

FILED  
Court of Appeals  
Division II  
State of Washington  
12/13/2019 2:07 PM

No. 53761-3-II

DIVISION II OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

CALVIN JOHNSON,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Appellant.

---

RESPONDENT'S BRIEF

---

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

Ron Meyers & Associates, PLLC  
8765 Tallon Ln. NE, Suite A  
Olympia, WA 98516  
(360) 459-5600

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. ISSUES ..... 3

III. STATEMENT OF FACTS ..... 3

IV. LEGAL ANALYSIS ..... 8

    A. The Department’s denial of FF Johnson’s application to reopen his RCW 51.32.185 presumptive occupational disease claim involved the presumption in RCW 51.32.185, and that determination was appealed to the Board. Attorney fees under RCW 51.32.185(9) apply. .... 10

    B. The Board’s Decision & Order was not appealed by the Department and is final. The Board’s Decision & Order reversed the Department’s denial of FF Johnson’s application to reopen his previously-closed presumptive heart claim. The Board’s Decision & Order allowed FF Johnson’s reopening claim for benefits ..... 15

        1. The Boards Decision & Order is the "final decision" . 16

        2. The Decision & Order allowed the claim for benefits 16

            a. The Department’s construction injects language into the statute that does not exist and fundamentally changes the statute ..... 16

            b. The phrase "the claim for benefits" includes an application to reopen a claim. The Department's parsing of the statute's use of the word "the" and the phrase "the claim" does not result in changing the protection to firefighters who prevail on an appeal in an reopening claim involving the presumption of

	occupational disease .....	19
	c. Obtaining a final decision that grants the application to reopen claim is obtaining claim allowance .....	22
	d. Liberal construction applies and is mandated .	24
C.	Attorney Fees .....	26
V.	CONCLUSION .....	27

TABLE OF AUTHORITIES

**Cases**

*Bryant v. Dep't of Labor & Indus.*  
173 Wash. 240, 247–48, 22 P.2d 667 (1933) . . . . . 22

*Castro v. Stanwood Sch. Dist. No. 401*  
151 Wash. 2d 221, 224, 86 P.3d 1166 (2004) . . . . . 8

*Cockle v. Dep't of Labor & Indus.*  
142 Wash. 2d 801, 811, 16 P.3d 583, (2001) . . . . . 25

*Dennis v. Dep't of Labor & Indus.*  
109 Wash.2d 467, 470, 745 P.2d 1295 (1987) . . . . . 25

*Double D Hop Ranch v. Sanchez*  
133 Wash.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997) . . . . . 25

*Eastwood v. Dep't of Labor & Indus.*  
152 Wash. App. 652, 657, 219 P.3d 711 (2009) . . . . . 5, 13, 23

*Grimes v. Lakeside Indus.*  
78 Wash. App. 554, 561, 897 P.2d 431 (1995) . . . . . 13

*Hubbard v. Dep't of Labor & Indus. of State of Washington*  
140 Wash. 2d 35, 39, 992 P.2d 1002 (2000) . . . . . 18

*LaCoursiere v. Camwest Dev., Inc.*  
181 Wash. 2d 734, 742, 339 P.3d 963 (2014) . . . . . 12

*Ma'ae v. Washington Dep't of Labor & Indus.*  
8 Wash.App 2d 189, 200, 438 P.3d 148 (2019) . . . . . 18, 23

*Nw. Animal Rights Network v. State*  
158 Wash. App. 237, 245, 242 P.3d 891 (2010) . . . . . 19, 26

*Singletary v. Manor Healthcare Corp.*  
166 Wash. App. 774, 783, 271 P.3d 356 (2012) ..... 17

*Solven v. Dep't of Labor & Indus., State of Wash.*  
101 Wash. App. 189, 198, 2 P.3d 492 (2000) ..... 23

*Spivey v. City of Bellevue*  
187 Wash. 2d 716, 741–42, 389 P.3d 504 (2017) ..... 1, 7, 13, 14, 15

*Weaver v. City of Everett*  
450 P.3d 177, 181 (2019) ..... 8, 23

**Statutes**

RCW 51 ..... 20, 25

RCW 51.08.140 ..... 3

RCW 51.12.010 ..... 2, 17

RCW 51.28.010 ..... 21

RCW 51.28.040 ..... 19

RCW 51.32.160 ..... 20, 21, 23

RCW 51.32.160(1) ..... 5, 13

RCW 51.32.160(1)(a) ..... 23

RCW 51.32.185 ..... 1, 3, 4, 7, 8, 9, 10, 11, 13, 14  
15, 16, 17, 24, 25, 26, 27

RCW 51.32.185(1)(b) ..... 11, 12

RCW 51.32.185(9) ..... 10, 17, 19, 22, 23, 24, 27

RCW 51.32.185(9)(a) .....	2, 3, 6, 8, 10, 15
RCW 51.32.185(9)(b) .....	2, 26
RCW 51.52.130 .....	26
ECW 51.52.130(2) .....	26
<b>Other Authority</b>	
RAP 18.1 .....	26
WAC 296-14-400 .....	19
WAC 296-14-420 .....	21
WAC 296-14-420(3)(a) .....	21

## I. INTRODUCTION

Calvin Johnson, a career firefighter, was suffering from heart problems. He filed an application to reopen his prior claim that had been allowed as a presumptive occupational disease under RCW 51.32.185. In his reopening claim, the Department had denied his application to reopen on the basis of causation. The purpose of the presumptive disease statute is to relieve the firefighter of the unique problems of proving causation. *See Spivey v. City of Bellevue*, 187 Wash. 2d 716, 741–42, 389 P.3d 504 (2017).

Calvin Johnson appealed the Departments' denial order to the Board. At the Board, the Department made concerted efforts to blame Calvin Johnson's heart problem on a non-occupational preexisting condition and claimed that his heart problem was not experienced within the time-frames (72 hours and 24 hours) set forth in the presumptive disease statute to qualify as a presumptive occupational disease and was not within the presumption of occupational disease – i.e. a defense based on causation.

Calvin Johnson prevailed at the Board and his reopening claim was allowed. The Proposed Decision & Order was adopted by the Board, was not appealed and is the final order. This final order allowed Calvin Johnson's reopening claim for benefits.

Calvin Johnson is entitled to recover reasonable attorney fees and

costs of the appeal to the Board (and now the Court), under RCW 51.32.185(9)(a) and (b).

RCW 51.32.185(9)(a) states that “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 [. . .] by the opposing party.”

The Department has appealed the Superior Court’s order awarding Calvin Johnson reasonable attorney fees and costs.

Calvin Johnson appealed a determination involving the presumption and the final decision allowed his reopening claim for benefits. This tracks directly with the fee provision of the presumptive disease statute.

The Department’s desired outcome is based on injecting language into the presumptive disease statute that does not exist and construing the statute narrowly (so narrowly as to distort it).

The Superior Court chose not to defy RCW 51.12.010 and decades of Supreme Court decisions affirming the mandate that court shall construe the IIA liberally, with all doubts to be resolved in favor of the injured worker.

## II. ISSUES

Should the trial court's order awarding FF Johnson reasonable attorney fees and costs of his appeal on his reopening claim, under RCW 521.32.185, be affirmed where this case tracks the fee provision of RCW 51.32.185(9)(a) because it was an appeal to the Board from a determination involving the presumption and the final decision allowed the claim for benefits? YES.

## III. STATEMENT OF FACTS

Calvin Johnson, a career firefighter, suffered a heart problem occurring on April 15, 2015. *CP 21*. Firefighter Johnson ("FF Johnson") was pulling fire hoses off of a firetruck. *CP 21*. Fellow firefighter Michael O'Neil observed FF Johnson's pale pallor. *CP 21*. FF Johnson left the firehouse. *id*. He was tired, worn out, huffing and puffing. *CP 21*. He could not catch his breath and he stated getting a pain in his right shoulder. *CP 21*. The pain became so excruciating that he went to Saint Anthony's Hospital. *id*. A stent was placed in his heart on April 16, 2015. *CP 22*.

Five days later, FF Johnson filed an application for benefits. *CP 22*. For FF Johnson, there exists a prima facie presumption that 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 are occupational diseases under RCW 51.08.140. *See RCW 51.32.185*.

The Department allowed the claim as an occupational disease under

the presumptive occupational disease statute RCW 51.32.185. *CP 21.*

After claim closure, FF Johnson returned to work in a light-duty capacity, but continued to feel a vague dull ache in his back, quicker shortness of breath with exercise and the consistent hallmark of his heart problem: pain at the right shoulder blade. *CP 22.* FF Johnson presented with symptoms of shoulder pain consistent with the objective findings of a positive angiogram, positive enzymes indicating further heart damage, episodes of ischemia, rupture of plaque and stenting in February, 2016. *CP 25.* He testified that the cath lab identified a failure in a graft and the need for two additional stents in February, 2016. *CP 22.*

On December 13, 2016, FF Johnson filed an Application to Reopen Claim. *CP 162.* The Department admits to denying reopening based on a determination that the objective worsening was “[u]nrelated to the condition for which the claim was allowed, by order dated December 21, 2016.” – i.e. based on causation. [Bold added]. *CP 162.* FF Johnson protested that order.

The Department not only denied FF Johnson’s Application to Reopen based on causation, but after the protest, the Department requested a medical review by a cardiologist, to determine whether there was worsening in his previously allowed heart condition, and if so, **whether it was related** to the April 15, 2015 myocardial infarction. *CP 161-162.*

Based in part on the opinion of the Department's medical reviewer, the Department affirmed its denial of FF Johnson's Application to Reopen Claim. *CP 163*.

FF Johnson had to appeal to the Board and litigate against the Department to obtain allowance of his reopening claim for a worsening of his presumptive occupational disease.

At the Board, the Department opposed FF Johnson's reopening claim on the basis of causation. The Department blamed his heart condition on preexisting atherosclerosis, not his occupation - - i.e on causation. *See Certified Appeal Board Record page 255 (entire brief at App A hereto)*.

The Proposed Decision & Order was later adopted by the Board, and therefore will be referred to as the Board's Decision & Order. *CP 27*.

The central issue in FF Johnson's reopening claim was proximate cause of his heart condition.

The only reason that FF Johnson's reopening claim was on appeal to the Board was because the Department denied his application based on causation. "[. . .] RCW 51.32.160(1) allows a claim to be reopened for aggravation of [. . .] an **occupationally-related** condition." [Bold added]. *Eastwood v. Dep't of Labor & Indus.*, 152 Wash. App. 652, 657, 219 P.3d 711 (2009).

In its Decision & Order, the Board states: “Whether a heart condition resulting from employment activities which give rise to a need for surgery is an aggravation of an occupational disease for which prior claims were filed, or a new occupational disease, is a question of proximate cause.” *CP 22*

The Board also noted that “[T]he Department seeks to limit the allowance to a myocardial infarction and then deny as not proximately caused by a myocardial infarction, based on the testimony of Dr. Robert G. Thompson.” *CP 23*.

After a full hearing on the merits, FF Johnson prevailed at the Board and **his reopening claim was allowed**. The Board determined that the Department’s order (affirming denial of the Application to Reopen) was incorrect and is reversed. *CP 25*.

The Board’s Decision & Order states: “This matter is remanded to the Department of Labor and Industries to grant the application to reopen the claim.” *CP 25*.

FF Johnson won claim allowance on appeal to the Board in a case that involved the statutory presumption of occupational disease.

After prevailing at the Board on his reopening claim, FF Johnson moved to recover attorney fees and costs, as is his right under RCW 51.32.185(9)(a). *CP 32-43*. After the Board denied FF Johnson’s motion

(CP 5-6), FF Johnson appealed that decision to the Superior Court. *CP 1-3*.

In the Superior Court FF Johnson filed a motion for summary judgment. *CP 8-14*. FF Johnson properly identified that the claim in this matter was the claim to allow benefits to a firefighter by reopening his closed RCW 51.32.185 presumptive occupational heart problem claim. *CP 11*.

FF Johnson correctly pointed out in his reply brief on his MSJ in the Superior Court that “[T]he outcome of this matter is that Plaintiff’s request to re-open his RCW 51.32.185 presumptive occupational heart problem [claim] **has been allowed**, under RCW 51.32.185. The Plaintiff will now be able to receive medical treatment and other benefits, up to and including pension and line of duty death benefits for his heart problem. **None of those benefits would confer unless the claim had been allowed.** This claim has been allowed for benefits and the Board’s decision has become final.” [bold in original]. *CP 178*.

The Superior Court granted FF Johnson’s motion for summary judgment. *CP 185-189*. The Department now appeals the Superior Court’s order. The Superior Court’s order is rooted in the Supreme Court’s opinion in the presumptive occupational disease case *Spivey v. City of Bellevue, id.*, well-settled precedent to interpret the IIA liberally with all doubts in favor of the injured worker, and the presumptive occupational disease statute itself,

RCW 51.32.185.

The superior court was correct: “When obligated to construe the statute liberally in favor of the worker, this court disagrees with the Department’s analysis that an application to reopen a claim does not entitle a worker to receive attorney fees and costs incurred while pursuing reopening of the claim. This strict interpretation of the law would prevent workers with aggravated injuries the opportunity for adequate legal representation, and thereby, as was the case here, deny the worker entitled benefits and diminish his compensation. The plaintiff is entitled to attorney fees and costs under the appeal.” *Superior Court’s Order, at CP 188.*

#### IV. LEGAL ANALYSIS

The standard of review on appeal of a summary judgment order is de novo. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wash. 2d 221, 224, 86 P.3d 1166 (2004). Interpretation of a statute is a matter of law subject to de novo review. *id.* Here, because there is no genuine issue of material fact and FF Johnson is entitled to judgment as matter of law, summary judgment was proper. *Weaver v. City of Everett*, 450 P.3d 177, 181 (2019).

The Department argues that FF Johnson is not entitled to attorney fees and costs under RCW 51.32.185(9)(a) - - despite prevailing (after appeal and a full hearing at the Board) in reopening his presumptive occupational disease

claim. The crux of the Department's argument is two-fold: (1) The Department argues that FF Johnson's reopening claim did not "involve" the presumption of occupational disease in RCW 51.32.185, and (2) The Department argues that the presumptive disease statute's language of "final decision allows the claim for benefits" only applies to initial claims and not reopening claims.

This argument fails. First, it is inconsistent with the facts. The presumption in RCW 51.32.185 was at the center of this reopening claim. Second, the only way to arrive at the Department's position is to contort the presumptive disease statute and violate of the long-established mandate to construe the IIA liberally, with all doubts in favor of the injured worker.

The trial court got it right: "When obligated to construe the statute liberally in favor of the worker, this court disagrees with the Departments's analysis that an application to reopen a claim does not entitle a worker to recovery attorney fees and costs incurred while pursuing reopening of the claim. This strict interpretation of the law would prevent workers with aggravated injuries the opportunity for adequate legal representation, and thereby, as was the case here, deny the worker entitled benefits and diminish his compensation." *CP 188*.

**A. The Department’s denial of FF Johnson’s application to reopen his RCW 51.32.185 presumptive occupational disease claim involved the presumption in RCW 51.32.185, and that determination was appealed to the Board. Attorney fees under RCW 51.32.185(9) apply.**

In this reopening claim, a determination “involving” the presumption was appealed to the Board, and the final decision allowed the claim for benefits. This case tracks directly with the fee section of the presumptive disease statute - RCW 51.32.185(9).

The Department defines involve as meaning “to relate closely: CONNECT.” *App. Br. 16*. That definition supports the affirmation of the Superior Court’s order. Using that definition, RCW 51.32.185(9)(a) would read: “When a determination relating closely to 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 [. . .] by the opposing party.”

The presumption of occupational disease in RCW 51.32.185 was a centerpiece of this reopening claim. At the Board, FF Johnson filed a motion for summary judgment seeking among other relief allowance of his application to reopen. *Certified Appeal Board Record page 285-293 and Appendix B hereto*. The presumption in RCW 51.32.185 was central to that

motion. *id.* The Department filed an opposition brief. *Certified Appeal Board Record, pages 250-262, and App. A hereto.* The Department's opposition revolved around its argument that FF Johnson's heart condition was **non-occupational**. *id.*

The Department's defense was that FF Johnson's heart condition in his reopening claim was from preexisting atherosclerosis – and **was not experienced within the time-frames (72 hours and 24 hours) set forth in the presumptive disease statute to qualify as a presumptive occupational disease.** *See Certified Appeal Board Record page 255 (entire brief at App A hereto).* The Department's opposition to the Motion for Summary Judgment at the Board states in pertinent part:

The presumption of occupational disease applies to heart conditions “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.” RCW 51.32.185(1)(b). Mr. Johnson's heart condition that occurred within these conditions was a myocardial infarction, which is what the Department allowed. **His preexisting atherosclerosis does not fall within the conditions of the statute, as it is a process that takes place over many years, and is not just experienced within 72 hours of exposure to smoke fumes or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities.”**

[bold added]. *id.*

The Department argued to the Board that FF Johnson's heart

condition on reopening was “**experienced outside of employment as a firefighter**” [bold added] and was “**beyond the specific timelines included in RCW 51.32.185(1)(b)**” [bold added] and was a worsening of preexisting coronary disease, unrelated to the myocardial infarction, and was **not within the presumption of occupational disease**. *See Certified Appeal Board Record pages 253, 257-258, (entire brief at App A hereto).*

The presumption is not limited to myocardial infarction, but applies to “any heart problems”. Even the Board invoked the presumptive occupational disease statute, and concluded in its Decision & Order that “[T]he preponderance of the evidence was persuasive that **Mr. Johnson’s condition was a heart problem within the meaning of RCW 51.32.185** that worsened or became aggravated between January 21, 2016 and May 26, 2017, within the meaning of RCW 51.32.160.” [bold added]. *CP 21.*

The Department’s interpretation of the presumptive disease statute is employer-skewed and inconsistent with the legislature’s purpose of that statute. The Court shall adopt the interpretation which best advances the legislative purpose. *See LaCoursiere v. Camwest Dev., Inc.*, 181 Wash. 2d 734, 742, 339 P.3d 963 (2014) (“Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose.”)

The purpose of RCW 51.32.185 is to relieve a firefighter of the problems of proving that firefighting caused his or her disease. *See Spivey v. City of Bellevue, id.*, at 741–42.

FF Johnson was forced to litigate at the Board the issue of whether his heart problem in his reopening claim was part of his presumptive heart problem for which he obtained his initial claim allowance. *CP 21-25*.

If FF Johnson proved that a disease was aggravated, but could not prove that it was an occupationally-related disease that was aggravated, then he would lose his reopening claim.

“As noted above, RCW 51.32.160(1) allows a claim to be reopened for aggravation of[. . .] an **occupationally-related** condition.” [Bold added].

*Eastwood v. Dep't of Labor & Indus., id.*, at 657. “To prevail on an aggravation claim, a claimant must prove through medical evidence that (1) the **industrial injury caused the aggravation** and (2) his condition became aggravated during the time between the first and second terminal dates.” [bold added]. *Grimes v. Lakeside Indus.*, 78 Wash. App. 554, 561, 897 P.2d 431 (1995).

In *Spivey v. City of Bellevue, id.*, the Supreme Court noted that the fee subsections of RCW 51.32.185 specifically address attorney fees in “**cases involving**” the firefighter presumption. [bold added]. *id.*, at 740.

Here, FF Johnson's appeal "involved the presumption." He was forced to appeal the Department's denial of his application to reopen - a denial based on the Department's claim that his heart condition was "unrelated" to his presumptive occupational disease. On the appeal to the Board, the Department (1) argued that FF Johnson's heart condition on reopening does not "fall within the conditions of the statute", (2) blamed his heart condition on reopening on a "preexisting atherosclerosis", (3) quoted from the presumptive occupational disease statute, and (4) argued to the Board that his heart problem on reopening was experienced outside of employment as a firefighter and beyond the timelines set forth in the presumptive occupational disease statute for presumed heart problems.

The Board's Decision & Order pointed out that FF Johnson's condition "[w]as a heart problem **within the meaning of RCW 51.32.185** that worsened or became aggravated [. . .]" [bold added]. *CP 21*.

The Supreme Court awards attorney fees in industrial insurance cases in order to guarantee the injured worker adequate legal representation in presenting his claim on appeal without the incurring of legal expense or the diminution of his award. *Spivey v. City of Bellevue, id.*, at 741. The presumptive disease statute it reflects a strong social policy in favor of the worker. *id.*, at 721.

The Washington State Supreme Court has mandated the liberal construction of the Industrial Insurance Act in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Spivey v. City of Bellevue, id.*, at 726. The Superior Court’s ruling was consistent with the law and this mandate.

**B. The Board’s Decision & Order was not appealed by the Department and is final. The Board’s Decision & Order reversed the Department’s denial of FF Johnson’s application to reopen his previously-closed presumptive heart claim. The Board’s Decision & Order allowed FF Johnson’s reopening claim for benefits.**

The Department argues that FF Johnson cannot recover his attorney fees under RCW 51.32.185 because (according to the Department) the statutory language “final decision allows the claim for benefits” does not apply to an application to reopen the claim.

When, as here, a determination involving the presumption established in RCW 51.32.185 is appealed to the Board, the Board 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 – if the final decision (factor 1) allows the claim for benefits (factor 2). *See RCW 51.32.185(9)(a)*.

**1. The Board's Decision & Order is the "final decision".**

The Board's Decision & Order concluded that the Department's order is incorrect and is reversed, and that "[T]his matter is remanded to the Department of Labor and Industries to grant the application to reopen the claim." *CP 25*.

The Department did not file a petition for review of the proposed decision & order. *CP 27*. RCW 51.52.104 provides: "In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts."

On September 18, 2018, the Board adopted the proposed decision & order and stated in its Order Adopting Proposed Decision And Order: "The Board adopts the order and it becomes the Decision and Order of the Board. No appeal may be taken to the courts." *CP 27*. The Board's Decision & Order is the final decision on FF Johnson's application to reopen.

**2. The Decision & Order allowed the claim for benefits.**

- a. The Department's construction injects language into the statute that does not exist and fundamentally changes the statute.**

The Department argues that in RCW 51.32.185 the phrase "final

decision allows the claim for benefits” refers to the initial opening of the claim. *App. Br. 21*. There is no such limiting language in that statute. To arrive at the Department’s conclusion, the Court would either need to defy the mandate of liberate construction as set forth in RCW 51.12.010 (which is repeatedly affirmed by the Supreme Court) or inject language into the statute that does not exist.

Absence such limiting language in the statute, the Department outlined a statutory scheme and argues that from that statutory scheme, “it appears” that the phrase refers to the initial opening of the claim. There is nothing about the statutory scheme that gives support to the constraints on the presumptive disease statute being placed there by the Department.

The fee sections of RCW 51.32.185 do not use the term “original claim” or “initial claim” or “claim for occupational disease” or any other term limiting its application only to the original claim. Rather, RCW 51.32.185(9) uses the term “claim for benefits”. An application to reopen is a claim for benefits. *See Singletary v. Manor Healthcare Corp.*, 166 Wash. App. 774, 783, 271 P.3d 356 (2012), which states: “The Department enjoys broad subject matter jurisdiction to adjudicate **all** claims for workers' compensation benefits. The Department's broad subject matter jurisdiction to adjudicate **all workers' compensation claims includes applications to reopen** a closed

claim.” [bold added]. [internal citation omitted].

In *Ma'ae v. Washington Dep't of Labor & Indus.*, 8 Wash.App 2d 189, 200, 438 P.3d 148 (2019), the Court of Appeals stated: “The IIA allows an injured worker to reopen a claim for aggravation of the disability **and additional medical benefits** within seven years of the final award.” [bold added].

“A worker has the right to submit an application to reopen a claim **to obtain benefits** for aggravation of an injury.” [bold added]. *id.*, at 207.

In *Hubbard v. Dep't of Labor & Indus. of State of Washington*, 140 Wash. 2d 35, 39, 992 P.2d 1002 (2000), the Supreme Court stated: “[t]hus, a worker who experiences an “objective worsening” of an industrial injury can easily obtain an order reopening **a claim for medical benefits.**” [bold added]. The Supreme Court also stated: “The aggravation statute clearly entitles such workers to “proper and necessary medical and surgical services.”” *id.*, at 41.

If the final decision on FF Johnson’s reopening claim affirmed the Department’s denial order, then payment for medical treatment (i.e. a Title 51 RCW benefit) would not apply. The Board’s Decision & Order is final, and that final decision – on an appeal that involved the firefighter presumption – allowed FF Johnson’s reopening claim for benefits.

“If the application to reopen is granted, compensation will be paid pursuant to RCW 51.28.040.” *WAC 296-14-400*.

- b. The phrase “the claim for benefits” includes an application to reopen a claim. The Department’s parsing of the statute’s use of the word “the” and the phrase “the claim” does not result in changing the protection to firefighters who prevail on an appeal in an reopening claim involving the presumption of occupational disease.**

The Department is incorrect when it claims that the word “the” in “the claim for benefits” is limited to only “[t]he claim that a worker has alleging an occupational disease.” *App. Br. 21*. **Nowhere** in RCW 51.32.185(9) did the legislature restrict its application to only a claim alleging an occupational disease. To state otherwise is to inject language into the statute. It is not the role of the judiciary to enact law. *Nw. Animal Rights Network v. State*, 158 Wash. App. 237, 245, 242 P.3d 891 (2010).

The Department’s rationale is that “the” refers to a specific thing and the initial claim (a claim alleging an occupational disease) is a “specific thing.” *App Br. 21*. The Department has essentially defined the word “the” in a strict and narrow sense – arguing that it refers to only one type of claim for benefits – “the claim alleging occupational disease”. This is another example where the Department injects language into the statute that does not exist – or otherwise outright changes the statute.

The Department's analysis does not support the Department's conclusion. A reopening claim is also a "specific thing" (see RCW 51.32.160) **and** it is also a claim alleging occupational disease (otherwise, FF Johnson would not have prevailed, because a worker is not entitled to benefits under Title 51 RCW for diseases that are non-occupational) **and** the reopening claim becomes part of the original claim (the claim on reopening has the same claim number as the underlying claim. *See Certified Appeal Board Record p. 30 [App C hereto] and CP 29.* Under each of those scenarios, the "the" in "the claim for benefits" can and does apply to a reopening claim.

The subject to which the "the" refers is stated in the statute: the "claim for benefits". It has already been shown (above) that a reopening claim is a claim for benefits.

The Departments' argument fails to change the statute from what it says ("the claim for benefits") to what the Department wants it to say ("the claim alleging occupational disease.")

The Department also argues that Title 51 RCW "consistently uses the term 'the claim' to refer to the claim filed by the worker for the worker's injury or occupational disease, [. . .]" *App. Br. 22.*

Not one of the statutes or WACs relied on by the Department for its

argument defines “claim”, states that the use of the term “claim” is limited as the Department infers, or is even used for the purpose of discerning a difference between a claim for occupational disease and a reopening claim.

Second, the reopening statute (RCW 51.32.160) also uses the word “claim”. At section (1)(c) of RCW 51.32.160 it states in pertinent part: “The time limitation of this section shall be ten years **in claims** involving loss of vision or function of the eyes.” [bold added]. This is undeniably referring to the reopening as a claim.

In WAC 296-14-420 (the WAC on reopening claims) it states at subsection (3)(a): “The Department is required to act under this rule only if: (a) There is substantial evidence that the worker will be determined to be entitled to benefits on one of the **claims**,” [bold added]. *WAC 296-14-420(3)(a)*. This WAC uses the term “claim” in relation to an application to reopen.

Third, under the Department’s argument that the word “claim” does not apply to an application to reopen, employers would be allowed to engage in claim suppression so long as it is in a reopening claim – (because “claim” is the word used in the claim suppression statute RCW 51.28.010).

Nowhere in the presumptive disease statute is the firefighter’s right to recover attorney fees restricted to only the original claim.

c. **Obtaining a final decision that grants the application to reopen claim is obtaining claim allowance.**

The Department claims that the term “allows” in RCW 51.32.185(9) read along with the phrase “the claim for benefits” means “claim allowance” - and argues that claim allowance is only applicable to the acceptance of the initial claim for benefits for an occupational disease/industrial injury and not allowance of reopening claims.

It is a fact that in this appeal, FF Johnson obtained a final decision that allowed (not denied) his application to reopen. The application to reopen is a claim for benefits. Even the Application itself states: “Benefits may be delayed if this form is not filled out completely.” *Certified Appeal Board Record page 31, also at App C hereto*. His claim for benefits was ultimately allowed.

As far back as 1933, prevailing in a reopening claim was claim allowance: “On June 3, 1931, claimant applied for the reopening of his claim on the ground of aggravating of his injury pursuant to Rem. 1927, Supp., § 7679, paragraph (h). After investigation by the department, **the claim was allowed** and he was reclassified as permanently totally disabled as of the date of the filing of his application for the reopening of his case. *Bryant v. Dep't of Labor & Indus.*, 173 Wash. 240, 247–48, 22 P.2d 667 (1933).

In 2000, Court of Appeals, Division II stated: “Accordingly, we reverse and remand the matter to the Department for further proceedings consistent with the Board's proposed order and decision, which **allows the reopening** of Solven's **claim** for the limited purpose of determining his entitlement to additional medical services. RCW 51.32.160.” [bold added]. *Solven v. Dep't of Labor & Indus., State of Wash.*, 101 Wash. App. 189, 198, 2 P.3d 492 (2000).

In 2009 Court of Appeals, Division III stated: “As noted above, RCW 51.32.160(1)(a) **allows a claim to be reopened** for aggravation of a condition [ . . .]” [bold added]. *Eastwood v. Dep't of Labor & Indus., id.*, at 657.

In 2019, Court of Appeals, Division I stated; “The IIA **allows** an injured worker to **reopen a claim for** aggravation of the disability and **additional medical benefits** within seven years of the final award.” [bold added]. [bold added]. *Ma'ae v. Washington Dep't of Labor & Indus., id.*, at 200.

In *Weaver v. City of Everett*, 450 P.3d 177 (2019) the Supreme Court stated: “[T]he Act nowhere uses the term “claim allowance” and provides scant notice to workers that a temporary disability claim carries such stakes. See e.g., RCW 51.32.185(9) (stating that firefighters may recover costs

incurred on appeal if “the final decision allows the claim *for benefits*” [italics in original]. *id.*, at 183.

The Department is pushing for the court to adopt a restricted and narrow construction of the IIA to remove the firefighter’s recouping of his attorney fees – where the firefighter obtained a final decision in an appeal to the Board involving the presumption and even though the law requires liberal construction for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment.

**d. Liberal construction applies and is mandated.**

The Department has devoted essentially its entire opening brief to dissecting and parsing words and phrases of RCW 51.32.185(9) and relying on various extraneous resources to derive its meaning. Yet in the last section of its opening brief, the Department argues that the trial court should not have applied the mandate to liberally construe the presumptive disease statute within the IIA on the basis that the language in RCW 51.32.185 is unambiguous.

The Superior Court was tasked with interpreting a statute within the IIA to determine whether FF Johnson is entitled to recover his attorney fees on his appeal of his reopening claim. The Department wanted the trial court to construe the statute so narrowly as to deem it inapplicable even though the

language of the statute tracks directly with the facts of this case: FF Johnson appealed to the Board from a Department determination that related to or was connected with (i.e. involved) the presumption in RCW 51.32.185 and the final decision allowed his reopening claim for benefits.

“In other words, where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

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

The Department claims that “[T]he Legislature choose [sic] to have fees in the circumstances of claim allowance. The Legislature could have drafted the statute to include an award of fees for *any* final order of the Board in which the firefighter prevailed, if that was its intent.” *App. Br. 29*. Reality is that the statute does not restrict the type of final order - it just has to be (as

here) a “final decision” that allows the claim for benefits on an appeal to the Board (or Court) from a decision involving the presumption.

The Department’s argument is based on the false premise that the fee section of RCW 51.32.185 uses the term “claim allowance” and that “claim allowance” is limited to acceptance of an initial claim. None of that is written in the statute. The Department seeks to have the trial court and this Court second-guess the legislature. “It is not the role of the judiciary to second-guess the wisdom of the legislature.” *Nw. Animal Rights Network v. State*, id., at 245.

**C. Attorney fees**

This request for fees is made under authority of RAP 18.1, RCW 51.52.130, and RCW 51.32.185(9)(b).

RCW 51.52.130(2) states: “In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney’s fee shall be payable as set forth under RCW 51.32.185.”

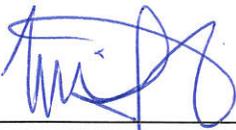
RCW 51.32.185 permits attorney fees here, as this is an appeal to the Court from a decision involving the presumption established in RCW 51.32.185. The firefighter presumption was at the heart of FF Johnson’s initial claim, was a central part of his reopening claim and is a central part of this appeal. RCW 51.32.185(9)(b) applies to appeals to any court.

## V. CONCLUSION

The Superior Court properly awarded FF Johnson attorney fees and costs, after the Department litigated his appeal from a Department determination involving the presumption, whereupon the Board's final decision allowed his claim for benefits. This directly tracks the fee provision of RCW 51.32.185(9). That statute exists to protect the firefighter. The mandate of liberal construction of the IIA exists to protect the worker. The Department's attempt to prevent the firefighter from recovering his fees and costs on appeal **requires** defiance of this mandate. This Court should affirm the Superior Court's order, and award Calvin Johnson attorneys fees and costs incurred on appeal to this court under RCW 51.32.185.

DATED: December 13, 2019

RON MEYERS & ASSOCIATES PLLC

By:   
\_\_\_\_\_  
Ron Meyers, WSBA No. 13169  
Matthew G. Johnson, WSBA No. 27976  
Tim Friedman, WSBA No. 37983  
Attorneys for Respondent firefighter

# Appendix A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**BOARD OF INDUSTRIAL INSURANCE APPEALS  
OF THE STATE OF WASHINGTON**

In Re: CALVIN JOHNSON

Docket No. 17 18177

Claim No. AX-53678

DEPARTMENT'S RESPONSE TO  
CLAIMANT'S MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION & RELIEF REQUESTED**

COMES NOW, Washington State Department of Labor and Industries (Department) by and through ROBERT W. FERGUSON, Attorney General, and LESLIE V. JOHNSON, Assistant Attorney General, and responds to the Motion for Summary Judgment brought by Calvin Johnson, the claimant. The Department was requested by the IAJ in this appeal to respond to the issues raised in the claimant's notice of appeal by November 6, 2017. The Department filed that response on that date. Apparently, that same day, the claimant filed his Motion for Summary Judgment, which the Department received November 9, 2017. A hearing on that motion has been set for November 30, 2017. Because the issues raised by Motion for Summary Judgment, as well as the standard of review on a Motion for Summary Judgment were not addressed in the Department's Response to the Issues Raised in Notice of Appeal, this response follows. The arguments contained in the Department's November 6 response to the extent they are not covered in this Response to Motion for Summary Judgment, are hereby incorporated by reference in this Response.

1 Claimant's assertion that RCW 51.32.185, including provisions for attorney fees at the  
2 Board, applies to reopening applications, is incorrect. The Board should reject claimant's  
3 argument that he is entitled to reopening as a matter of law pursuant to the presumption of  
4 occupational disease under RCW 51.32.185, and the Board should deny claimant's motion for  
5 attorney fees.

6 The medical evidence attached to the Declarations of counsel in this issue should not be  
7 admitted as evidence of the truth of the matters asserted. The Department respectfully requests  
8 that the Board of Industrial Insurance Appeals (Board) consider medical evidence attached to  
9 the Declarations included with Claimant's Motion for Summary Judgment, **not** for the truth of  
10 the matter asserted, but for the limited purpose of showing that given the conflicting opinions  
11 of the doctors who have both conducted and reviewed independent medical examinations of  
12 Mr. Johnson there exist questions of material fact. The Department respectfully requests that  
13 the Board deny the claimant's motion on the grounds that there are questions of material fact  
14 that make judgment as a matter of law inappropriate.

## 15 II. STATEMENT OF FACTS

### 16 A. Statement of Material Facts

17 This case involves the denial of an application to reopen the claim for aggravation of  
18 the claimant's heart condition, allowed pursuant to RCW 51.32.185, by order dated August 6,  
19 2015. *See* Ex. A, Declaration of Ron Meyers in Support of Claimant's Motion for Summary  
20 Judgment. The Department allowed the claim for a myocardial infarction occurring on April  
21 15, 2016. This order allowing the claim was neither protested nor appealed, and the claim  
22 allowance is final and binding on all parties, as is the condition for which the claim was  
23 allowed. The Department provided treatment and other benefits as appropriate, and when the  
24 claimant's condition was at maximum medical improvement, the Department closed the claim  
25 by order dated January 21, 2016 with no permanent partial disability award. *See* Ex. B,  
26 Declaration of Ron Meyers in Support of Claimant's Motion for Summary Judgment. There

1 was no timely protest or appeal to this order, and the determination that Mr. Johnson's  
2 condition was at maximum medical improvement and not in need of further treatment, as well  
3 as the determination that he had sustained no permanent disability from the allowed April 15,  
4 2015 myocardial infarction as of that date, are also final and binding on all parties. On  
5 December 13, 2016, Claimant filed an Application to Reopen Claim. *See Ex. C, Declaration*  
6 *of Ron Meyers in Support of Claimant's Motion for Summary Judgment.* The Department  
7 denied reopening as being unrelated to the condition for which the claim was allowed, by order  
8 dated December 21, 2016. *See Ex. E, Declaration of Ron Meyers in Support of Claimant's*  
9 *Motion for Summary Judgment.*

10 Mr. Johnson protested that order, and the Department requested an Independent Medical  
11 Review to determine whether there was worsening in Mr. Johnson's previously allowed heart  
12 condition, and if so, whether it was related to the April 15, 2015 myocardial infarction which  
13 was allowed under Claim No. AX-53678. That review was conducted by Robert G.  
14 Thompson, MD, Cardiologist. *See Ex. 1, Declaration of Leslie V. Johnson in Response to*  
15 *Claimant's Motion for Summary Judgment.* Doctor Thompson opined that Mr. Johnson has  
16 progressive atherosclerosis, a process that takes place over many years, and involves the  
17 buildup of cholesterol in the coronary arteries. "[Mr. Johnson] has a severe tendency to build  
18 up cholesterol in his coronary arteries and this is unrelated to his employment. However,  
19 occasionally marked exertion or severe fright creating a discharge of adrenaline can trigger a  
20 rupture of a cholesterol plaque in a coronary artery and be the trigger for a myocardial  
21 infarction or an episode of acute ischemia which presumably was the triggering event for his  
22 original coronary artery bypass grafting." *See Ex. 1, Declaration of Leslie V. Johnson in*  
23 *Response to Claimant's Motion for Summary Judgment, pp. 2-3.* Dr. Thompson went on to  
24 indicate that it was the underlying and unrelated progressive atherosclerosis which had  
25 worsened, not the April 15, 2015 myocardial infarction for which Mr. Johnson's claim was  
26

1 allowed. *See* Ex. 1, Declaration of Leslie V. Johnson in Response to Claimant's Motion for  
2 Summary Judgment, p.3.

3 Based at least in part on the medical opinion of Dr. Thompson, the Department affirmed  
4 the denial of the Application to Reopen Claim by order dated May 26, 2017. *See* Ex. E,  
5 Declaration of Ron Meyers in Support of Claimant's Motion for Summary Judgment.  
6 Claimant has appealed the May 26, 2017 order denying reopening of his claim.  
7

### 8 III. STATEMENT OF ISSUES

- 9 1. **Is Summary Judgment Appropriate where there are contradictory medical**  
10 **opinions on whether Mr. Johnson's worsening is related to the allowed**  
11 **condition, or the worsening of preexisting coronary disease, unrelated to the**  
12 **April 15, 2015 myocardial infarction which was allowed on this claim? NO.**
- 13 2. **Is the claimant entitled to a presumption of occupational disease under**  
14 **RCW 51.32.185(1) where the issue is reopening of the claim, and where the**  
15 **conditions which the claimant now seeks to have considered as "worsening"**  
16 **do not meet the very specific criteria for application of that presumption**  
17 **outlined in that statute? NO.**
- 18 3. **Is the claimant entitled to an award of attorney fees pursuant to RCW**  
19 **51.32.185(7)(a), where the issue on appeal is reopening, not claim**  
20 **allowance? NO.**

### 21 IV. EVIDENCE RELIED UPON

22 The Department relies upon the Declaration of Leslie V. Johnson, and the documents  
23 attached thereto, and the jurisdictional history and other pleadings contained within this  
24 tribunal's file.

### 25 V. AUTHORITY & ARGUMENT

#### 26 A. Medical Reports Should Be Admitted To Show That Material Questions of Fact Exist; Not For the Truth of the Matter Asserted.

Testimony before the Board of Industrial Appeals must conform to Superior Court Civil  
Rules and Washington Rules of Evidence. RCW 51.52.140, WAC 264-12-125. The current  
motion before this forum is a Motion for Summary Judgment. This motion is a dispositive

1 motion brought pursuant to Civil Rule 56. Facts to be considered by the judge may be submitted  
2 in declarations or affidavits and must be admissible according to the Rules of Evidence. CR  
3 56(e), *Roger Crane & Assocs., Inc. v. Felice*, 74 Wn. App. 769, 778-9, 875 P.2d 705 (1994).  
4 When inadmissible evidence is submitted the proper action is for the non-moving party to make  
5 a motion to strike the inadmissible evidence. *Mithoug v. Apollo Radio*, 128 Wn.2d 460, 463,  
6 909 P.2d 291 (1996); Commentary, 10A Wash. Practice, Civil Procedure Forms § 56.66 (3d  
7 ed.). If a party fails to object or bring a motion to strike deficiencies in affidavits or other  
8 documents in support of a motion for summary judgment, the party fails to preserve any such  
9 deficiencies. *Bonneville v. Pierce County*, 148 Wash. App. 500, 509, 202 P.3d 309 (2008).  
10

11 In the present case, the Department respectfully requests that the medical reports offered  
12 by both sides not be admitted as evidence of the truth of the matters asserted (they remain  
13 hearsay as non of the medical witnesses have testified), but only for the limited purpose of  
14 establishing that there is a material question of fact that precludes summary judgment. There is  
15 no ER 904 motion pending. In this case there are several expert witnesses who hold differing  
16 opinions about pivotal facts. This alone should preclude a judgment solely based on the law.  
17 Those opinions should be sifted, weighed, and thoughtfully considered by the trier of fact in  
18 this case. Yet in order to demonstrate this, the Department, with the resources available to it,  
19 must offer the fact that it has medical reports as well and that in addition those reports support  
20 its orders. Therefore, the Department objects to the medical information offered to prove the  
21 facts of the matters asserted; the information offered by both parties may only be used to  
22 ascertain that there are material facts at issue in this matter, which cannot be resolved as a matter  
23 of law by summary judgment.  
24  
25  
26

1           **B.     The Presumption of Occupational Disease Under RCW 51.32.185(1) Applies**  
2           **Only Under the Very Specific Conditions Outlined in That Statute.**

3           This claim was allowed as an occupational disease claim under RCW 51.32.185, because  
4           the condition arose under the very specific terms of that statute. Claimant was a firefighter as  
5           defined in RCW 41.26.030 and was covered under Title 51 RCW. Claimant experienced a heart  
6           problem – a myocardial infarction - within seventy-two hours of exposure to smoke, fumes or  
7           toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting  
8           activities. Claimant was employed as a firefighter for the requisite number of years for the  
9           presumption of occupational disease to apply. The Department appropriately allowed the  
10          myocardial infarction which was diagnosed, administered the claim, then closed the claim when  
11          the worker’s condition allowed.

12  
13          The presumption of occupational disease applies to heart conditions “experienced within  
14          seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within  
15          twenty-four hours of strenuous physical exertion due to firefighting activities”. RCW  
16          51.32.185(1)(b). Mr. Johnson’s heart condition that occurred within these conditions was a  
17          myocardial infarction, which is what the Department allowed. His preexisting atherosclerosis  
18          does not fall within the conditions of the statute, as it is a process that takes place over many  
19          years, and is not just experienced within 72 hours of exposure to smoke fumes or toxic  
20          substances, or experienced within twenty-four hours of strenuous physical exertion due to  
21          firefighting activities. Allowance of a occupational disease does not, as asserted by the claimant,  
22          automatically allow any preexisting condition, unless that preexisting condition is made worse  
23          by the occupational disease. As explained by Dr. Thompson in Attachment 1 to the Declaration  
24          of Leslie V. Johnson in Support of Response to Motion for Summary Judgment, marked exertion  
25          or severe fright creating a discharge of adrenaline can trigger a rupture of a cholesterol plaque  
26

1 in a coronary artery and this can be a trigger for a myocardial infarction. It is the myocardial  
2 infarction which is the occupational disease resulting from the strenuous exertion due to  
3 firefighting activities, not the underlying, preexisting atherosclerosis. The atherosclerosis was  
4 the preexisting systemic damage on which stress acted to cause the myocardial infarction, but  
5 the myocardial infarction did not cause or change the preexisting atherosclerosis. This is why  
6 the Department's allowance order explicitly references the claimant's April 15, 2015 myocardial  
7 infarction, and no other condition. There is no basis in the statute for applying the presumption  
8 of occupational disease to any condition which does not fall within the specific terms of the  
9 statute, nor to any stage of the administration of the claim other than the allowance of the  
10 condition as a presumptive occupational disease. RCW 51.32.185 applies when a claim is filed,  
11 and the presumption applies to claim allowance, as does the provision for an award of attorney  
12 fees at the Board. The Department applied the prima facie presumption in allowing this claim,  
13 and the provisions of RCW 51.32.185 have been met and do not control any further  
14 administration of the claim after allowance.

17 RCW 51.32.185 creates two exceptions to the general rules administering the  
18 Washington State Industrial Insurance Act. First, it creates an exception to the burden of proof  
19 for occupational disease claim allowance for firefighters, for specific diseases under specific  
20 conditions. Second, this section of Title 51 provides for an award of costs and attorney fees from  
21 the Department in firefighter presumption cases at the Board "[w]hen a determination involving  
22 the presumption established in this section is appealed to the board of industrial insurance  
23 appeals and the final decision *allows the claim for benefits*". (emphasis added). The statute is  
24 extremely specific about to whom the prima facie presumption of occupational disease applies.  
25 It specifies that the presumption only applies to firefighters as defined in RCW  
26

1 41.26.030(4)(a)(b) and (c), covered under Title 51, and firefighters employed on a full-time,  
2 fully compensated basis as a firefighter of a private sector employer's fire department that  
3 includes over fifty such firefighters. It specifies how long the firefighter must have been  
4 employed, and how long ago. And it details what specific conditions are covered by the prima  
5 facie presumption – including when those conditions must manifest in reference to the claimant's  
6 employment as a firefighter, or activities engaged in as a firefighter.  
7

8 Under the canon of construction *expressio unius est exclusio alterius*, to express one  
9 thing in a statute implies the exclusion of the other. In re Detention of Williams 147 Wash.2d  
10 476 (2002) at 491 , citing *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, (1999) at 571.  
11 Given that RCW 51.32.185 creates an exception to the general rule regarding proof of  
12 occupational disease, as well as the general rule that parties bear their own fees and costs at the  
13 Board, the statute should be narrowly interpreted to apply only where the clear and specific terms  
14 of the statute have been met. The Legislature did not include in the statute a presumption that  
15 any heart problems experienced outside of employment as a firefighter, or beyond the specific  
16 timelines included in section (1)(b) are presumed to be an occupational disease. Nor did the  
17 Legislature include language applying a presumption of relatedness to any further heart problems  
18 experienced after an initial claim for an occupationally related myocardial infarction – or any  
19 other heart problem. More specifically, the Legislature limited the presumption established in  
20 RCW 51.32.185 to claim allowance, not aggravation. Because the Legislature was very specific  
21 regarding the circumstances under which the presumption applies, other circumstances are  
22 presumed to fall intentionally outside of the plain terms of the statute. Claimant attempts to  
23 argue that liberal construction of Title 51 RCW mandates that the preexisting condition be  
24 considered part of the allowed condition, but that wouldn't just require liberal construction of  
25  
26

1 RCW 51.32.185(1), it would require that the statute be rewritten. Further, the order allowing the  
2 claim specifically allowed it for the April 15, 2015 myocardial infarction, and that order is final  
3 and binding on all of the parties.

4  
5 **C. The Claimant is Not Entitled to an Award of Attorney Fees and Costs Where**  
6 **the Board's Final Order Addresses Reopening of the Claim, Not Allowance**  
7 **of the Claim.**

8 RCW 51.32.185(7)(a) is the only exception to the general rule under Title 51 that each  
9 party bears its own fees and costs in an appeal to the Board. *See* RCW 51.52.120. Just as RCW  
10 51.32.185 is very specific regarding who is covered by the firefighter's presumption, what  
11 conditions are covered by the presumption, and under what circumstances those conditions are  
12 covered by the presumption, it is is very specific that the exception to the general rule that each  
13 party bears its own costs and fees at the Board applies when "the final decision allows the claim  
14 for benefits. In this appeal, the issue is reopening, which is mentioned nowhere in the statute.  
15 The Board's jurisdiction to issue a decision is based on the order on appeal from the Department.  
16 Since the Department's order allowing this claim for benefits is already final and binding, the  
17 Board's final order in this appeal cannot reach that issue, even if a party attempts to raise it. The  
18 Legislature could have drafted the statute to include an award of fees if the final decision allowed  
19 reopening of a claim initially allowed under the presumption. Alternatively, the Legislature  
20 could have drafted the statute to include an award of fees for any final order of the Board in  
21 which the firefighter prevailed, if that was their intent. It did neither. The plain language of the  
22 statute awards fees only where the Board's final decision allows the claim for benefits. The  
23 rules of statutory construction cannot change the plain language of RCW 51.32.185 which only  
24 includes the award of fees and costs when the Board's final decision allows the claim for  
25 benefits. Where, as here, claim allowance has already been determined, the Board's final  
26

1 decision on an aggravation application will not fall within the terms of RCW 51.32.185(7)(a),  
2 and no award of attorney fees or costs should be contemplated by the Board.

3  
4 **D. Summary Judgment is Not Appropriate Where There Are Differing Expert  
Opinions About Material Facts.**

5 The purpose of summary judgment is to examine the sufficiency of the evidence in  
6 hopes of avoiding unnecessary trials where no genuine issue of material fact exists. *Mark v.*  
7 *Seattle Times*, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981). Summary judgment is appropriate:

8 . . . if the pleadings, depositions, answers to interrogatories, and admissions on  
9 file, together with the affidavits, if any, show that there is no genuine issue as to any  
10 material fact and that the moving party is entitled to judgment as a matter of law.

11 CR 56(c).

12 A summary judgment motion will be granted if (1) there is no genuine issue as to any  
13 material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving  
14 party is entitled to judgment as a matter of law. *Peterick v. State*, 22 Wn. App. 163, 181, 589  
15 P.2d 250 (1977). **The Board must view all facts and reasonable inferences in a light most**  
16 **favorable to the non-moving party.** *Simpson Tacoma Kraft Co. v. Ecology*, 119 Wn.2d 640,  
17 646, 835 P.2d 1030 (1992); *Davis v. Niagara Mach. Co.*, 90 Wn.2d 342, 348, 581 P.2d 1344  
18 (1978).

19 In this case, regardless of whether or not Mr. Johnson's April 15, 2015 myocardial  
20 infarction was allowed as an occupational disease pursuant to RCW 51.32.185(1), Mr. Johnson  
21 would have to show worsening of his claim related condition since the January 21, 2016 order  
22 closing his claim without an award for permanent partial disability. Two medical opinions  
23 regarding the relationship of Mr. Johnson's condition when he submitted his reopening  
24  
25  
26

1 application to his allowed condition have been presented attached to the Declaration of Ron  
2 Meyers and the Declaration of Leslie V. Johnson. These differing opinions present a genuine  
3 issue of material fact which cannot be resolved by summary judgment, particularly where the  
4 Board must view all facts and reasonable inferences in the light most favorable to the  
5 Department, as the non-moving party. The question of whether Mr. Johnson's allowed heart  
6 condition has worsened can be resolved but not by repairing to the law books, because the  
7 answer is not written there. The answer is only to be found by reviewing testimony provided by  
8 the medical professionals who have reviewed the medical records and circumstances and/or the  
9 patient and opined regarding preexisting conditions, worsening, and the relationship of any  
10 worsening to the allowed condition on the claim.

11  
12 "A genuine issue of material fact exists where reasonable minds could differ on the facts  
13 controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545,  
14 552, 192 P.3d 886 (2008). The moving party bears the burden of demonstrating that there is no  
15 genuine issue of material fact. *Fitzpatrick v. Okanogan County*, 169 Wash.2d 598, 605, 238  
16 P.3d 1129 (2010).

17  
18 Viewed in the light most favorable to the Department the existence of these differing  
19 opinions prevents summary judgment. The material issues of this case must be presented to and  
20 weighed by the trier of facts.  
21

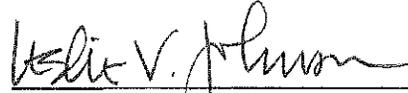
## 22 VI. CONCLUSION

23 For the reasons stated above, the Department respectfully requests that the Motion for  
24 Summary Judgment be denied. Issues of material fact exist which preclude summary judgment.  
25 The Board should also find that presumption of occupational disease to claim allowance under  
26 RCW 51.32.185 does not apply to reopening of a claim, nor does the provision for an award of

1 attorney fees and costs apply in an appeal regarding reopening of a claim. Any final Board  
2 order will not result in the allowance of the claim (which has already been allowed).  
3

4 DATED this 22nd day of November, 2017.  
5

6 ROBERT W. FERGUSON  
7 Attorney General

8 

9 

---

LESLIE V. JOHNSON  
10 Assistant Attorney General  
11 WSBA No. 19245  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of record  
3 on the date below as follows:

4  US Mail Postage Prepaid via Consolidated Mail Service

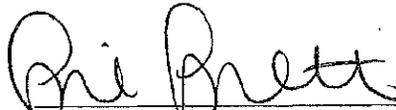
5 Ron Meyers  
6 Ron Meyers & Associates PLLC  
7 8765 Tallon Lane NE Ste A  
8 Olympia, WA 98516

8  E-file to

9 Tom Kalenius, IAJ  
10 Board of Industrial Insurance Appeals  
11 2430 Chandler Court SW  
12 Olympia, WA 98504-2401

12 I certify under penalty of perjury under the laws of the state of Washington that the  
13 foregoing is true and correct.

14 DATED this 22nd day of November, 2017, at Tumwater, Washington.

15  
16 

17 TONI HUSTON  
18 Legal Assistant  
19  
20  
21  
22  
23  
24  
25  
26

# Appendix B

1  
2  
3  
4  
5  
6 **BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**  
7 **FOR THE STATE OF WASHINGTON**

8 In re: CALVIN JOHNSON

Docket No. 17 18177

9 Claim No. AX53678

**CLAIMANT'S MOTION FOR SUMMARY  
JUDGMENT**

10  
11  
12 **I. RELIEF REQUESTED**

13 Claimant firefighter, Calvin Johnson, requests summary judgment on all issues, including attorney fees  
14 and costs based upon RCW 5132.185(7).

15 **II. STATEMENT OF FACTS**

16 This presumptive heart claim was allowed by Department order on August 6, 2015 in accordance with  
17 RCW 51.32.185. (*Exhibit A, Meyers Decl.*) The claim was closed on January 21, 2016 as "The medical  
18 records shows treatment is no longer necessary and there is no permanent partial disability." (*Exhibit B,*  
19 *Meyers Decl.*) On December 16, 2016, Claimant filed an Application to Reopen Claim due to a worsening  
20 of his accepted RCW 51.32.185 "heart problem" condition which manifested itself as the heart attack in  
21 February of 2016. (*Exhibit C, Meyers Decl.*)

22 The Claimant's attending physician, on December 13, 2016, stated (*Exhibit D, Meyers Decl.*):

23 "I think the claim from April 2015 should be reopened because the patient had persistent  
24 chest pain symptoms which were probably not resolved by the stenting in April 2015."

25 The Department denied reopening on December 21, 2016, affirmed May 26, 2017. (*Exhibit E,*  
26 *Meyers Decl.*) The Department misinterprets fact and law. The Department is wrong on both counts.

1 **IV. STATEMENT OF ISSUES**

2 Claimant requests summary judgment on the following issues:

- 3 1. Is Firefighter Johnson entitled to summary judgment as a matter of law? **YES.**
- 4 2. Did Firefighter Johnson suffer a RCW 51.32.185 presumptive occupational disease “heart
- 5 problem” in the course of his employment? **YES.**
- 6 3. Did Firefighter Johnson’s RCW 51.32.185 presumptive occupational disease “heart problem”
- 7 worsen after the January 21, 2016 closing order? **YES.**
- 8 4. Was the Department correct order correct in denying the Application to Reopen Firefighter
- 9 Johnson’s claim? **NO.**
- 10 5. Is Firefighter Johnson entitled to RCW 51.32.185(7) attorney fees and costs for defending
- 11 this presumptive occupational disease claim? **YES.**

12 **V. EVIDENCE RELIED UPON**

13 This motion is based on the declaration of Ron Meyers and exhibits thereto, the legal authority and  
14 argument set forth below, the Department of Labor & Industries’ file and all other papers filed in these matters,  
15 and the exhibits thereto. All exhibits attached to the declaration of Ron Meyers are found in the Department  
16 claim file and were relied on to make adjudicative decisions on this claim.

17 **VI. LEGAL AUTHORITY/ARGUMENT**

18 **Plaintiff is entitled to summary judgment as a matter of law.**

19 Summary judgment is proper where there are no genuine issues of material fact and the moving party  
20 is entitled to judgment as a matter of law. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013).

21 The purpose of summary judgment is to determine matters of law prior to trial. *Balise v. Underwood*,  
22 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The party moving for summary judgment bears the initial burden  
23 of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.  
24 *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 549, 909 P.2d 1303 (1996); *Young v. Key*  
25 *Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

26 When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion,

1 those facts are considered to have been established. *Central Wash. Bank v. MendelsonZeller, Inc.*,  
2 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

3 *See also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1  
4 (1986) holding that after the moving party has submitted adequate affidavits, the burden shifts to the nonmoving  
5 party to set forth specific facts sufficiently rebutting the moving party's contentions.

6 **Firefighter heart problems are not injuries - they are occupational diseases**

7 The Department continues to treat firefighter heart problems as single incidents and as industrial  
8 injuries. This is simply incorrect. RCW 51.32.185 says that firefighter heart problems are occupational  
9 diseases:

10 (1) In the case of firefighters as defined in \*RCW 41.26.030(4) (a), (b), and (c) who are  
11 covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time,  
12 fully compensated basis as a firefighter of a private sector employer's fire department that  
13 includes over fifty such firefighters, there shall exist a prima facie presumption that: (a)  
14 Respiratory disease; (b) **any heart problems**, experienced within seventy-two hours of  
15 exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of  
16 strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases  
17 **are occupational diseases under RCW 51.08.140.**

18 The statute specifically says that "heart problems" are occupational diseases. The Department is  
19 knowingly misapplying the law.

20 The Department is treating Firefighter Johnson's presumptive heart problem as a single injury rather  
21 than the occupational disease for which his claim is allowed. Claimant's heart attack in February of 2016 was  
22 a worsening of his accepted RCW 51.32.185 presumptive heart problem which resulted in the placement of  
23 stents. Claimant's original claim was allowed in accordance with RCW 51.32.185, any future heart problems  
24 can be attributable, at least in part, to the already accepted RCW 51.32.185 occupational heart problem.  
25 (*Exhibit B, Meyers Decl*). There is no dispute that Claimant has an occupational disease, the statute says so  
26 and the Department's original allowance order says so. The evidence is ~~overwhelming~~ that Claimant continued  
to have heart problems after the April 15, 2015 incident up through and beyond the heart attack in February,  
2016. Again, the Department attempts to classify this claim as an "injury", it is not.

Simply put Claimant has an accepted RCW 51.32.185 occupational disease of his heart. Since the

1 April 15, 2015 incident, Claimant was receiving treatment for the accepted condition, but he was not having  
2 a heart attack for the duration of that time. Then in February Claimant ~~approximately one month after claim~~  
3 ~~closure, his heart problem results in~~ a heart attack. Going from getting treatment for a presumptive heart  
4 problem to actually having a ~~heart attack is on its face~~ a worsening of his condition.

5 The Department's action is inconsistent with Chapter 10 of the Workers' Compensation Adjudicator  
6 Manual:

7 "The department may reopen claims for Medical Aid (MA) and Accident Fund (AF) benefits  
8 **worsened (become aggravated)** since the most recent claim closure or reopening denial  
9 (See RCW 51.32.160 and WAC 296-14-400.) [emphasis added]

10 **The Purpose Of The Industrial Insurance Act Is Remedial In Nature And Shall Be Liberally**  
11 **Construed In Favor Of The Injured Worker.**

12 The Industrial Insurance Act is the product of a compromise between employers and workers. Under  
13 the Industrial Insurance Act, employers accept limited liability for claims that might not otherwise be  
14 compensable under the common law. In exchange, workers forfeit common law remedies. *Cowlitz Stud Co.*  
15 *v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). RCW 51.04.010 provides that "sure and certain  
16 relief for workers, injured in their work, and their families and dependents is hereby provided regardless of  
17 questions of fault and to the exclusion of every other remedy."

18 The Supreme Court in *Spivey v. City of Bellevue*, 389 P.3d 504 (2/9/2017), another consolidated  
19 firefighter presumptive occupational disease claim decision recently reaffirmed the remedial nature and liberal  
20 construction of the Industrial Insurance Act:

21 The IIA is remedial in nature, and thus we must construe it "liberally . . . in order to achieve  
22 its purpose of providing compensation to all covered employees injured in their employment,  
23 with doubts resolved in favor of the worker." citing *Dennis v. Dep't of Labor and Indus.*,  
109 Wash.2d 467, 470-472, 745 P.2d 1295 (1987).

24 Here, we are asked to interpret sections of the IIA. Statutory interpretation is a question of  
25 law that this court reviews de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801,  
807, 16 P.3d 583 (2001). The IIA is remedial in nature, and thus we must construe it  
26 "liberally ... in order to achieve its purpose of providing compensation to all covered  
employees injured in their employment, with doubts resolved in favor of the worker." *Dennis*

1 v. *Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987).

2  
3 The Washington Supreme Court has stated again and again that the "guiding principle in construing  
4 the Industrial Insurance Act is remedial in nature and shall be liberally construed in order to achieve its purpose  
5 of "reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the  
6 course of employment." RCW 51.12.010. "All doubts about the meaning of the [IIA] must be resolved in  
7 favor of workers." *Dennis v. Dep't of Labor and Indus.*, 109 Wn.2d 467, 470 (1987); *Boeing Co. v.*  
8 *Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

9 And *Dennis v. Dep't of Labor and Indus.*, 109 Wash.2d 467, 470-472, 745 P.2d 1295 (1987):

10 By expressly providing that workers suffering disability from occupational disease be  
11 accorded equal treatment with workers suffering a traumatic injury during the course of  
12 employment, RCW 51.32.180 effectuates the Act's purpose of providing sure and certain  
13 relief to all workers injured in their employment. The worker whose work acts upon a  
14 preexisting disease to produce disability where none existed before is just as injured in his or  
15 her employment as is the worker who contracts a disease as a result of employment  
16 conditions. Moreover, **we have long recognized that benefits are not limited to those  
17 workers previously in perfect health.** *Groff v. Department of Labor & Indus.*, 65  
18 Wash.2d 35, 44, 395 P.2d 633 (1964); *Kallos v. Department of Labor & Indus.*, 46  
19 Wash.2d 26, 30, 278 P.2d 393 (1955); *Jacobson v. Department of Labor & Indus.*, 37  
20 Wash.2d 444, 448, 224 P.2d 338 (1950); *Miller v. Department of Labor & Indus.*, 200  
21 Wash. 674, 682-83, 94 P.2d 764 (1939).

22 It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury  
23 complained of is the proximate cause of the disability for which compensation is sought, the  
24 previous physical condition of the workman is immaterial and recovery may be had for the full  
25 disability independent of any preexisting or congenital weakness; the theory upon which that  
26 principle is founded is that **the workman's prior physical condition is not deemed the  
cause of the injury**, but merely a condition upon which the real cause operated. *Miller*, at  
682-83, 94 P.2d 764. **The worker is to be taken as he or she is, with all his or her  
preexisting frailties and bodily infirmities.** *Wendt v. Department of Labor & Indus.*, 18  
Wash.App. 674, 682-83, 571 P.2d 229 (1977).

21 Thus, we have repeatedly recognized in a long line of cases that where a sudden injury "lights  
22 up" a quiescent infirmity or weakened physical condition occasioned by disease, the resulting  
23 disability is attributable to the injury and compensation is awardable. See, e.g., *Harbor  
24 Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956);  
25 *Ray v. Department of Labor & Indus.*, 177 Wash. 687, 33 P.2d 375 (1934) (preexisting  
26 dormant arthritic condition lighted up and made active by injury). In *Harbor Plywood Corp.*,  
this court held **compensation was due where the evidence established that an industrial  
injury aggravated a preexisting nonwork-related cancer, causing acceleration of the  
employee's death due to cancer.** It would be anomalous were we to hold on the one hand  
that compensation is due under the Act where a sudden injury results in aggravation of a  
nonwork-related disease, but is not due where disability results from the progressive effect of

1 work activity on a nonwork-related disease. **In each case disability results from**  
2 **employment conditions; in each instance the worker may be equally affected, in one**  
3 **case swiftly, in the other slowly.** [emphasis added]

4 See also, *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d  
5 310 (1956) (evidence established that an industrial injury aggravated a preexisting nonwork-related cancer,  
6 causing acceleration of the employee's death due to cancer). The worker is to be taken as he or she is, with  
7 all his or her preexisting frailties and bodily infirmities. *Wendt v. Department of Labor & Indus.*, 18  
8 Wash.App. 674, 682-83, 571 P.2d 229 (1977).

#### 8 **Attorney Fees and Costs.**

9 Firefighter Johnson is entitled to the attorney fees, skilled paralegal fees, and all litigation costs incurred  
10 by the Department/Employer's resistance at the Board of Industrial Appeals. See, RCW 51.32.185(7)(b);  
11 RCW 51.52.130; and *Spivey, supra*.

12 RCW 51.32.185(7)(a) provides that "when a determination involving the presumption established in  
13 this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for  
14 benefits, the board of industrial insurance appeals *shall order that all reasonable costs of the appeal,*  
15 *including attorney fees and witness fees, be paid to the firefighter* or his or her beneficiary by the  
16 opposing party." [bold italic emphasis added]

#### 17 **RCW 51.32.185:**

18 ...  
19 (7)(a) When a determination involving the presumption established in this section is appealed  
20 to the board of industrial insurance appeals and the final decision allows the claim for benefits,  
21 the board of industrial insurance appeals shall order that all reasonable costs of the appeal,  
22 including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by  
23 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.

24 The Supreme Court in *Spivey v. City of Bellevue*, 389 P.3d 504 (2/9/2017):

25 RCW 51.32.185(7) is broader than the general provision governing attorney fees in workers'  
26 compensation cases. The general provision, RCW 51.52.130, limits recovery to "services  
before the court only." This court has held that this provision does not include fees for work  
at the Board. See, e.g., *Borenstein v. Dep't of Labor & Indus.*, 49 Wn.2d 674, 676-77, 306  
P.2d 228 (1957). However, **RCW 51.32.185(7)(b) does not contain such limiting**

1 **language. It speaks more broadly, allowing "all reasonable costs of the appeal,**  
2 **including attorney fees and witness fees."**

3 Fees incurred before the Board are reasonable "costs of appeal." This is especially true in  
4 workers' compensation cases where generally the trial is conducted on the hearing record. All  
5 witnesses are called at the board level, and the trial court may analyze only the documentation  
6 and testimony accumulated at that level. RCW 51.52.115 (stating "the court shall not receive  
7 evidence or testimony other than, or in addition to, that offered before the board"). Thus, a  
8 great deal of the "costs of appeal" are likely those that are incurred before the Board, not the  
9 trial court.

10 This result is also consistent with our obligation to construe the IIA liberally in favor of the  
11 worker. We award attorney fees in industrial insurance cases in order to "guarantee the  
12 injured [worker] adequate legal representation in presenting his claim on appeal without the  
13 incurring of legal expense or the diminution of this award." *Harbor Plywood Corp. v. Dep't*  
14 *of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co.*  
15 *v. Dep't of Labor & Indus.*, 26 Wn.2d 51, 57, 173 P.2d 164 (1946)). To refuse to grant  
16 attorney fees here, when Larson prevailed at the Court of Appeals and before this court,  
17 would result in an inadequate recovery for Larson. We affirm the Court of Appeals and  
18 uphold the attorney fees award. We also grant Larson's request for attorney fees on appeal  
19 to this court.

[Bold emphasis added]

20 The Court of Appeals written opinion in *Larson v. City of Bellevue*, 188 Wash. App. 857, 884, 355  
21 P.3d 331 (2015) states:

22 "We conclude that the plain language of "all reasonable costs of the appeal" **includes all**, and  
23 not only some, **of the costs required to succeed on a claims benefit** under the Industrial  
24 Insurance Act." [Bold emphasis added]

25 "And because RCW 51.32.185(7)(b) provides for a prevailing claimant's recovery of "all  
26 reasonable costs of the appeal" to "any court," the court properly awarded *Larson* attorney  
27 fees incurred at both the trial and Board levels."

28 Calvin Johnson respectfully requests attorney fees and costs under RCW 51.32.185(7), and is entitled  
29 to the attorney fees, skilled paralegal fees (awarded either as legal fees or litigation costs), and all litigation  
30 costs incurred by the Department's resistance at the Board of Industrial Appeals,. See, RCW  
31 51.32.185(7)(b); RCW 51.52.130; and *Spivey, supra*.

32 *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wash.App. 841 (1995):

33 "No case in Washington specifically addresses whether the time of non-lawyer personnel may  
34 be included in an attorney fee award.

35 We find persuasive the reasoning of the Arizona court in *Continental Townhouses East Unit*  
36 *One Ass'n v. Brockbank*, 152 Ariz. 537, 733 P.2d 1120, 73 A.L.R.4th 921 (1986).  
Properly employed and supervised non-lawyer personnel can decrease litigation expense.

1 Lawyers should not be forced to perform legal tasks solely so that their time may be  
2 compensable in an attorney fee award.”

### 3 VII. CONCLUSION

4 There are no genuine issues of material fact that Claimant’s RCW 51.32.185 presumptive  
5 occupational disease - heart problem worsened after the January 21, 2016 claim closure. Claimant’s “heart  
6 problem” is presumed occupational under RCW 51.32.185.

7 Claimant’s Motion for Summary Judgment should be granted and his claim reopened as a matter of  
8 law.

9 The Department order of December 21, 2016, affirmed May 26, 2017 should be set aside and held  
10 for naught and that the RCW 51.32.185 *presumptive occupational disease* “heart problem” claim be  
11 reopened for further medical benefits, payment of medical bills, further diagnostic testing, time-loss benefits,  
12 vocational services, permanent partial disability and/or pension. The Claimant is entitled to all Title 51 benefits,  
13 all RCW 51.32.185 benefits to include attorney fees and all costs, and such other relief on Claimant’s behalf  
14 as is established by the record.

15 Claimant is entitled to his attorney fees and costs. RCW 51.32.185; *Spivey, supra*.

16 Dated this 6<sup>th</sup> day of November, 2017 at Olympia, Washington.

17 **RON MEYERS & ASSOCIATES PLLC**

18 By:   
19 Ron Meyers, WSBA No. 13169  
20 Matthew G. Johnson, WSBA No. 27976  
21 Tim Friedman, WSBA No. 37983  
22 Counsel for Claimant Calvin Johnson  
23  
24  
25  
26

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date set forth below, I served the documents listed below on the following parties in each manner set forth:

- Documents:
  1. Claimant’s Motion for Summary Judgment;
  2. Declaration of Ron Meyers in Support of Summary Judgment;
  3. This Certificate of Service.

Originals To: The Honorable Tom M. Kalenius  
 Board of Industrial Insurance Appeals  
 PO Box 42401  
 Olympia, WA 98504-2401

[ ✓ ] Via e-filing

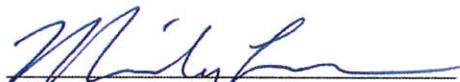
Copies To: Leslie V. Johnson, AAG  
 Office of the Attorney General  
 PO Box 40121  
 Olympia, WA 98502-0121

[ ✓ ] Via U.S. Postal Service

Pierce Co Fire Dist #5  
 10222 Bujacich Rd NW  
 Gig Harbor, WA 98332

[ ✓ ] Via U.S. Postal Service

DATED this 6<sup>th</sup> day of November, 2017, at Olympia, Washington.

  
 Mindy Leach, Paralegal

# Appendix C

Dept. of Labor & Industries  
Claims Section  
PO Box 44291  
Olympia WA 98504-4291

Dept. of Labor & Industries  
Self Insurance  
PO Box 44892  
Olympia WA 98504-4892

# APPLICATION TO REOPEN CLAIM

## DUE TO WORSENING OF CONDITION

### WORKER INFORMATION

Complete your portion in FULL  
for prompt action

Claim number

**AX 53678**

#### Important:

Only use this form if your medical condition has worsened, and your claim has been closed for more than 60 days. If time loss benefits are paid before a decision about reopening is made and your claim is not reopened, you will be required to repay those benefits. Please write your claim number above. You will receive information about your reopening application within 90 days of the Department's receipt of the reopening application. If you have had a new injury at work, complete a new Report of Industrial Injury or Occupational Disease form in lieu of this application.

1. Name (first, middle, last) <b>Calvin S. Johnson</b>	2. Name changed since claim closed? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If yes, list previous name	3. Home phone no. <b>253-314-9099</b>	4. Soc. Sec. No. (for ID only)
---	---	--	--------------------------------

5. Present home address <b>409 Silverbrook Rd</b>	6. Mailing address (if different than home address)
7. City <b>Randle</b> State <b>WA</b> ZIP <b>98377</b>	8. City _____ State _____ ZIP _____

8a. I prefer my correspondence go to my Representative. Name: \_\_\_\_\_ Address \_\_\_\_\_ State \_\_\_\_\_ ZIP \_\_\_\_\_

9. Date of original injury <b>April 1, 2015</b>	10. Employer at time of original injury <b>Cig Harbor Fire &amp; Medic One</b>
--	---

11. What are your present physical complaints? <b>Lower back pain, shoulder, persistent</b>	12. Date claim closed <b>1/1</b>	13. Date condition became worse after claim closure? <b>1/2016 fully resolved</b>
--	-------------------------------------	---

14. Full name of doctor treating you at time of claim closure <b>Dr. Marc Craddock</b>	15. What parts of your body are affected by this injury/ disease? <b>Cardiac</b>
---	---

16. Have you had any new injuries or illnesses since the date of claim closure? If yes, explain. **yes - treatment authorized under this claim was incomplete. Required additional**

17. Did your condition worsen due to another injury or accident either on or off the job? Yes  No  If yes, explain.

18. Have you received any medical treatment for this condition since claim closure? Yes  No   
If yes, list name and address of treating doctor(s).

19. Doctor <b>Dr. Gavin</b> Phone number <b>360-463-8625</b>	20. Doctor _____ Phone number _____
Address <b>500 Lilly Rd N.E. Ste 100</b>	Address _____
City <b>Olympia</b> State <b>WA</b> ZIP+4 <b>98506</b>	City _____ State _____ ZIP+4 _____

21. Have you applied for or are you receiving? (check correct box(es))

Unemployment  Public assistance   
Sick leave  Retirement benefits   
Disability insurance

22. Are you working? If no, Retired  Laid off   
Yes  No  Why? Unable to work  Quit

23. Last date worked \_\_\_\_\_

Any other Industrial Insurance compensation? (i.e., Longshore harbor workers, Jones Act, Railroad)  If checked, explain.

24. Present or last employer <b>Cig Harbor Fire &amp; Medic One</b>	28. What other employers & job titles have you had since your claim was closed? <b>N/A</b>
Address <b>10222 Bojacade Rd</b>	
City <b>Cig Harbor</b> State <b>WA</b> ZIP+4 <b>98332</b>	
Job title <b>EMS Division Chief</b>	

25. Your job title and duties  
**Fire Dept.**

26. Type of business  
**23+ years**

27. How long have you worked for this employer?

NOTE: Persons making false statements in obtaining industrial insurance benefits are subject to civil and criminal penalties. I declare that these statements are true to the best of my knowledge and belief. In signing this form, I permit doctors, hospitals, clinics or others with medical information to release my medical records to the Department of Labor & Industries and/or the Self Insured Employer.

Today's date **12/13/2016** Claimant's signature **[Signature]**

F242-079-000 application to reopen claim 8-07 CONTINUE FOR DOCTOR'S INFORMATION

At LNI: 12/16/2016 1:27:50 PM [Pacific Standard Time]



**RON MEYERS & ASSOCIATES PLLC**

**December 13, 2019 - 2:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53761-3  
**Appellate Court Case Title:** Calvin J. Johnson, Respondent v. Department of Labor & Industries, Appellant  
**Superior Court Case Number:** 19-2-00129-0

**The following documents have been uploaded:**

- 537613\_Affidavit\_Declaration\_20191213140606D2966673\_8878.pdf  
This File Contains:  
Affidavit/Declaration - Service  
*The Original File Name was DOS Resp Brief.pdf*
- 537613\_Briefs\_20191213140606D2966673\_9393.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Respondents Brief.pdf*

**A copy of the uploaded files will be sent to:**

- LIOlyCEC@atg.wa.gov
- lesliej@atg.wa.gov
- shawn.gordon@atg.wa.gov
- shawn.w.gordon@gmail.com

**Comments:**

---

Sender Name: Mindy Leach - Email: mindy.l@rm-law.us

**Filing on Behalf of:** Ronald Gene Meyers - Email: ron.m@rm-law.us (Alternate Email: mindy.l@rm-law.us)

Address:  
8765 Tallon Ln NE, Ste A  
Olympia, WA, 98516  
Phone: (360) 459-5600

**Note: The Filing Id is 20191213140606D2966673**

FILED  
Court of Appeals  
Division II  
State of Washington  
12/13/2019 2:07 PM  
No. 53761-3-II

DIVISION II OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

CALVIN JOHNSON,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Appellant.

---

DECLARATION OF SERVICE  
OF RESPONDENT'S BRIEF

---

Ron Meyers WSBA No. 13169  
Matthew Johnson WSBA No. 37597  
Tim Friedman WSBA No. 37983  
Attorneys for Petitioner

Ron Meyers & Associates, PLLC  
8765 Tallon Ln. NE, Suite A  
Olympia, WA 98516  
(360) 459-5600

The undersigned declares under penalty of perjury of the laws of the State of Washington that on the date stated below I caused to be served the document entitled RESPONDENT'S BRIEF as follows:

Original to:  
Court of Appeals, Division II

E-Filing via Washington State Appellate Courts Portal

**Counsel for Defendant**

Shawn W. Gordon  
Assistant Attorney General  
Labor and Industries Division  
7141 Cleanwater Dr. SW  
Olympia, WA 98504

E-mail via Washington State Appellate Courts Portal:  
[shawn.w.gordon@gmail.com](mailto:shawn.w.gordon@gmail.com); [lesliej@atg.wa.gov](mailto:lesliej@atg.wa.gov)  
[LIOLyCEC@atg.wa.gov](mailto:LIOLyCEC@atg.wa.gov); [daisy.logo@atg.wa.gov](mailto:daisy.logo@atg.wa.gov);

DATED this 13<sup>th</sup> day of December, 2019 at Olympia, Washington.



**RON MEYERS & ASSOCIATES PLLC**

BY: MINDY LEACH  
Paralegal

**RON MEYERS & ASSOCIATES PLLC**

**December 13, 2019 - 2:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53761-3  
**Appellate Court Case Title:** Calvin J. Johnson, Respondent v. Department of Labor & Industries, Appellant  
**Superior Court Case Number:** 19-2-00129-0

**The following documents have been uploaded:**

- 537613\_Affidavit\_Declaration\_20191213140606D2966673\_8878.pdf  
This File Contains:  
Affidavit/Declaration - Service  
*The Original File Name was DOS Resp Brief.pdf*
- 537613\_Briefs\_20191213140606D2966673\_9393.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Respondents Brief.pdf*

**A copy of the uploaded files will be sent to:**

- LIOlyCEC@atg.wa.gov
- lesliej@atg.wa.gov
- shawn.gordon@atg.wa.gov
- shawn.w.gordon@gmail.com

**Comments:**

---

Sender Name: Mindy Leach - Email: mindy.l@rm-law.us

**Filing on Behalf of:** Ronald Gene Meyers - Email: ron.m@rm-law.us (Alternate Email: mindy.l@rm-law.us)

Address:  
8765 Tallon Ln NE, Ste A  
Olympia, WA, 98516  
Phone: (360) 459-5600

**Note: The Filing Id is 20191213140606D2966673**