the firefighter context. Generally, a worker claiming entitlement to benefits for an occupational disease carries the burden of proving that the disabling condition arose naturally and proximately out of employment. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999); *Raum*, 286 P.3d at 704. If RCW 51.32.185's rebuttable evidentiary

---

[14] As the City of Tacoma argues, RCW 51.32.185 does not create a strict liability statute at the Department, Board, or superior court levels. City of Tacoma Respondent/Cross-Appellant's Brief 34-39. Nor does it create an irrebuttable presumption. *Raum*, 286 P.3d at 705-06; City of Tacoma Respondent/Cross-Appellant's Brief 34-39.

presumption applies, the burden of proof shifts to the employer and the Department to establish that it is more probable than not that it is not work related. *Raum*, 286 P.3d at 704. But the Department and employer may rebut this presumption through any evidence that is relevant to whether the disease is related to the worker's employment or not. *See* RCW 51.32.185(1).

RCW 51.32.185(1) provides that the "presumption of occupational disease may be rebutted by a preponderance of the evidence." The Legislature did not say this was to be a high burden. Rather, "[s]uch evidence may include, *but is not limited to*, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities." RCW 51.32.185(1) (emphasis added). This is a broad and non-exclusive list of the type of evidence that rebuts the presumption, and it controls.[15] Gorre in effect argues that it is an exclusive list of the types of evidence that can

[15] Cases from foreign jurisdictions do not control over this express Washington provision. Gorre relies on cases from other jurisdictions for the proposition that these "cases agree that a presumptive statute cannot be overcome by expert testimony which simply challenges the premise of the presumption. Instead, to overcome the presumption, the Employer must procure clear medical evidence of a cause for the presumptive disease, outside of claimant's employment. Testimony regarding idiopathic or unknown causes is not sufficient." AB 44. Even accepting that his characterization of these cases is correct, they do not apply in Washington. Rather the terms of RCW 51.32.185 apply, together with Washington case law. *See Raum*, 286 P.3d at 710 (rejecting application of foreign cases). Washington's Industrial Insurance Act is unique and it is well accepted that case law from other jurisdictions is of little assistance in interpreting the Act. *See Dennis*, 109 Wn.2d at 482-83; *Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 57, 240 P.2d 567 (1952).

be used to rebut the presumption of coverage, but his argument lacks merit as it is contrary to the plain language of the statute. Furthermore, here, there was medical evidence on a more probable than not basis that Gorre acquired valley fever either while he was on a trip to Las Vegas or while he was in California. BR Ayars 111-12, 121, 137, 139, 149-50; BR Bardana 21, 33; BR Bollyky 14-17, 24-25. This is "exposure from other . . . nonemployment activities." *See* RCW 51.32.185(1). It constitutes substantial evidence that Gorre's valley fever is not related to his employment as a firefighter, and, as such, it would be more than sufficient to rebut a presumption of coverage even assuming that Gorre should have been found to be entitled to such a presumption.

Gorre argues that the employer "by presenting other potential speculative causes of respiratory or infectious disease, or denying the existence of respiratory or infectious disease has failed to present *any* evidence excluding Lt. Gorre's occupational exposures as *a* proximate cause of his respiratory or infectious diseases." AB 39 (emphasis in original). The evidence presented by the City of Tacoma and the Department was not speculative. Moreover, there is no particular type of evidence necessary to rebut the presumption (RCW 51.32.185(1)), and there is no reason why it would not be sufficient for the medical witness to deny the existence of a respiratory or infectious disease.

Assuming the presumption applies, the employer and Department rebutted the presumption, and the burden then shifted back to Gorre. "If the employer rebuts the presumption, the burden of proof returns to the worker to show that he is entitled to benefits, i.e., that he suffers from an 'occupational disease' as defined in RCW 51.08.140." *Raum*, 286 P.3d at 709-10. Gorre argues that under RCW 51.32.185 a firefighter does not have to prove causation. AB 38, 43. But Gorre does have to prove causation, if the presumption is rebutted, assuming it applies. The fact-finder then must determine, as the fact-finder would in any other case where there is a dispute as to whether an occupational disease claim should be allowed or not, whether the preponderance of the evidence supports a finding that the worker's medical condition arose naturally and proximately out of any distinctive condition of the worker's employment. *See Raum*, 286 P.3d at 710. "If both parties present competent medical testimony, the jury must weigh the evidence to determine whether the worker's condition 'arises naturally and proximately out of employment.'" *Id.* at 710 (quoting RCW 51.08.140); *cf. Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992) (in discrimination case once shifting burden of production is satisfied, the case goes to the trier of fact). At this point the presumption ceases to matter.

See Bradley v. S.L. Savidge, Inc., 13 Wn.2d 28, 42, 123 P.2d 780 (1942). This is because in Washington a presumption disappears when it is rebutted. *Id.*

Here, the rebuttable evidentiary presumption does not apply, and the worker had the burden of proof to prove he had an occupational disease. However, even assuming that the rebuttable evidentiary presumption applies, there is substantial evidence supporting that the employer and the Department rebutted the presumption, and there is also substantial evidence to support the trial court's ultimate determination that Gorre did not have an occupational disease. Therefore, even assuming that the trial court should have concluded that Gorre was entitled to a rebuttable presumption of coverage under RCW 51.32.185, the trial court's decision to affirm the Board and Department's decisions to reject the claim must still be affirmed.

2. Gorre Has Not Preserved Any Objections To Testimony

Gorre's theory is that Dr. Ayars and Dr. Bardana had "speculative" testimony that, therefore, their testimony should be disregarded. *See* AB 33. Gorre says speculation, conjecture, or conclusory allegations are not admissible. AB 36. It is unclear if this is meant to be an objection to the evidence being considered part of the record. If so, the Court should not consider any argument about the admissibility of the evidence. Gorre does

not assign error to any evidentiary rulings made by the superior court and this precludes appellate review of this issue. AB 2; RAP 10.3(a)(4); *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (party's failure to assign error precludes appellate consideration of alleged error).

Furthermore, Gorre provides no citation to the record showing that he objected to all the relevant testimony at the Board, or that he preserved any such objections at the superior court. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 329, 189 P.3d 178 (2008) (trial court may only review evidentiary objections raised at the Board); *Sepich v. Dep't of Labor & Indus.*, 75 Wn. 2d 312, 319, 450 P.2d 940 (1969) (in workers' compensation appeal, objections not raised at the trial court are not considered by the appellate court). This Court should not consider his conclusory and unsupported arguments. *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (court will not consider conclusory arguments); *Eugster v. City of Spokane*, 118 Wn. App. 383, 425, 76 P.3d 741 (2003) (court will not consider arguments unsupported by citation to record and by reasoned argument).

Although Gorre now argues that Dr. Bardana was not qualified to testify about valley fever because he refers these cases out to other physicians (AB 20), Gorre does not point to any objection to Dr.

Bardana's testimony on this point, thus waiving his objection. *See Lewis*, 145 Wn. App. at 329.

3. Dr. Ayars's and Dr. Bardana's Testimony Provide Substantial Evidence To Show That Gorre Did Not Incur Any Disease Arising From The Distinctive Conditions Of His Employment

Gorre argues he sustained an occupational disease on two theories. First, Gorre argues that he "was exposed to immeasurable dust, smoke, fumes, and other toxic substances that are known to increase eosinophilic levels in the body and cause eosinophilic lung disease." AB 31 (citing BR Goss 22). Thus, he argues his purported eosinophilic or interstitial lung disease was caused by his occupation. As discussed above, in Part VI.A.3, the fact-finder rejected his argument that he had these conditions. CP 942. For the reasons stated previously, this finding is supported by substantial evidence and must be upheld by this Court.

Further, even assuming he had an eosinophilic or interstitial lung disease condition, the trial court found that Gorre did not contract any respiratory condition caused by the distinctive conditions of employment. CP 942; BR 8. Substantial evidence supports finding that no occupational exposure to dust, smoke, fumes, and other toxic substances proximately caused any of his alleged medical conditions, as Dr. Ayars and Dr. Bardana testified that Gorre did not have occupational inhalational

exposure that caused any type of medical condition. *See* BR Ayars 106-07, 111; BR Bardana 67-68. Both Dr. Ayars and Dr. Bardana said that these alleged exposures were immaterial to his condition. *See* BR Ayars 111; BR Bardana 67-68.

Second, Gorre argues that he contracted valley fever at his work in Washington. AB 33. He argues he was not in an endemic area for almost two years before his symptoms arose. AB 33. He relies on Dr. Johnson's testimony that because Gorre was purportedly not in an endemic area in the six weeks before manifestation of the symptoms, it is more likely than not that he contracted the disease in Washington. AB 33 (citing BR Johnson 22).

Gorre asserts Dr. Ayars was ignorant of his relevant timeline, work exposures, and travel history. AB 34. And he argues that this Court should weigh Dr. Johnson's testimony more heavily. *See* AB 34. "Dr. Johnson's overwhelming experience and knowledge regarding Coccidioidomycosis are compelling reasons to give a high degree of weight to his testimony." AB 34. Gorre concludes "[t]he weight of the evidence submitted clearly indicates that, to at least a reasonable medical probability, Lt. Gorre's Coccidioidomycosis is work related on a more likely than not basis." AB 34.

The problem with Gorre's arguments is that he is not arguing under the correct standard of review. These arguments were more properly addressed to the fact-finder, who rejected them. The appellate court does not reweigh the evidence. *Fox*, 154 Wn. App. at 527. Gorre discounts Dr. Ayar's credibility and highlights Dr. Johnson's credibility. But credibility determinations are solely for the trier of fact and are not reviewable on appeal. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). The issue before this Court is not whether Dr. Johnson's testimony is more or less persuasive than that of Dr. Ayars, but whether the trial court's finding that Gorre did not contract valley fever as a result of employment in Washington was supported by substantial evidence.

Dr. Ayars, Dr. Bardana, and Dr. Bollyky disagreed that Gorre acquired valley fever in Washington. BR Ayars 121, 139, 149-50; BR Bardana 35; BR Bollyky 14-15. Dr. Ayars testified that the exposure to coccidioidomycosis came from Gorre's trip to Las Vegas in 2005, as the best choice, or from living in Sacramento. *See* BR Ayars 111-12, 121, 137, 139, 149-50. Dr. Bardana also testified, on a more probable than not basis, that Gorre did not acquire valley fever in Washington. BR Bardana 35. He believed that Gorre acquired it on the golfing trip in Las Vegas in 2005. BR Bardana 21.

Dr. Bollyky testified that the most probable likelihood, given that Gorre has lived in central California and traveled around to places where coccidioidomycosis is endemic, is that he would have acquired it in those places. BR Bollyky 14-17, 25.

Lay testimony supports the expert witness testimony. Gorre admitted that he previously had been in California, a place where valley fever is endemic. BR Gorre 182; BR Ayars 136. There was testimony from Rivers that Gorre had been in Las Vegas in 2005, another place where valley fever is endemic. BR Rivers 36; BR Ayars 93, 111-12.

Furthermore, the fact-finder could discount the opinions of Dr. Goss and Dr. Johnson because they did not have complete medical records and travel history. *Compare* BR Ayars 97-99; BR Bardana 14-16 *with* BR Goss 45-46; BR Johnson 30-31, 42-43.

Viewing the testimony of Dr. Ayars, Dr. Bardana, and Dr. Bollyky, in the light most favorable to the City of Tacoma and to the Department, there was substantial evidence supporting the superior court's findings. Therefore, the superior court's findings must be upheld.

C. The City of Tacoma Should Receive Its Deposition Transcription Costs Under RCW 4.84.010

The trial court erred by denying the City of Tacoma its prevailing party deposition transcription costs. CP 942. The trial court should have awarded deposition transcription costs under RCW 4.84.010 and RCW 4.84.030 because, as the Supreme Court has recognized, the cost-provisions contained in those statutes apply to superior court proceedings involving appeals from decisions of the Board. *See Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997); *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729-30, 175 P.3d 1109 (2008); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992).

RCW 4.84.030 allows a party who prevails in any superior court action to claim, and receive, certain litigation expenses:

> In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements . . . .

RCW 4.84.030. RCW 4.84.010 specifies the types of costs that a prevailing party may recover, and subsection (7) of that statute allows a party to claim as a cost the expenses incurred in transcribing a deposition.

RCW 4.84.030 states that it applies to "any action in the superior court." As *Black*, *Ferencak*, and *Allan* each recognized, RCW 51.52.140

provides that the rules of civil practice generally apply in industrial insurance appeals. *Black*, 131 Wn.2d at 557; *Ferencak*, 142 Wn. App. at 730; *Allan*, 66 Wn. App. at 422.

RCW 51.52.140 reads, in part:

> Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases . . . .

RCW 51.52.140.

Black, *Ferencak*, and *Allan* each concluded that RCW 51.52.140's incorporation of the "practice in civil cases" to industrial insurance cases includes the provisions governing costs set forth in RCW 4.84.010 and RCW 4.84.030. *Black*, 131 Wn.2d at 557; *Ferencak*, 142 Wn. App. at 730; *Allan*, 66 Wn. App. at 422-23. Since the Department was the prevailing party in each of those cases, each case held that the Department was entitled to its statutory attorney fees. *Black*, 131 Wn.2d at 558; *Ferencak*, 142 Wn. App. at 730; *Allan*, 66 Wn. App. at 423.

Here, it cannot be reasonably disputed that the City of Tacoma was the "prevailing party" as defined by RCW 4.84.030. While *Black*, *Ferencak*, and *Allan* did not address the precise question of whether an employer who prevails (under RCW 4.84.030) in a superior court matter

stemming from an industrial insurance case is entitled to an award of its deposition transcriptions under RCW 4.84.010(7), those cases did hold that the cost provisions contained in RCW 4.84.010 and RCW 4.84.030 apply to superior court matters that stem from industrial insurance appeals. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23. There is no compelling reason to distinguish the costs identified in RCW 4.84.010(6) from the costs identified in RCW 4.84.010(7); and, accordingly, *Black*, *Ferencak* and *Allan* all support the conclusion that a prevailing party is entitled to its deposition transcription costs. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Under the plain language of RCW 4.84.010(7), the City of Tacoma should have been awarded its deposition transcription costs. RCW 4.84.010(7) provides:

> (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: Provided, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

Here, the depositions were "necessary" for the City of Tacoma "to achieve the successful result," as the depositions were evidence offered by the City of Tacoma in support of its position. RCW 4.84.010(7). The City

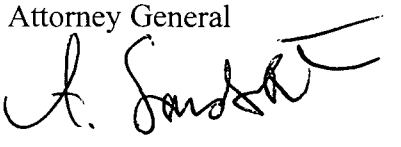
of Tacoma's "expense" associated with taking them is recoverable, because the depositions were "used at trial." RCW 4.84.010(7). The City of Tacoma should therefore receive this cost.

VI. CONCLUSION

The Department respectfully requests that this Court affirm the trial court in all respects except for the deposition transcription costs, which should be awarded to the City of Tacoma.

RESPECTFULLY SUBMITTED this 4th day of January, 2013.

ROBERT M. MCKENNA
Attorney General



ANASTASIA SANDSTROM
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

Appendix A

RCW 51.32.185 Occupational diseases — Presumption of occupational disease for firefighters — Limitations — Exception — Rules.

(1) In the case of firefighters as defined in *RCW 41.26.030(4) (a), (b), and (c) who are covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(2) The presumptions established in subsection (1) of this section shall be extended to an applicable member following termination of service for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment.

(3) The presumption established in subsection (1)(c) of this section shall only apply to any active or former firefighter who has cancer that develops or manifests itself after the firefighter has served at least ten years and who was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. The presumption within subsection (1)(c) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty, primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

(4) The presumption established in subsection (1)(d) of this section shall be extended to any firefighter who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

(5) Beginning July 1, 2003, this section does not apply to a firefighter who

develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter from the provisions of this section.

(6) For purposes of this section, "firefighting activities" means fire suppression, fire prevention, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and training and other assigned duties related to emergency response.

(7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(c) When reasonable costs of the appeal must be paid by the department under this section in a state fund case, the costs shall be paid from the accident fund and charged to the costs of the claim.

[2007 c 490 § 2; 2002 c 337 § 2; 1987 c 515 § 2.]Notes:

*Reviser's note: RCW 41.26.030 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (4)(a), (b), and (c) to subsection (16)(a), (b), and (c).
Legislative findings -- 1987 c 515: "The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for firefighters." [1987 c 515 § 1.]

Appendix B

BEFORE TH BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWARD O. GORRE	) DOCKET NO. 09 13340
	)
CLAIM NO. SB-29707	) DECISION AND ORDER

APPEARANCES:

Claimant, Edward O. Gorre, by
Ron Meyers & Associates, PLLC, per
Ron Meyers

Self-Insured Employer, City of Tacoma, by
Pratt, Day & Stratton, PLLC, per
Marne J. Horstman

Department of Labor and Industries, by
The Office of the Attorney General, per
Pat L. Demarco, Assistant

The claimant, Edward O. Gorre, filed an appeal with the Board of Industrial Insurance Appeals on April 8, 2009, from an order of the Department of Labor and Industries dated March 24, 2009. In this order, the Department set aside an order dated March 26, 2008, and rejected Mr. Gorre's Application for Benefits for the stated reasons that there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury alleged, the condition was not the result of an industrial injury, as that term is defined in RCW 51.08.100, and the condition was not an occupational disease within the meaning of RCW 51.08.140. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant and employer filed timely Petitions for Review of a Proposed Decision and Order issued on October 1, 2010, in which the industrial appeals judge affirmed the Department order dated March 24, 2009.

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

We agree with our industrial appeals judge's assessment of the evidence and the conclusions he drew from it. We have granted review to add Findings of Fact and Conclusions of Law to clarify why Mr. Gorre's medical condition cannot be presumed to be an occupational disease

under the provisions of RCW 51.32.185, and to briefly explain why we conclude that Mr. Gorre did not satisfy his burden of proof.

RCW 51.32.185 creates a rebuttable prima facie presumption that a firefighter who develops certain medical conditions is presumed to have developed the illness because of an occupational disease process. The conditions include respiratory disease, cancer, heart conditions that become manifest within 72 hours of exposure to smoke, fumes, or toxic substances or within 24 hours after strenuous physical exertion and infectious diseases. Subsection (4) of the statute states:

> The presumption established in subsection (1)(d) of this section [infectious diseases] shall be extended to any firefighter who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

Mr. Gorre asserts that he did not have to produce any evidence to prove that his condition was presumed to be an occupational disease. We disagree with his interpretation of the applicability of the presumption. For the presumption to apply, a firefighter must first present evidence that his or her medical condition is one contemplated by the statute to have been presumptively caused by an occupational disease process. Only after he or she has done so, does the burden of producing a preponderance of the evidence to rebut the presumption fall to the Department or the firefighter's self-insured employer. If the condition for which Mr. Gorre here seeks industrial insurance coverage is not one presumed by statute to be an occupational disease, he carries the burden of proof.

The diagnosis of the condition Mr. Gorre developed is critical to a determination of whether his condition was presumptively an occupational disease. Mr. Gorre advanced two theories to support his prayer for relief. Under one of the theories, Mr. Gorre asserts that he was exposed to harmful substances during the course of his employment that caused him to develop a respiratory disorder, eosinophilic pneumonia, and that the treatment for the respiratory condition resulted in an infectious disease, coccidioidomycosis. The Department and the City of Tacoma contend that Mr. Gorre contracted only coccidiodomycosis, and that distinctive conditions of his employment did not naturally and proximately cause the coccidiodomycosis.

Four medical experts, Christopher H. Goss, M.D., Royce H. Johnson, M.D., Garrison H. Ayers, M.D., and Emil J. Bardana, Jr., M.D., detailed their opinions regarding the nature of the condition Mr. Gorre developed. They agreed that the claimant suffered from coccidioidomycosis. The ailment is commonly known as Valley Fever. Valley Fever is caused by Coccidioides immitis,

an organism that lives in the soil in desert areas such as Mexico, the Sonoran desert, other areas of California and Arizona, and in Nevada and other southwestern states. The organism produces arthrospores that become airborne when the soil is disturbed and may be inhaled and cause disease in humans. Because it thrives only in desert climates, the organism cannot live in the northwestern United States. About 60 percent of the people who are exposed to the organism that causes Valley Fever never develop any symptoms. The symptoms from which the other 40 percent suffer are similar to those caused by the flu or colds. Valley Fever is an infectious disease, the symptoms of which can affect a patient's respiratory functions.

No case of Valley Fever has ever been reported as having been proximately caused by an exposure that happened in the State of Washington. The few patients who have been treated for the condition in Washington contracted it elsewhere.

Mr. Gorre's Relevant Background

Mr. Gorre lived in Fair Oaks, California from 1986 until he graduated from high school. Fair Oaks is a suburb of Sacramento. After the claimant graduated, he enlisted in the United States Army and served in the armed forces for three years. He was stationed in Germany for the first two years of his enlistment but ended his Army career after he was posted in Saudi Arabia for the final 12 months. He traveled in Iraq and Kuwait during that time.

Mr. Gorre then lived in the Sacramento area from 1990 through sometime in 1994. He attended a community college and then obtained his college degree from California State Los Angeles. Mr. Gorre resided in Long Beach, California from 1994 through 1997. He relocated to the State of Washington in early 1997.

The firefighter acknowledged that before he moved to Washington, he traveled throughout California. He visited Mexico in the late 1980s, early 1990s, and in 2008. From 1995 through 2004, Mr. Gorre visited Fair Oaks between five and ten times to visit his father. In November 2005, Mr. Gorre took a trip to Nevada, where he played golf outside the city limits of Las Vegas.

Mr. Gorre conceded that he could not identify one specific instance in which he was exposed to a substance during the course of his work as a firefighter/EMT that proximately caused the condition for which he seeks industrial insurance coverage. The record demonstrated that the claimant responded to few calls to fight fires, but many calls for EMT services from 2005 through early 2007. Considering the time within which Valley Fever usually becomes symptomatic following exposure, it is that time period that is important.

The Medical Evidence

No medical witness identified any specific substance to which Mr. Gorre was exposed during the course of his job that was the probable proximate cause of his condition.

Mr. Gorre relied on the opinions of two medical experts to support his claim for benefits.

The Theory of Christopher H. Goss, M.D.

Christopher H. Goss, M.D., is certified by the American Board of Critical Care Physicians as qualified in that medical specialty. The doctor treated Mr. Gorre for the symptoms that are at issue. He concluded that Mr. Gorre actually suffered from two medical conditions. Eosinophilic pneumonia, which the doctor thought was the first disease the claimant contracted, is a respiratory disease of the vessels of a person's airway. Dr. Goss believed that the disease resulted from "multiple occupational exposures," but he could not identify when the exposures happened or the substances that likely caused the pneumonia.

Mr. Gorre was treated with steroids for the presumed pneumonia. Dr. Goss believed that while the steroids resolved the pneumonia, they also caused the Valley Fever organism that had lain dormant for many years after the claimant contracted it when he lived in an area in which the organism is endemic, to become active and symptomatic. The record established that in the 40 percent of people who become ill after exposure to the Valley Fever organism, symptoms usually begin within two weeks of exposure. The organism may, however, remain dormant for several years.

Thus, based on Dr. Goss's testimony, Mr. Gorre contended that the proper and necessary treatment he underwent for a respiratory disease that was proximately caused by occupational exposures "caused dissemination of coccidimycosis which he may have acquired as a young man while growing up in California . . .." Goss Dep. at 24. While proximate cause may be established under such circumstances, *In re Arvid Anderson*, BIIA Dec., 65,170 (1986), we are not convinced of the efficacy of Dr. Goss's theory.

Garrison H. Ayers, M.D., is certified by the American Boards of Internal Medicine, Infectious Diseases, and Allergy and Clinical Immunology as a qualified medical specialist. He examined Mr. Gorre on September 3, 2008. The doctor said that Mr. Gorre did not report having been exposed to any substance that could have caused chronic eosinophilic pneumonia. Dr. Ayers also declared that the symptoms Mr. Gorre had when he saw Dr. Goss were consistent with a person who has Valley Fever, but not eosinophilic pneumonia. He explained:

> Well, I think, it is clear that this gentleman had coccidioidomycosis, and that he had been in endemic areas and lived in typical areas, which one

> would obtain it. And therefore, is at higher risk, and also given the fact that he is Philippino, which increases his risk of dissemination, and that the picture that, not only from my history that I obtained and reviewing the records goes along perfectly well with that, and the fact that he had biopsy that was not consistent with hypersensitivity pneumonitis.
>
> He had clinical symptoms that you don't see with chronic pulmonary eosinophilic pneumonia, and that he had arthralgias and rash, and those kind of symptoms.
>
> And then, of course, the icing on the cake, which I did not have in my first visit, by the way, is that he grew coccidioidomycosis. So, I think it is unequivocal that this gentleman had coccidioidomycosis as his initial, and only disease, and it is a farfetched stretch without clinical data to support that he had another disease that resulted in him getting treated with Prednisone that immunosuppressed him more so he came out with coccidioidomycosis. For him to come out with coccidioidomycosis he already had it. It is clear it was present before.

6/14/10 Tr. at 104, 105.

Paul L. Bollyky, M.D., is certified as a qualified specialist in internal medicine and infectious diseases. As did Dr. Goss, Dr. Bollyky treated Mr. Gorre for the condition that is here at issue. The physician confirmed that the claimant suffered from Valley Fever. He was unsure whether Mr. Gorre ever suffered from the pneumonia that Dr. Goss diagnosed. Dr. Bollyky noted that the symptoms of Valley Fever may be misdiagnosed as a respiratory disease because the symptoms of the infectious disease and of respiratory illnesses are similar.

Emil J. Bardana, Jr., M.D., holds credentials from the American Boards of Internal Medicine and Allergy and Immunology. He reviewed a complete set of Mr. Gorre's records in October 2009. Dr. Bardana described the medical records he reviewed as much more comprehensive than the ones Dr. Goss and Dr. Johnson reviewed, as, he said, were the records he read regarding where Mr. Gorre had lived and his history of travel. The doctor concluded that Mr. Gorre developed only one disease, Valley Fever, which is an infectious disease, and that he did not contract any eosinophilic lung, or respiratory disease caused by a harmful exposure during the course of his job as a firefighter. Dr. Bardana stated that unless a firefighter's breathing apparatus either fails or comes off, "[e]osinophilic lung disease in firefighters is almost a non-issue." 6/24/10 Tr. at 57.

Dr. Bardana determined that Mr. Gorre's travel history was a critical factor in determining when he was exposed to the Valley Fever organism. He concluded that the claimant was probably exposed to the organism during his trip to Nevada in November 2005. By way of explanation, Dr. Bardana outlined Mr. Gorre's medical history after he returned from Nevada. In December 2005, the claimant had a three or four day episode during which he had an acute febrile

illness demonstrated by a fever, muscle pains, arthralgias, sweats, sore throat and headache. The symptoms recurred in January and May 2006. When he experienced another episode in June 2006, Mr. Gorre sought medical treatment.

The infectious disease specialist said that between June 2006 and February 2007, Mr. Gorre developed an allergic response or hypersensitivity caused by Valley Fever. The witness noted that of all of the doctors who participated in treating Mr. Gorre during that time, only Dr. Goss steadfastly thought the claimant had a distinct respiratory disease. Dr. Bardana noted that the steroids with which Dr. Goss treated Mr. Gorre improved the claimant's hypersensitivity response but did not address his primary illness of Valley Fever. That condition, which Dr. Bardana concluded caused all of Mr. Gorre's symptoms, not only did not respond to the steroids, the infectious disease "actually flourished and became disseminated, and he later required antifungal therapy." 6/24/10 Tr. at 24.

The Theory of Royce H. Johnson, M.D.

Royce H. Johnson, M.D., enjoys certification as a specialist by his peers in the American Board of Internal Medicine and in a subspecialty of infectious diseases. He promoted the second theory of proximate cause that Mr. Gorre advanced. Dr. Johnson postulated that the claimant's exposure to the Valley Fever organism happened when a vehicle drove through the Tacoma area after having been in one of the southwestern areas of the United States in which the organism is endemic. The vehicle, he thought, probably caught fire on Interstate 5, and Mr. Gorre responded to the scene where he contracted the disease during the course of his employment.

Dr. Johnson was unaware that Mr. Gorre had lived in California.

We find Dr. Johnson's theory of causation to be highly improbable.

Payam Fallah Moghadam, Ph.D., is a mycologist, whose occupation involves the study of organisms. He said that the organism that causes Valley Fever would have immediately died if it was carried to an environment such at Washington's. He also averred that the organism cannot survive fires that reach temperatures of more than 130 degrees F. Both of these factors detract from the persuasiveness of Dr. Johnson's theory.

By far, a preponderance of the persuasive evidence leads us to conclude that Mr. Gorre did not contract a respiratory disease that distinctive conditions of his employment as a firefighter naturally and proximately caused. He contracted an infectious disease because of his exposure to the Valley Fever organism that did not happen during the course of his employment for the City of Tacoma.

FINDINGS OF FACT

1. On April 26, 2007, the claimant, Edward O. Gorre, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged that he contracted an occupational disease that distinctive conditions of his employment with the City of Tacoma Fire Department naturally and proximately caused. The Department rejected the claim for benefits on August 13, 2007, for the stated reason that Mr. Gorre did not provide it with a physician's report or medical proof. In its order the Department also informed Mr. Gorre that he had the right to file another claim with the Department so long as he filed it within one year of the date he was injured. The City of Tacoma protested the order on September 6, 2007. On February 11, 2008, the Department held the August 13, 2007 order in abeyance and rejected Mr. Gorre's claim for benefits because there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury he alleged, and the condition was not caused by an industrial injury event or occupational disease process. Mr. Gorre protested the order on February 20, 2008. On March 26, 2008, the Department allowed Mr. Gorre's claim for an occupational disease that the Department described as interstitial lung disease, nodular with eosinophilia and granulomatous disease with possible sarcoid. The Department held the order in abeyance one day later. On March 24, 2009, the Department canceled the March 26, 2008 order and rejected Mr. Gorre's claim for benefits because there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury he alleged, and the condition was not caused by an industrial injury event or occupational disease process. Mr. Gorre filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the March 24, 2009 Department order on April 8, 2009. On May 7, 2009, the Board agreed to hear the appeal, and under Docket No. 09 13340, it issued an Order Granting Appeal.

2. In 2000, Mr. Gorre began working as an EMT for the City of Tacoma's Fire Department. From that time through April 2007, by far the majority of the claimant's work duties involved EMT work. The City of Tacoma hired Mr. Gorre as a firefighter on March 17, 2007.

3. Mr. Gorre was exposed to the organism that causes Valley Fever when he took a golfing trip to Nevada in November 2005.

4. Valley Fever is an infectious disease.

5. Mr. Gorre became symptomatic from Valley Fever in December 2005.

6. Mr. Gorre did not contract any respiratory condition that distinctive conditions of his occupation as a firefighter for the City of Tacoma naturally and proximately caused.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter of and the parties to this appeal.

2. During the course of his employment with the City of Tacoma's Fire Department, Mr. Gorre did not develop any disabling medical condition that the provisions of RCW 51.32.185 mandate be presumed to be an occupational disease.

3. Mr. Gorre did not incur any disease that arose naturally and proximately from distinctive conditions of his employment with the City of Tacoma's Fire Department.

4. The March 24, 2009 order of the Department of Labor and Industries is correct and is affirmed.

Dated: December 8, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY, Chairperson

FRANK E. FENNERTY, JR., Member

LARRY DITTMAN, Member

Appendix C

11-2-05064-1 38668750 JD 06-12-12

FILED
DEPARTMENT 17
IN OPEN COURT
JUN 08 2012
PIERCE COUNTY
By

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

EDWARD O. GORRE, Plaintiff, v. CITY OF TACOMA AND DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendants.	NO: 11-2-05064-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditors:	State of Washington Department of Labor and Industries and the City of Tacoma
2. Judgment Debtor:	Edward O. Gorre
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees to Department:	$200.00
6. Statutory Attorney Fees to City of Tacoma:	$200.00
7. Costs payable to the City of Tacoma:	~~$830.30~~ & mot LG
8. Other Recovery Amounts:	$0

ORIGINAL

OFFICE OF THE ATTONRNEY GENERAL
1250 Pacific Ave, Suite 105
P.O Box 2317
Tacoma, WA 98401
(253) 593-5243

3. Final Judgment is entered in favor of Boeing against Plaintiff in the amount of $21,985.19 for attorneys' fees and costs.

4. Post-judgment interest shall accrue on the foregoing amount from the date hereof at twelve percent (12%) per annum.

DONE IN OPEN COURT this 15th day of May, 2012.

GEORGE F.B. APPEL
Snohomish County Superior Court Judge

Presented By:

PRATT, DAY & STRATTON, PLLC

By: Nancy Thygesen Day
Nancy Thygesen Day, #11797
Attorneys for Defendant
The Boeing Company

PRATT, DAY & STRATTON, PLLC
2102 N. PEARL STREET, SUITE 204
TACOMA, WASHINGTON 98406
(253) 573-1441 (TACOMA)
(206) 467-6820 (SEATTLE)
FACSIMILE: (253) 572-5570

9. Principal Judgment Amount shall bear interest at 0% per annum.

10. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

11. Attorney for Judgment Creditor, Department of Labor & Industries: Pat L. DeMarco, Assistant Attorney General

12. *Attorney for Judgment Creditor,* City of Tacoma: *Marne J. Horstman*

13. Attorney for Judgment Debtor: Ron Meyers

This matter came on regularly before the Honorable Ronald C. Culpepper, in open court on March 30, 2012. The Plaintiff, Edward Gorre, appeared by his counsel, Ron Meyers; The Defendant, City of Tacoma was represented by its attorneys, Pratt, Day & Stratton PLLC, per Marne J. Horstman; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Robert M. McKenna, Attorney General, per Pat L. DeMarco, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on June 7, June 14, June 25, and July 26, 2010, and the testimony of other witnesses was perpetuated by deposition.

Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on October 1, 2010, from which Plaintiff and the Self-insured Employer filed timely Cross Petitions for Review on October 14, 2010, for Plaintiff and November 18, 2010 for the City of Tacoma. On December 8, 2010, the Board, having considered the Cross Petitions for Review, granted review to add Findings of Fact and Conclusions of Law to clarify why Mr. Gorre's medical condition cannot be presumed to be an occupational disease under the provisions of RCW 51.32.185, and to briefly explain why the Board concluded that Mr. Gorre did not satisfy his burden of proof. The Board's Decision and Order was issued on December 8, 2010.

Plaintiff thereupon timely appealed the Board's December 8, 2010 order to this Court.

OFFICE OF THE ATTONRNEY GENERAL
1250 Pacific Ave, Suite 105
P.O Box 2317
Tacoma, WA 98401
(253) 593-5243

1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts Nos. 1 through 6 of the December 8, 2010 Decision and Order issued by the Board of Industrial Insurance Appeals.

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

II. CONCLUSIONS OF LAW

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

2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 4 of the December 8, 2010 Decision and Order issued by the Board of Industrial Insurance Appeals.

2.3 The Board's December 8, 2010 Decision and Order is correct and is affirmed.

2.4 The March 24, 2009 Department order which set aside a March 26, 2008 order and rejected Mr. Gorre's claim because there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury alleged, the condition was not the result of an industrial injury as that term is defined in RCW 51.08.100, and the condition was not an occupational disease within the meaning of RCW 51.08.140 is correct and is affirmed.

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

III. JUDGMENT

3.1 The December 8, 2010 Board of Industrial Insurance Appeals Decision and Order which affirmed the Department of Labor and Industries March 24, 2009 order, be and the same is hereby affirmed.

3.2 The Defendant City of Tacoma is awarded, and the Plaintiff is ordered to pay, costs and disbursements herein in the amounts of $830.30 as set forth in the City of Tacoma's Cost Bill pursuant to RCW 4.84.010 and RCW 4.84.090. MJH LG

3.3 The Defendant City of Tacoma is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00 pursuant to RCW 4.84.080. The Defendant Department of Labor & Industries is also awarded, and the Plaintiff is ordered to pay a statutory attorney fee of $200.00.

///

finding of fact 1.3: Mr. Gorre was not a smoker. Mr. Gorre had coccidioidomycosis. Mr. Gorre did not have separate diseases of eosinophilia or interstitial lung disease. Mr. Gorre's symptoms were manifestations of his coccidioidomycosis. MJH LG

///

///

///

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Ave, Suite 105
P O Box 2317
Tacoma, WA 98401
(253) 593-5243

3.4 The Department and the City of Tacoma are awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 8th day of June, 2012.

RONALD C. CULPEPPER
Judge

Presented by:
ROBERT M. McKENNA
Attorney General

Pat L. DeMarco, WSBA #16897
Assistant Attorney General

FILED
DEPARTMENT 17
IN OPEN COURT
JUN 08 2012
PIERCE COUNTY, Clerk
By

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

Ron Meyers WSBA # 16897
Attorney for Plaintiff,
Edward O. Gorre

Pratt, Day& Stratton, PLLC

Marne J. Horstman
WSBA # 27339
Attorney for the Defendant,
City of Tacoma

NO. 43621-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EDWARD O. GORRE,

Appellant,

v.

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

Respondents.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on January 4, 2013, she caused to be served the Brief of Respondent and this Certificate of Service in the below-described manner:

Via First Class United States Mail, Postage Prepaid to:

Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

ORIGINAL

Ron Meyers, Kenneth Gorton, Tim Friedman
Ron Meyers & Associates PLLC
8765 Tallon Ln NE Suite A
Lacey, WA 98516

Marne J. Horstman
Pratt Day & Stratton PLLC
2102 N. Pearl Street, Suite 204
Tacoma, WA 98406-2550

Signed this 4th day of January 2013, in Seattle, Washington by:

ROBIN E. HANEY
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740