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

CALVIN JOHNSON,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant.

REPLY BRIEF

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I. INTRODUCTION

The Legislature designed the firefighter presumption statute to help firefighters access the workers' compensation system by easier recognition that a firefighter has an occupational disease. The Legislature adopted the law because often firefighters struggled to prove what chemical or other work exposure initially caused a condition.¹

Upon a firefighter's application to open a claim, the Department of Labor and Industries applies the firefighter presumption to determine whether a firefighter has an occupational disease, and then upon that determination allows the claim—recognizing the existence of an occupational disease. This ruling carries forth throughout the life of the claim, and the issue is not relitigated. So it would not be disputed that the firefighter has an occupational disease during claim administration on issues like time loss compensation, treatment, claim closure, and reopening of closed claims.

Upon an application to reopen the claim, the inquiry is whether the occupational disease has worsened, so there is no need for the presumption. It is unneeded because it is undisputed that the firefighter has an occupational disease caused by workplace exposure.

¹ House Report, H.R. Rep. No. 2663 (2002).

Although the Legislature intended to award attorney fees for work at the Board when a firefighter is trying to get the firefighter's claim allowed, the Legislature did not intend to award fees once the claim has been accepted—which removes any doubt over whether the worker has a valid occupational disease claim.

The statute requires two things before a fee award is proper. First, the “determination involv[es] the presumption”—not the case here because it is a reopening case in which the presumption is not involved. RCW 51.32.185(9)(a). Second, the Board decision must “allow[] the claim for benefits”—not the case here because the Board decision did not allow the claim for benefits; instead, this had occurred in a 2015 Department order. *Id.* Since neither requirement is met here, this Court should reverse the superior court's ruling to the contrary and grant summary judgment to the Department.

II. REBUTTAL FACTS

The underlying cause of action that led to the attorney fee request was, as Johnson put it, about an “aggravation of an occupationally-related condition.” Resp't's Br. 5 (internal markings omitted). When Johnson began this cause of action about reopening, the Department had already allowed Johnson's occupational disease claim and recognized that he was entitled to benefits for that claim. AR 26.

On August 6, 2015, the Department issued an order that ruled “[t]his claim filed for myocardial infarction occurring on April 15, 2015, is allowed in accordance with RCW 51.32.185.” AR 26. This order became a final order, and Johnson received benefits. The Department later closed the claim. AR 28.

Johnson then applied to reopen that allowed claim. AR 30. After the Department denied the reopening application, Johnson appealed to the Board of Industrial Insurance Appeals, where the industrial appeals judge reversed the Department’s order. He issued a proposed decision and order finding that Johnson’s condition after closure of the original claim in January 2016 was an aggravation of the July 2015 event, ruling that the “preponderance of the evidence was persuasive that Mr. Johnson’s occupational disease worsened and became aggravated after January 21, 2016.” AR 212.

After prevailing before the industrial appeals judge, Johnson sought attorney fees. The Board rejected this request because the attorney fee statute applies only when the Board allows a claim for benefits, not when it is reopened:

Just as this statute is very specific regarding who is covered by the firefighters presumption, what conditions are covered by the presumption, and under what circumstances those conditions are covered by the presumption, it is very specific that the exception to the general rule that each

party bears his own costs and fees at the Board applies when, “the final decision allows the claim for benefits.” Once a claim has been allowed, the presumption is no longer at issue. It has already been applied to allow the claim. The Legislature could have drafted the statute to include an award of fees if the final decision allowed reopening of a claim initially allowed under the presumption. 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. It did neither. The rules of statutory construction cannot change the plain language of RCW 51.32.185, which only includes the award of fees and costs when the Board’s final decision allows the claim for benefits.

AR 2.²

III. REBUTTAL ARGUMENT

Firefighters may only receive attorney fees at the Board if (1) a “determination involving the presumption” has been appealed, and (2) the Board has issued a “final decision [that] allows the claim for benefits.” RCW 51.32.185(9)(a). Johnson did not prove these elements.

A. **This Case Did Not Involve a Determination About the Presumption; It Involved Aggravation of an Already Accepted Condition**

Because there is no determination about the presumption involved here, Johnson has no right to attorney fees. To receive attorney fees, there needs to be a “determination involving the presumption.” RCW 51.32.185(9)(a). The relevant “presumption” is the presumption that

² The court gives “great deference” to the Board’s interpretation of the Industrial Insurance Act. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

certain medical conditions are occupational diseases. RCW 51.32.185. By order dated August 6, 2015, the Department resolved whether Johnson had an occupational disease: it determined that he did. This order became final. So in Johnson’s reopening case, there was already recognition that Johnson had “an occupational disease[] under RCW 51.08.140.” RCW 51.32.185(1)(a). It was no longer necessary to *presume* that his condition was an occupational disease since it had been determined that it was one. There was thus no determination here about RCW 51.08.140, so the fee provision does not apply. RCW 51.32.185(9)(a). The question here was not whether he had an occupational disease; the only question was whether that occupational disease got worse. And the presumption does not apply to whether his condition worsened.

1. There is only one decision applying the presumption to a claim—this determination is made when the claim is allowed

Attorney fees are awarded only if there is a “determination involving the presumption.” RCW 51.32.185(9)(a). RCW 51.32.185 establishes the parameters of the presumption. It provides

In the case of firefighters [as defined], there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) 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; (iii) cancer; and (iv)

infectious diseases are occupational diseases under RCW 51.08.140.

RCW 51.32.185(1)(a) (emphasis added).

The presumption statute references RCW 51.08.140: “there shall exist a prima facie presumption that [certain conditions] are occupational diseases under RCW 51.08.140.” RCW 51.08.140, in turn, establishes what an “occupational disease” is: a “disease or infection as arises naturally and proximately out of employment”

Johnson incorrectly argues that “[n]owhere in RCW 51.32.185(9) did the legislature restrict its application to only a claim alleging an occupational disease.” Resp’t’s Br. 19 (emphasis omitted). The presumption statute itself restricts the presumption to RCW 51.08.140. RCW 51.32.185(1)(a). RCW 51.08.140 establishes what an occupational disease is, and RCW 51.32.185 creates a presumption that certain medical conditions are occupational diseases. By its own terms, RCW 51.32.185 creates nothing other than that.

Once the Department applies the firefighter presumption to recognize that a firefighter has an occupational disease and allows the claim, this determination is binding throughout the life of the claim and is not decided again later. After the presumption is applied, there can no longer be a dispute that the firefighter has an occupational disease. This is

true throughout claim administration on issues like time loss compensation, treatment, and reopening of closed claims.

The court's holding in *Raum* supports that the presumption only applies to the initial decision on whether to allow the claim. In *Raum*, the court emphasized that "RCW 51.32.185's presumption eliminates only the requirement that [the worker] present competent medical evidence *at the outset* to show that his heart condition is related to his firefighting duties and thus an occupational disease." *Raum v. City of Bellevue*, 171 Wn. App. 124, 147, 286 P.3d 695 (2012). The court determined that "RCW 51.32.185 does nothing more than create a rebuttable evidentiary presumption. We conclude the statute creates no occupational disease claim different from that defined in RCW 51.08.140." *Id.* at 144. This case means the presumption only goes to the issue of whether the claim should be allowed initially and does not carry through to every subsequent question under the claim.

2. Reopening a claim for worsening does not involve the presumption

When a claim is allowed under the presumption, the question being decided is whether the firefighter has an occupational disease under RCW 51.08.140. But in an aggravation case, the issue is not whether a worker had an occupational disease under RCW 51.08.140, but whether the

existing claim should be reopened under RCW 51.32.160.³ What is at issue is whether the occupational disease (here, the one manifesting on April 15, 2015, and accepted by the Department order dated August 6, 2015) worsened after the claim was last closed. RCW 51.32.160; *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009) (showing of worsening necessary to establish aggravation under RCW 51.32.160).

In an aggravation case, the worker needs to present objective medical evidence that the worker's occupational disease worsened between relevant dates (the date of last closing and the date of the order denying reopening). *See Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). As Johnson admits, the claim is reopened for "an occupationally-related condition," and the worker must show that there is a causal relationship between the occupational disease and the worsened condition. *Eastwood*, 152 Wn. App. at 657; Resp't's Br. 5, 13. These standards presuppose that the worker has an occupational disease, and the inquiry is to see if the condition worsened, and, if so, whether the

³ Johnson cites *Bryant v. Dep't of Labor & Indus.*, 173 Wash. 240, 22 P.2d 667 (1933), and *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 271 P.3d 356 (2012), for the proposition that a reopening application is a new claim. Resp't's Br. 17, 22. But this was loose language, and the cases did not address such an issue, nor did their facts require such a ruling. In any event, neither case addressed questions related to the presumption statute.

worsening related to the allowed occupational disease or whether it worsened independently of that disease. But there is no question at all on whether the worker had an occupational disease. Since the worker indisputably has an occupational disease, there is no reason to presume that the worker has one. Nor is there any presumption under RCW 51.32.185 that any subsequent change to the worker's condition is attributable to the occupational disease. The Legislature showed no intent that the question of worsening under RCW 51.32.160 was subject to the presumption, but it did link a finding under RCW 51.08.140 to the presumption. Under these circumstances, there is no determination involving the presumption.

3. Johnson's arguments about causation have no merit

Johnson argues that "[t]he purpose of the presumptive disease statute is to relieve the firefighter of the unique problems of proving causation." Resp't's Br. 1. But the statute only eases the worker's burden of establishing as a threshold matter that the occupational disease was caused by the firefighting employment: the statute does not create a presumption for any other question about causation that might arise after the claim is allowed, such as whether the worker's condition worsened after it was first closed. Although Johnson points to a general policy, a general purpose of a statutory scheme does not establish the particular

requirements—only the statutory language does that. *Bd. of Indus. Ins. Appeals v. S. Kitsap Sch. Dist.*, 181 Wn. App. 357, 367, 324 P.3d 813 (2014) (applying statutory language not a general policy).

And the boundaries on the scope of the presumption under RCW 51.32.185 are clear—it is only presumed that certain medical conditions “are occupational diseases under RCW 51.08.140.” RCW 51.32.185(1)(a). So the causation question is limited to whether the “disease or infection [arose] naturally and proximately out of employment.” RCW 51.08.140 *cited in* RCW 51.32.185(1)(a). The causation reference—the arising “proximately”—is only to whether the disease exists, not whether it has worsened, nor any other question that might arise about causation.

Johnson conflates causation under the occupational disease statute (RCW 51.08.140) with the aggravation statute (RCW 51.32.160). They are two different inquiries. Under the occupational disease statute, the inquiry is whether the medical condition was proximately caused by workplace conditions. Under the aggravation statute, the inquiry is whether the occupational disease caused the condition to worsen.

Proving an occupational disease under RCW 51.08.140 is difficult in the firefighter context, so the Legislature adopted the presumption. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 741-42, 389 P.3d 504 (2017). In *Spivey*, which Johnson relies on, the Court noted the difficulty of

proving that a medical condition was caused by occupational exposure and should therefore be allowed as an occupational disease, such as the melanoma at issue in that case. 187 Wn.2d at 741-42 (“RCW 51.32.185 reflects the legislature’s intent to relieve a firefighter of unique problems of proving that firefighting caused his or her disease.”); *see also id.* at 735 (outlining burden to disprove existence of the “disease.”); Resp’t’s Br. 1, 7, 13-15. *Spivey* does not suggest that the presumption applies to situations other than the allowance of an occupational disease, such as issues of aggravation or other causation-related questions that might arise later in a case. The Court specifically linked the presumption to the element of proximate cause in RCW 51.08.140. *Spivey*, 187 Wn.2d at 738. It did not link it to all causation questions.

Johnson correctly points out that the Department’s theory was that the worsening of his condition was not caused by the occupational disease. Resp’t’s Br. 11-12. To defeat the Department’s theory, Johnson had to prove that the worsening was caused by the occupational disease. But never did he have to prove that he had an occupational disease under RCW 51.08.140 because this was done in the August 6, 2015 Department order.

Finally, Johnson repeatedly tries to invoke the principle of liberal construction to argue his causation theory. Resp’t’s Br. 2, 7-9, 15, 17, 24-

25, 27. But liberal construction applies only if the statute is ambiguous, which it is not. *See Raum*, 171 Wn. App. at 155 n.28.

B. The Language “Final Decision Allows the Claim for Benefits” Refers to Claim Allowance

Besides not showing that his case was one where there was a “determination involving the presumption,” Johnson also does not show that the “final decision” in the reopening case “allow[ed] the claim for benefits.” RCW 51.32.185(9)(a).

1. The Supreme Court has already equated “the final decision allows the claim for benefits” to claim allowance

Johnson fails to address the import of a key Supreme Court case: *Weaver*. In *Weaver*, the Court has already decided that the phrase “the final decision allows the claim for benefits” equates to claim allowance. *Weaver v. City of Everett*, 194 Wn.2d 464, 475, 450 P.3d 177 (2019) (emphasis omitted). In *Weaver*, the Department argued that claim allowance meant the “‘threshold question of whether he had an occupational disease’” *Id.* at 476. The Court acknowledged this was correct: “While that may be true in theory . . . ,” the pro se did not have notice of this. *Id.* It relied on “RCW 51.32.185(9) (“stating that firefighters may recover costs incurred on appeal if ‘the final decision allows the claim for benefits’”). *Id.* (emphasis omitted). Although the Court

ultimately found that the Industrial Insurance Act gave insufficient notice to a pro se to support the use of collateral estoppel, it recognized that the attorney fee statute relates to issues of claim allowance. So under *Weaver*'s analysis, Johnson would not be entitled to fees based on a decision that reopens his claim.

2. RCW 51.32.185(9) refers to “allow[ing]” “the claim for benefits”

RCW 51.32.185(9) provides for fees upon a determination involving the presumption when the final decision “allows” “the” claim for benefits. These two terms show that fees are only awarded in the context of claim allowance that grants access to the workers’ compensation system. First, “allows” is a term of art referencing opening a claim for benefits as detailed in the Appellant’s Opening Brief pages 26-28.

Second, “the claim for benefits” means, in the context of RCW 51.32.185(9), the legal construct denominated by a claim number that allows workers to receive benefits. As Johnson admits, for each claim the Department gives a unique identifying number that applies throughout the life of a claim, including any reopening applications. Resp’t’s Br. 20; AR 26. The Legislature did not need to use “original claim,” “initial claim,” or “claim for occupational disease” to provide that the “the claim for

benefits” references the claim itself. *Contra* Resp’t’s Br. 17. There is only one claim—“the” claim. RCW 51.32.185(9). The very case law cited by Johnson emphasizes this point—referencing that “claims” are reopened. *See* Resp’t’s Br. 18, 23 (citing *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 39, 992 P.3d 1002 (2000); *Ma’ae v. Dep’t of Labor & Indus.*, 8 Wn. App. 2d 189, 200, 438 P.3d 148 (2019); *Eastwood*, 152 Wn. App. at 657; *Solven v. Dep’t of Labor & Indus.*, 101 Wn. App. 189, 198, 2 P.3d 492 (2000)).

3. Many statutes and regulations, including the statute at issue, refer to “the claim” and to “allow”

Johnson does not deny that in the very fee provision at issue, RCW 51.32.185(9)(c), requires that “the costs shall be paid from the accident fund and charged to the costs of *the claim*.”⁴ This internal reference to “the claim” shows that when the Legislature used “the claim” when stating “allows the claim for benefits,” it meant “the claim for benefits” used in section 9(a) to have the same meaning as “the claim” in section 9(c). When the Legislature uses the same words in a statutory provision, this means it has the same meaning. *Medcalf v. Dep’t of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997).

⁴ The accident fund is one mechanism for funding claim costs. *See Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015).

As Johnson points out, RCW 51.32.160, the reopening statute, references “claims.” Resp’t’s Br. 21. This reference shows that the Legislature means “the claim.” RCW 51.32.160 provides “Applications for benefits where *the claim* has been closed without medical recommendation, advice, or examination are not subject to the seven year limitation of this section.” (emphasis added).

WAC 296-14-420 confirms the Department’s positions about claims. *Contra* Resp’t’s Br. 21. This rule provides that “[w]henver an application for benefits is filed where there is a substantial question whether benefits shall be paid pursuant to the reopening of an *accepted claim* or allowed as a *claim for new injury or occupational disease*, the department shall make a determination in a single order.” WAC 296-14-420(a). The use of the term “claim” shows that the Department contemplates the entirety of the claim that it initially allowed—consistent with the language “allow[ed] the claim for benefits” in RCW 51.32.185(9)(a).

The many other authorities that provide that “allowing” “the claim” is the opened claim itself are provided in the Appellant’s Opening Br. at 26-28. When the Legislature crafted RCW 51.32.185 it was aware of these provisions and intended RCW 51.32.185 to fit within this context.

IV. CONCLUSION

The Legislature did not design the firefighter attorney fee provision to reimburse fees any time a firefighter prevails in any appeal about any issue that arises over the life of the claim. It is only at the outset that a worker may receive the fees if the worker prevails in having the occupational disease claim allowed. This is shown both by the language in the statute and the statutory scheme using a plain language analysis. The Court should reverse the superior court and grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 12th day of February 2020.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Reply Brief and this Certificate of Service in the below described manner:

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