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STATE OF WASHINGTON

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No. 436213

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

EDWARD O. GORRE,

Appellant,

v.

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

Respondents.

# RESPONDENT/CROSS-APPELLANT'S BRIEF

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## A. INTRODUCTION

Appellant Claimant Gorre (Gorre) is employed by the City of Tacoma (City) as a firefighter. He seeks workers' compensation benefits from the City for the infectious disease coccidioidomycosis, colloquially known as Valley Fever[1], a condition which is endemic to the Southwestern United States and Mexico, but not found in the soil in Washington or acquired in Washington. Gorre seeks this coverage by resort to legally and factually unsupported and unsupportable arguments. He erroneously attempts to deprive the Department of its statutorily mandated original jurisdiction by arguing RCW 51.32.185, which provides an evidentiary presumption to firefighters for certain occupational diseases in certain circumstances, required the Department of Labor & Industries to allow his claim regardless of the lack of required credible supporting medical evidence of proximate cause to his work. Because coccidioidomycosis is not listed as an infectious disease to which the evidentiary presumption of RCW 51.32.185 applies, Gorre also erroneously argues he has more than one condition, a separate and distinct respiratory disease, in an attempt to fall within the provisions of RCW 51.32.185 and its fee-shifting provision.

[1] Coccidioidomycosis is also referred to in this Brief and in the record as cocci and Valley Fever.

The record establishes Gorre's condition, and only condition, is coccidioidomycosis, an infectious disease not falling under RCW 51.32.185 and not arising naturally and proximately out of the distinctive conditions of his employment.

The Department, the Board and the Superior Court uniformly rejected Gorre's arguments, and the Court's resulting decision is supported by substantial evidence, despite Gorre's attempt to have this Court reweigh the evidence. The adjudications of the Department and Board, as the agencies charged with application of Title 51, although not binding on this Court are entitled to deference unless contrary to law. *Doe v. Boeing Co.,* 121 Wn.2d 8, 15, 846 P.2d 531 (1993); *Superior Asphalt & Concrete v. Dep't of Labor & Indus.,* 84 Wn. App. 401, 405, 929 P.2d 1120 (1996); *Weyerhauser Co. v. Board of Ind. Ins. Appeals*, 107 Wn. App. 505, 27 P.3d 1194, 1196 (2001). None of the experts were aware of instances of acquisition in Washington State, and there are no reported instances of acquisition in Washington State. Drs. Ayars and Bardana, the only physicians with complete travel, residence, and medical histories, testified Gorre had only condition, coccidioiodmycosis, which was not work related. Drs. Goss and Johnson lacked complete medical, residence, and travel history and employment information and their opinions lacked foundation as a result. Gorre is from California and has traveled in

California, Mexico and Nevada. He did not disclose in his written discovery answers or in his discovery deposition, that he had traveled to Las Vegas, Nevada, an endemic area, and played golf outside the city limits prior to the onset of his symptoms, a fact which did not come to light until his friend and co-worker, Darrin Rivers, testified on his behalf.[23] Gorre's arguments have been considered and rejected by Division I of this Court in *Raum v. City of Bellevue*, __ Wn.App. __, 286 P.3d 695, 705-06, *review pending* (2012) .

The City filed a cross-appeal regarding the Superior Court's failure to strike certain documents improperly offered by Gorre for the first time at the Superior Court trial, the Superior Court's failure to award the City its statutory costs, and the Superior Court's finding that Gorre had no smoking history, which also defeats the RCW 51.32.185 presumption.

## B. ASSIGNMENTS OF ERROR

The City assigns error to the following findings and decisions of the Superior Court:

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[2] Clerk's Papers are cited as "CP." The Verbatim Reports of Proceedings are cited "VRP." Appellant's Brief is cited as "AB." Perpetuation Deposition and Hearing Testimony of witnesses who testified in the Board proceedings is referenced by witness.

[3] Gorre makes repeated references to exposures to mold, fumes, toxic substances and the asserted lack of self-contained breathing apparatus equipment, immaterial to to his infectious disease caused only by exposure to a very specific organism, one which does not exist in Washington State. For this same reason, Gorre's reference to the Legislative findings of RCW 51.32.185 and apparent intent to request the Court to take judicial notice of the Legislative findings as adjudicative facts is immaterial. AB Appendix.

1. FINDING OF FACT 1.3: Failure to find that Appellant/Cross-Respondent had a smoking history defeating application of RCW 51.32.185;

2. Failure to rule on the Employer's Motion to Strike and exclude inadmissible documents and unsupported assertions, and;

3. JUDGMENT 3.3: Failure to award Respondent/Cross-Appellant deposition costs pursuant to RCW 4.84.010 and RCW 4.84.090.

## C. COUNTERSTATEMENT OF ISSUES

1. Does substantial evidence support the Superior Court's finding that Gorre contracted the infectious disease coccidioidomycosis and not a separate respiratory disease when three medical experts specifically testified to these facts, and the only expert to support a separate respiratory disease lacked the proper foundation of medical and travel history?

2. Does substantial evidence support the Superior Court's determination that Gorre did not develop any disabling medical condition that RCW 51.32.185 presumes is an occupational disease when substantial evidence supports that coccidioidomycosis is an infectious disease and this disease is not covered by RCW 51.32.185(4)?

3. Does substantial evidence support the Superior Court's determination that Gorre did not acquire any disease that arose naturally and proximately from the distinctive conditions of his employment with the City?

4. Does substantial evidence support the Superior Court's finding that Gorre had no relevant history of smoking when the contemporaneous records reflect a ten-year smoking habit?

5. Did the Superior Court err by failing to strike inadmissible evidence presented by Gorre for the first time at the Superior Court when RCW 51.52.115 requires the Superior Court consider only evidence submitted at the Board absent a procedural irregularity?

6. Did the Superior Court err by denying the City its statutory costs and disbursements?

## D. COUNTERSTATEMENT OF THE CASE

### 1. PROCEDURAL HISTORY.

In April 2007, Gorre applied for worker's' compensation benefits under claim number SB-29707. CP 701. Ultimately, on February 11, 2008, the Department issued an order rejecting Gorre's claim. *Id.* Gorre protested the order. *Id.* On March 26, 2008, the Department issued an order that cancelled the February 11, 2008 order, and allowed the claim as an occupational disease. *Id.* After protesting the March 26, 2008 order, the City submitted medical information concerning Gorre's condition. CP 459-553, 566-575, 582-694; BR 747-749. These records revealed evidence that rebutted the statutory presumption that Gorre's condition arose naturally and proximately from distinctive conditions of his employment with the City or established the presumption did not apply in the first instance. *Id.* The records instead indicated that Gorre's condition was not proximately caused by his work with the City on a more probable than not basis. On March 24, 2009, the Department issued an order rejecting the claim. CP 290. Gorre appealed to the Board of Industrial Insurance Appeals (Board) *Id.* After the Industrial Appeals Judge (IAJ) denied both of Gorre's Motions for Summary Judgment, hearings were held and a Proposed Decision and Order issued rejecting Gorre's claim. Tr. 1/12/10,

p. 23, ll. 5-10; CP 284. After both Gorre and the City filed cross petitions for review, the Board granted review, made additional findings of fact and conclusions of law, clarified why Gorre's condition could not be presumed to be an occupational disease under the provisions of RCW 51.32.185, and explained the Board's conclusion that Gorre did not satisfy his burden of proof. *See*, *In re: Edward O. Gorre*, BIIA Dec. 09 13340 (2010).

Gorre appealed the Board's order to Pierce County Superior Court. CP 941. Although the parties initially cross-moved for summary judgment, the proceedings were converted to a bench trial. VRP 3/30/12 2-4. At trial, the Superior Court adopted the Board's findings of fact and conclusions of law as its own and made the additional Finding of Fact 1.3 finding Gorre was not a smoker, he had coccidioidomycosis, he did not have separate diseases of eosinophilia or interstitial lung disease, and his symptoms were manifestations of his coccidioidomycosis. CP 942; Appendix A. The Court also issued Conclusions of Law including the Conclusion that "[t]he March 24, 2009 Department order which set aside a March 26, 2008 order and rejected Gorre's claim because there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury alleged, the condition was not the result of an industrial injury as that term is defined in RCW 51.08.100, and the condition was not an occupational disease

within the meaning of RCW 51.08.140 is correct and is affirmed." *Id.* The Court awarded statutory attorneys' fees, but denied the City's motion for its costs and disbursements claimed under RCW 4.84.010 and .090. VRP 6/8/12 65; Appendix A. Gorre then appealed to this Court. CP 944-50. The City subsequently cross-appealed. CP 951-58.

**2. FACTUAL HISTORY**

Gorre began working for the City of Tacoma Fire Department (TFD) in 1997. (Edward Gorre, 6/7/10 Hearing (Gorre hearing), p. 106, l. 25-p.107, l. 5). He filed an SIF-2 on April 17, 2007, describing, "doctors found evidence of inhalation exposure upon biopsy of lungs." Gorre lived in Fair Oaks, California, a suburb of Sacramento from approximately 1970 until he graduated from high school in 1986. He playing in the dirt, bicycled on unpaved surfaces, and mowed the lawn. (Gorre hearing, p. 172, l. 2-p. 173, l. 2). Except for time in the military, he lived in Sacramento and Long Beach until moving to Tacoma in 1994. (Gorre hearing, p. 173, l. 3-p. 174, l. 2). He participated in fire academy training in California on the training grounds of the Rio Hondo Fire Academy. (Gorre hearing, p. 177, l. 9-p. 178, l. 4). Since moving to the Seattle area in 2000, he has driven to and from work in Tacoma along I-5. (Gorre hearing, p. 176, l. 17-p. 177, l. 8). Gorre's travel and residence histories were the subject of his discovery deposition, cross-examination, and the

Employer's Third Interrogatories. (Gorre hearing, p. 178, l. 20-p. 182, l. 21; Exhibit 3 [rejected]).

In contrast to the 44 fire calls between January 2006 and December 2007, per Assistant Chief Davis' testimony below summarized in Appendix B, Gorre testified he was called to approximately 623 fires between January 2006 and April 2007. Given this discrepancy, his testimony regarding the innumerable other calls and alleged exposures is suspect. (Gorre hearing, p. 159, l. 17-p. 164, l. 13).

Darrin Rivers is Gorre's friend and co-worker. (Rivers, p. 10, ll. 11-14; p. 34, l. 16-p. 35, l. -13). His testified that he took a couple of trips to Las Vegas with Gorre. It was revealed for the first time that Gorre was in an endemic area in 2005. The trips included, walking around, and sightseeing and golfing outside the Las Vegas city limits. (Rivers, p. 51, ll. 16-24; p. 54, l. 20-p. 55, l. 2). He also traveled with Gorre to California in 2000 and 2001. (Rivers, p. 35, l. 15-p. 36, l. 20). The N-95 masks used by the TFD filter down to .03 microns. (Rivers, p. 41, l. 24-p. 42, l. 16). The SCBA used by the TFD is pressure positive. (Rivers, p. 54, ll. 9-19). He never administered any respiratory aid to Gorre. (Rivers, p. 55, ll. 11-15).

Assistant Chief Davis has been employed by the Tacoma Fire Department since February 1987. (Davis, 6/14/10 hearing [Davis], p. 155, l. 4 -p. 159, l. 14). AC Davis gathered and provided testimony regarding

the number and nature of calls to which Gorre had been dispatched as set forth in the table in Appendix B. (Davis, p. 160, l. 21-p. p. 163, l. 20). The records do not reflect that Gorre responded to any fire calls between January 15, 2007, through April 15, 2007, and do not support his claims of number and types of calls, information provided to Drs. Goss and Johnson. (Davis, p. 163, l. 21-p. 164, l. 2).

Dr. Garrison Ayars, Board certified in internal medicine, infectious disease and allergy and clinical immunology, has assessed and treated Washington workers for 20 years.[4] (Dr. Ayars, 6/14/10 hearing (Ayars), p. 88, l. 19-p. 91, l. 25; Ayars, p. 116, ll. 1-23; Exhibit 5). Per below, he testified on a more probable than not basis that Gorre's sole condition is the infectious disease coccidioidomycosis, and he did not acquire it in Washington or at work.

Coccidioidomycosis is caused by Coccidioides immitis, an organism endemic, especially in the Sonoran desert. The organism likes the desert climate, and it lives in soil. Endemic areas are California, particularly the San Joaquin Valley, Southern Nevada, Arizona, and parts of New Mexico, Texas, Utah, Mexico and down into South America. The organism produces arthrospores that get into the air, which can be breathed into the lungs and cause disease in humans. Approximately 60

[4] Gorre did not move to exclude the testimony of Drs. Ayars and Bardana at or before hearings and has waived any admissibility argument.

percent of patients do not have many symptoms. Of the 40 percent who do, generally pulmonary symptoms are the first to appear; coughs, fever, sputum, and malaise. The condition is largely self-limiting and resolves spontaneously. Certain individuals have delayed onset of symptoms from coccidioidomycosis, with some descriptions up to 20 years later, but most will manifest within the first two years after exposure, which can then vary to other pulmonary syndromes that are more progressive, and possibly spread to other organs. (Ayars, p. 91, l. 26-p. 93, l. 17). Being Filipino, black or immunocompromised (such as cases of HIV, bone marrow transplant, and solid organ transplant) are predisposing factors for acquiring Valley Fever and having it disseminate. (Ayars, p. 94, ll. 5-12; p. 150, ll. 5-8; p. 152, ll. 15-23). Dr. Ayars is aware of no cases where the patient acquired Valley Fever in Washington State. (Ayars, p. 94, ll. 19-21).

Dr. Ayars evaluated Gorre on September 3, 2008. (Ayars, p. 94, l. 22-p. 95, l. 1). Gorre did not provide a complete residence or travel history and recalled that his fatigue and difficulty breathing started in February 2006. (Ayars, p. 148, ll. 1-23). Dr. Ayars reviewed substantial records after the evaluation as they became available, including the skin biopsy

which established with certainty the diagnosis of coccidioidomycosis.[5] (Ayars, p. 150, ll. 22-26).

Dr. Ayars testified there were 15 cases of Valley Fever noted by the Department of Health from 1997 to 2008, the bulk of which had clearly been acquired outside of Washington and in endemic regions with only one or two cases where the source was unknown due to inadequate documentation. He has never seen a case reported in the State of Washington acquired from soil in the State of Washington. (Ayars, p. 99, l. 13-p. 100, l. 9).

Dr. Ayars testified Valley Fever is an infectious disease that can cause respiratory symptoms and it is only one of hundreds of infectious diseases that cause respiratory symptoms, such as tuberculosis, HIV and AIDS. (Ayars, p. 100, l. 10-p. 101, l. 9). Dr. Ayars disagreed, as did Gorre's expert Dr. Johnson, with Dr. Goss' proposition that Gorre had a respiratory condition which when treated with Prednisone caused his Valley Fever to disseminate. Gorre did not have chronic eosinophilic pneumonia. (Ayars, p. 101, l. 10-p. 102, l. 19; p. 113, ll. 2-21).

Dr. Ayars testified it is unequivocal that Gorre has coccidioidomycosis as his initial and only disease "and it is a farfetched

[5] Dr. Ayars reviewed Gorre's medical records dating back to 2000 from multiple sources, Department of Health records, Gorre's resume and educational records, the transcripts of Drs. Goss and Johnson, and call logs. (Ayars, p. 95, l. 2-p. 99, l. 12; p. 149, ll. 13-22).

stretch without clinical data to support that he had another disease that resulted in him getting treated with Prednisone that immunosuppressed him more so he came out with coccidioidomycosis. ... he already had it. It is clear it was present before." (Ayars, p. 104, l. 10-p. 105, l. 5; p. 105, ll. 6-24). There was no acute significant inhalational exposure or lung injury. He also rejected the theory Gorre acquired the Valley Fever from dust coming from California on I-5 as implausible "without any scientific basis." (Ayars, p. 106, l. 2-p. 107, l. 16; p. 107, l. 17- p. 109, l. 12; p. 114, ll. 2-23; p. 133, ll. 7-p. 134, l. 1; p. 144, l. 1-p. 145, l. 13).[6]

Dr. Ayars testified on a more probable than not basis that Gorre did not have any of the possible syndromes or anything else associated with eosinophilia except for the Valley Fever. (Ayars, p. 146, l. 25-p. 147, l. 22; p. 150, ll. 9-14). He was unequivocal that Gorre's increased eosinophil count was related solely to coccidioidomycosis. (Ayars, p. 128, l. 6-p. 129, l. 12). As to the revelation that Gorre was in Las Vegas, Nevada in 2005 and had traveled outside the city limits to golf, he testified

[6] Despite the Employer's objections, Dr. Ayars was asked to consider the evidence presented by the Claimant to all manner of his alleged exposures to smoke, gasses, fumes, chemicals, hazardous materials, dust, dirt, all nature of building and construction materials, vermin, animals, unhygienic people, particulates, soot, animal and human fecal matter, urine, molds and fungi, water-damaged buildings, molded air conditioner filters, bird feathers, sawdust, bacteria, viruses, and some exposures without personal protective equipment, including without respiratory protection, and whether those alleged exposure have any relevant to the documented medical facts in this case, Dr. Ayars rejected the relevance, stating it was a "meaningless smoke screen. There is no evidence he has disease to any of those types of exposures." (Ayars, p. 110, l. 21- p. 111, l. 16).

he determined the condition was not acquired in Washington or related to work before learning of the travel to the endemic area, but it further supported his opinions. (Ayars, p. 111, l. 22-p. 112, l. 11; p. 148, l. 19-p. 149, l. 12).

Dr. Bardana, a physician at Oregon Health & Science University in Portland, explained eosinophilia is a response in the white blood cell count of a particular type of cell, seen very typically in hypersensitivity diseases or allergic disease such as asthma, allergic rhinitis or hives. (Dr. Bardana, 6/24/10 Hearing [Bardana], p. 3, l. 19-p. 12, l. 23; Exhibit 6). Eosinophilic lung disease as an independent medically separate diagnosed condition does not exist. (Bardana, p. 9, ll. 13-24). Further, Gorre has none of the conditions or diseases that have eosinophilia, except coccidioidomycosis. (Bardana, p. 42, l. 2-p. 45, l. 15).

Dr. Bardana reviewed the same set of records and information as Dr. Ayars reviewed. (Bardana, p. 4, l. 10-p. 17, l. 12). He testified "[t]here is only the Valley Fever. There is no other disease." (Bardana, p. 17, l. 13-p. 18, l. 9). He noted that Drs. Goss and Johnson did not have the critical and complete residence, travel, or medical histories including the critical medical records detailing his Gorre's health status prior to his presentation to Drs. Eckert and Sandstrom. (Bardana, p. 18, l. 10 - p. 21, l. 11).

Dr. Bardana believed Gorre's travels to the Las Vegas area in October 2005 was his primary exposure **and explicitly detailed Gorre's clinical course from that time until confirmed diagnosis based on his review of Gorre's records which Drs. Johnson and Goss did not have. (Bardana, p. 21, l. 24-p. 24, l. 23).** This detailed clinical summary of Gorre's clinical course establishes that Gorre's claim of two diseases and his claim of proximate cause are false. Ultimately, on a more probable than not basis, Dr. Bardana diagnosed primary coccidioidomycosis not acquired in Washington State or at work (Bardana, p. 33, l. 13-p. 35, l. 19; p. 68, l. 16-p. 69, l. 17). Gorre's records reflected both a smoking history and a chewing tobacco history. (Bardana, p. 31, ll. 3-20; p. 69, ll. 18-25; p. 37, l. 18-p. 38, l. 6; p. 69, l. 18-p. 70, l. 19).

Dr. Fallah has a Ph.D. in mycology, the study of organisms, including fungi and the organism that gives rise to Valley Fever. (Dr. Fallah, 6/24/10 hearing (Fallah), p. 72, l. 21-p. 73, l. 26). He provided specific, scientific background regarding the organism. (Fallah, p. 74, ll. 1-17). He would not expect to find the organism in the soil in Pierce County, Washington, anywhere along the I-5 corridor, or anywhere in Western Washington, including grasslands and wildlands with vegetation because if there is vegetation, that implies the soil is rich, and the organism prefers sterile soil. There is no reported instance of the organism being found in

Western Washington soil. (Fallah, p. 74, l. 18-p. 75, l. 9; p. 77, ll. 12-14). Even if the organism somehow made its way to the soils of Pierce County, it would not survive beyond hours or days and die. The organism also would not do well under high rainfall and lack of sustained high temperatures. (Fallah, p. 75, l. 10-p. 76, l. 16). The organism cannot withstand fire and will begin to die off at 125 to 130 degrees Fahrenheit. (Fallah, p. 76, ll. 19-26). Dr. Fallah testified that from the onset of inhalation of a spore, the life span of the organism could be two weeks to several years, "12 years or so I've seen in the literature that these little arthrocondidia could potentially change to spherules or the pathogenic phase." (Fallah, p. 80, l. 15-p. 82, l. 10).

Dr. Goldoft is a medical epidemiologist in the communicable/infectious disease section of the Washington State Department of Health. (Dr. Goldoft, 6/24/10 hearing [Goldoft], p. 85, ll. 1-26). Coccidioidomycosis or Valley Fever is considered a rare disease of public health significance in Washington State. (Goldoft, p. 86, ll. 10-16). When the Department gets a report of coccidioidomycosis, there are inquiries about where the person had traveled, a summary question asking the most likely place of exposure, whether the exposure was occupational, the person's occupation, and the date of exposure. Dr. Goldoft testified that of the small number of cases of coccidioidomycosis reported between

1997 and 2009 [15 per Dr. Ayars' testimony], none were reported from Pierce County, and none were confirmed as exposures in Washington State. (Goldoft, p. 86, l. 18-p. 88, l. 14).

Dr. Eckert saw Gorre on March 8, 2007, and took a history of periodic bouts of night sweats over prior year, decreased energy, fever, and some other symptoms including hives two weeks prior treated with Prednisone and Benadryl. Dr. Eckert noted the social history reflected the Claimant was a former smoker but had no passive smoke exposure. Dr. Eckert noted risk factors reflected he quit in 1990 and had two-pack years. Dr. Eckert testified the nature of the records indicated it was cigarette smoking rather than smokeless tobacco, and the information had changed since Dr. Carter had seen him on June 1, 2006 for fever. (Dr. Eckert 6/14/10 Hearing, p. 170, l. 22-p. 172, l. 2; p. 175, l. 13-p. 177, l. 3; p. 177, ll. 19-23). Dr. Weinstein also testified that he saw Gorre on April 18, 2002, when Gorre was 34 years old, Gorre reported that he had been a non-smoker since age 30. Gorre smoked cigars from age 20 and quit at age 30. (Dr. Weinstein, 6/14/10 Hearing, p. 183, l. 6-p. 186, l. 9).

Dr. Bollyky is an infectious disease doctor at the University of Washington and Harborview. (Bollyky, p. 5, ll. 9-20; p. 6, ll. 15-24). He testified Gorre has cocci by all three standards used for diagnosis; serology, histology and culture. (Bollyky, p. 6, ll. 6-9; p. 7, l. 18- p. 8, l. 2;

p. 9, ll. 13-19). He reported in March 2009 that the diagnosis of coccidioidomycosis was uncontroverted, cocci is not endemic to Washington State, all of the of the individuals in his practice with cocci either traveled to or migrated from an endemic area, and that Gorre's exposure to cocci outside of Washington State and while in an endemic region was clearly more likely given his residence in California and his travel to endemic areas, the scenario he strongly suspected, and most people who work with cocci would agree. (Bollyky, p. 12, ll. 16-25; p. 14, l. 15-p. 15, l. 14; p. 6, ll. 1-4). As to the Claimant's attempted parsing of eosinophilia and interstitial findings, Dr. Bollyky testified that the presence of eosinophils in a lung is a histopathological feature which does not presume an etiology or a particular cause. (Bollyky, p. 28, l. 8-p. 29; p. 33, ll. 6-13; p. 34, ll. 5-11; p. 29, l. 13-p. 30, l. 3.)

Dr. Goss was unaware of any studies establishing increased risk of workers in Washington with increased exposure to dirt or soil contracting Valley Fever in Washington, or any link between employment in Washington and acquisition of Valley Fever. (Goss, p. 27, l. 22-p. 28, l. 20; p. 29, ll. 1-10; p. 30, ll. 22-25;p. 31, l. 3-p. 32, l. 25). Dr. Goss did not have complete travel, residence and employment information and lacked an accurate medical history. (Goss, p. 25, ll. 1-6; p. 38, ll. 1-4; Bardana, p. 31, ll. 25-26; Goss, p. 38, ll. 19-25; p. 39, ll. 1-4p. 45, l. 14-p. 46, l. 14).

Dr. Goss conceded HIV, AIDS, and microbacterium tuberculosis are all considered by the scientific and medical communities to be infectious disease, and these infectious diseases can cause respiratory symptoms and lung problems. He also conceded that the various strains of hepatitis and meningococcal meningitis are infectious diseases. (Goss, p. 43, l. 7-p. 44, l. 3). His understanding of Gorre's work was based solely on what Gorre told him. He mistakenly believed a significant portion of Gorre's work was dealing with fires, including large, four-alarm fires, and was unaware of the extent of any exposure. (Goss, p. 47, l. 7-p. 48, l. 14; p. 56, l. 1.).[7] He testified Gorre does not have allergic bronchopulmonary aspergillosis, sarcoidosis, Churg-Strauss syndrome, chronic eosinophilic pneumonia, acute eosinophilic pneumonia, hypersensitivity pneumonitis, vasculitis, or hypereosinophilic syndrome. (Goss, p. 20, ll. 2-14; p. 36, ll. 4-16; p. 41, ll. 13-16; p. 52, l. 20-p. 53, l. 14 ).

Dr. Johnson is only licensed to practice in the State of California. (Johnson, p. 9, ll. 13-18; p. 11, ll. 1-24; pp. 16-18; p. 53, ll. 2-6; Exhibit 10). His research and practice are California-based. (Johnson, p. 36, ll. 5-23).

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[7] The Employer maintains its objection to the Claimant's exposure hypothetical and to admission, despite the Employer's Motions in Limine and the IAJ's ruling on summary judgment, of all respiratory disease and exposure evidence having no bearing on coccidioidomycosis. The evidence was immaterial, unduly prejudicial, and should have been stricken or excluded. See, e.g., Goss, pp. 14-15.

Dr. Johnson saw Gorre on one occasion on January 21, 2009. (Johnson, p. 18, ll. 10-20; p. 54, ll. 21-23). Gorre provided an inaccurate clinical history. (Johnson, p. 19, l. 4-p. 20, l. 9). Dr. Johnson testified that the Claimant's cocci diagnosis was very clear. (Johnson, p. 20, ll. 10-13). His testimony was based on an inaccurate history. (Johnson, p. 22, ll. 4-16; p. 41, ll. 3-12). Dr. Johnson opined that he more likely than not acquired the condition from his work with the TFD, "largely based on our conversations that he frequently dealt with vehicle fires and problems that occurred with vehicles on I-5.[,]" a "plausible scenario[,]" although he could "dream up all kinds of different scenarios." (Johnson, p. 23, ll. 13-18; p. 51, ll. 1-15). He conceded that had Gorre been in an endmic area in the weeks before the onset of his symptomatology, "clearly the odds that he acquired the infection as a firefighter working in Tacoma would be clearly much less germane." (Johnson, p. 41, ll. 14-19; p., 46, l. 19-p. 46, l. p. 47).

Dr. Johnson admitted causation analysis is based in part on history. (Johnson, p. 42, ll. 10-12). Yet, he had almost none of Gorre's medical records and no record before Dr. Ayars' September 3, 2008 report. (Johnson, p. 42, l. 14-p. 43, l. 11).[8] Dr. Johnson disagreed, on a more

[8] Dr. Johnson's records were limited to Dr. Ayars September 3, 2008 report and October 16, 2008 addendum, Dr. Bollyky's March 3, 2009 report, and Dr. Goss's March 5 (2009) report, the Claimant's deposition, and Dr. Bardana's October 20, 2009 report, written

probable than not basis, with the proposition that Gorre had cocci that was caused to disseminate by the use of Prednisone because it "basically doesn't happen." (Johnson, p. 33, ll.4--p. 34, l. 1). He has not done any cocci research or studies regarding firefighters working in Washington State; "waiting around for firefighters in Washington to have cocci would be very career-limiting as a research prospect. This is a pretty unique circumstance I think." (CP 683; Johnson, p. 37, ll. 4-25).

## E. SCOPE AND STANDARD OF REVIEW

In appeals of Superior Court decisions, this Court reviews whether substantial evidence supports the trial court's factual findings and then reviews, de novo, whether the trial court's conclusions of law flow from the findings. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). In engaging in this review, the Court of Appeals "tak[es] the record in the light most favorable to the party who prevailed in Superior Court." The court does not reweigh competing testimony. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Even if the appellate court was convinced the trial court made the

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notations regarding a May 8, 2009 telephone call with Dr. Bollyky regarding length of treatment, his own January 21, 2009 report and the underlying handwritten notes, a partially annotated health questionnaire, cocci serology from January 21, 2009, and some additional laboratory reports. (Johnson, p. 27, ll. 5-25; p. 28, ll. 24-25;p. 30, l. 11-p. 31, l. 5). He did not have Dr. Ayars March 31, 2009 report, and was not aware Dr. Ayars agreed Gorre had cocci. (Johnson, p. 31, l. 10-p. 32, l. 9).

wrong decision, it does not substitute its judgment for that of the finder of fact if there is evidence which, if believed, would support the trial court's decision. *See Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943, 640 P.2d 1051 (1982). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Gorre correctly states that the standard of "'review is limited to examination of the record to see whether substantial evidence supports the findings made after the Superior Court's *de novo* review, and whether the court's conclusion of law flow from the findings.'" AB 25.

Notwithstanding Gorre's recognition that this Court does not reweigh evidence, his factual summary, which bears fleeting resemblance to the record and required the City to provide the summary above, does not address the facts actually under review – those most favorable to the City, the party who prevailed in Superior Court. Gorre is explicit in his desire for this Court to reweigh the evidence. *See, e.g.*, AB 34 (asking that this Court give "a high degree of weight" to a witness's testimony; stating that "[t]he weight of the evidence submitted clearly indicates" that he is entitled to benefits). Gorre has been afforded four opportunities for *de novo* review of his claim, which has been adjudicated by the Department,

by an Industrial Appeals Judge who considered Gorre's two motions for summary judgment before proceeding through hearings, by the Board, and by the Superior Court. His claim has been rejected each time. Gorre's opportunities for *de novo* review ended in the Superior Court. This Court's review of the Superior Court's findings is for substantial evidence when the record is viewed in the light most favorable to the City.

## F. ARGUMENT

### 1. GORRE DID NOT ESTABLISH THAT HE IS ENTITLED TO THE PRESUMPTION PROVIDED BY RCW 51.32.185.

#### *a. Gorre's condition, coccidioidmycosis, is not one of the conditions to which RCW 51.32.185 is applicable.*

Gorre challenges the Superior Court's determination that RCW 51.32.185 is inapplicable in this case. The meaning of plain and unambiguous statutes must be derived from the statutory language itself. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Per the plain language of the statute, which provides a rebuttable presumption that certain conditions are presumptive occupational diseases for firefighters, RCW 51.32.185 does not apply to Gorre's claim. RCW 51.32.185 provides in relevant part:

> (1) In the case of firefighters as defined in RCW 41.26.030(4)(a), (b), and (c) who are covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a

> private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory disease ... and (d) infectious diseases are occupational diseases under RCW 51.08.140. *This presumption of occupational disease may be rebutted by a preponderance of the evidence.* Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.
>
> ...
>
> (4) The presumption established in subsection (1)(d) of this section shall be extended to any firefighter who has contracted *any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.*
>
> (5) Beginning July 1, 2003, this section does not apply to a firefighter who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter from the provisions of this section.
>
> (6) For purposes of this section, "firefighting activities" means fire suppression, fire prevention, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and training and other assigned duties related to emergency response.
>
> (7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

RCW 51.32.185(1), (4), (5), (6), (7)(a), (emphasis added). Because the Superior Court properly found that coccidioidmycosis is an infectious disease and not a respiratory disease, the proper analysis is whether

coccidioidomycosis is an "infectious disease" entitling Gorre to the RCW 51.32.185 presumption.

The plain language of the statute, numerous rules of statutory construction, and a review of the statute's legislative history establish that coccidioidmycosis is not a condition the Legislature contemplated as a presumptive occupational disease for firefighters under RCW 51.32.185. This Court's primary duty in interpreting statutes is to give effect to the Legislature's intent. *Sacred Heart v. Dep't of Revenue*, 88 Wn. App. 632, 946 P.2d 409 (1997). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) . "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005).

RCW 51.32.185(1) makes a general reference regarding the presumption that "infectious diseases" are occupational diseases for firefighters. However, at RCW 51.32.185(4), the statute provides a definition for the "infectious diseases" to which the presumption applies. In so doing, the Legislature provided a defined, codified, and exclusive list

of which infectious diseases are entitled to the presumption. Coccidioidmycosis is not among those infectious diseases. RCW 51.32.185(4). The only conclusion that can be reached by an analysis of the plain language of the statute is that the presumption established by RCW 51.32.185 does not apply to coccidioidomycosis.

Assuming *arguendo* that the language of RCW 51.32.185 is ambiguous, well-established rules of statutory construction and review of the legislative history establish that coccidioidomycosis is not an "infectious disease" to which the statute was intended to apply because the term "infectious disease" is defined after the statute's initial general reference. "When there is a conflict between one statutory provision which treats a subject in a General way and another which treats the same subject in a Specific manner, the Specific statute will prevail." *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979).

Moreover, "where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies." *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000);."The principle of *expressio unius est exclusio alterius* is 'the law in Washington, barring a clearly contrary legislative intent.' " *Mason v. Georgia-Pac. Corp.,* 166

Wn. App. 859, 866, 271 P.3d 381, *review denied*, 174 Wn.2d 1015, 281 P.3d 687 (2012), *citing City of Algona v. Sharp,* 30 Wn. App. 837, 842, 638 P.2d 627 (1982).

RCW 51.32.185(4) treats "infectious diseases" in a specific manner by defining the specific diseases to which the presumption applies. As a result, it would be inappropriate to treat the statute as applying the presumption to the entire universe of infectious diseases; application is limited to the specific diseases codified by the Legislature.

In addition, well-established principles of statutory construction mandate rejection of both of Gorre's primary arguments that RCW 51.32.185 provides a separate cause of action and that his infectious disease of coccicdioidomycososis fall under RCW 51.32.185. The Court in *State v. Roggenkamp*, 153 Wn.2d 2d 614, 624, 106 P.3d 196 (2005), set forth these principles as follows:

> Another well-settled principle of statutory construction is that 'each word of a statute is to be accorded meaning.' '[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' 'W]e may not delete language from an unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.' .

*Id., citations omitted.* Gorre's argument that coccidioidomycosis is an infectious disease covered by RCW 51.32.185 fails. The general language

of RCW 51.32.185(1) would render RCW 51.32.185(4), denoting specifically which infectious diseases are covered, meaningless.

In addition, as originally proposed, RCW 51.32.185 contained no limitation on which infectious diseases fell within the statute's presumption. *See*, House Bill 2663, 57th Leg., Reg. Sess. (Wash. 2002). The diseases covered by the statute were ultimately limited to only those listed. *See*, RCW 51.32.185(4). The Legislature deliberately restricted the conditions to which RCW 51.32.185 applies to those delineated in the statute, which do not include coccidioidomycosis. Gorre presents no evidence that the Legislature intended coccidioidomycosis, a condition not endemic or reported to be acquired in Washington, to be a presumptive occupational disease for firefighters under RCW 51.32.185.

In fact, Division I of the Court of Appeals recently rejected similar arguments in *Raum v. City of Bellevue*, 286 P.3d at 705-06, a case in which the claimant was coincidentally represented by Gorre's Counsel. The Court in Raum noted as follows:

> The Engrossed Substitute S.B. 5801 Fact Sheet (1987) explained, "[The] Bill *does nothing more than shift the burden of proof* for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for fire fighters to L & I or self-insured employers." (Emphasis added.) The House Bill Report, Senate Bill Report, and Final Legislative Report all contain language echoing the statutory language: "A rebuttable *presumption* is established ...;" "There is a rebuttable *presumption* ..."; "The *presumption* may be

> rebutted...." ESSB 5801 House Bill Report; SB 5801 Senate Bill Report; SSB 5801 Final Legislative Report (emphasis added). 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.*

Finally, Gorre's reliance on the doctrine of liberal construction is misplaced. Liberal construction cannot be used to revise explicit statutory directives. AB 26-29; *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 418-19, 832 P.2d 489 (1992). Gorre cannot argue coccidioidomycosis is an infectious disease covered by RCW 51.32.185 by resorting to the doctrine of liberal construction alone. The plain meaning of the statute, numerous rules of statutory construction, and the statute's legislative history establish that the Legislature intended RCW 51.32.185 to apply only to those infectious diseases specifically denoted in RCW 51.32.185(4). "Rules of liberal construction cannot be used to change the meaning of a statute which in its ordinary sense is unambiguous. To allow such rules to be used for such a purpose would require the Court to usurp the legislative function and thereby violate the constitutional doctrine of separation of powers." *Wilson v. Dep't of Labor & Indus.*, 6 Wn. App. 902, 906, 496 P.2d 551 (1972).

*b. There is substantial evidence to support the Superior Court's finding that Gorre suffers from*

> *only one condition, coccidioidmycosis, which is an infectious disease.*

Recognizing that RCW 51.32.185(4) does not list coccidioidomycosis as an infectious disease covered by the statute, Gorre attempts to circumvent the flaw in his appeals to obtain the benefit of RCW 51.32.185, and its concomitant fee-shifting provision for fees before the Board, by claiming that he had a respiratory disease separate and distinct from coccidioidomycosis. The Board and Superior Court correctly rejected this attempted end-run of the statute. Had the Legislature intended to provide the benefits of RCW 51.32.185 to all infectious diseases with respiratory symptoms, rather than just the infectious diseases listed, it was free to make that provision. It did not.

When the record is viewed not just in totality, but in the light most favorable to the City, there is substantial evidence that establishes, as the Superior Court found, that this claim stems from one source and condition, coccidioidomycosis, an infectious disease. CP 942, CP 597, CP 518, CP 473, CP 668 CP 632. Dr. Goss was the only medical witness who felt that Gorre also suffered from a separate respiratory condition, eosinophilic lung disease, the treatment for which he opined led to the onset of Gorre's coccidioidomycosis. CP 619. However, the record contains substantial evidence to support the Superior Court's decision to

reject Dr. Goss's theory that Gorre had any condition beyond coccidioidomycosis. CP 942. Dr. Ayars testified that Gorre had coccidioidomycosis and no other disease CP 475-76.[11] In addition, Dr. Bardana stated that, in Gorre's case, "there is only Valley fever. There is no other disease." CP 518. Dr. Bardana went on to testify that "[i]t's one disease, it's not two diseases. And it's clear, it's crystal clear, and I think everybody except Dr. Goss agrees with that." CP 551. Indeed, Dr. Bardana testified that there is no such thing as eosinophilic lung disease, the condition misdiagnosed by Dr. Goss, as an independently diagnosed condition. CP 509. Dr. Bollyky also testified it is a finding. The record, when viewed in the light most favorable to the City, contains substantial evidence to support the Superior Court's finding that the Gorre "had coccidioidomycosis... [and] did not have separate diseases of eosinophilia or interstitial lung disease." CP 942.

The Board and the Superior Court correctly found that coccidioidomycosis is an infectious disease. CP 290.[12] The record contains substantial evidence to support this finding. Indeed, Gorre's allegation that "[i]t has already been conceded by the Employer's experts

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[11] Gorre makes a number of *ad hominem* attacks on Dr. Ayars. *See, e.g.*, AB 17 ("The Employer's hired expert tried to deceive the trier of fact[.]"). Such accusations are unsupported by fact and inappropriate.

[12] The Superior Court incorporated Findings of Facts 1-6 of the Board's Decision and Order, which includes "4. Valley Fever is an infectious disease." CP 942.

that Coccidioidomycosis is a respiratory disease" could not be further from the truth. AB 32.[13] Drs. Ayars and Bardana testified that coccidioidomycosis is an infectious disease. CP 471; CP 511. Gorre's own medical witness, Dr. Johnson, also categorized coccidioidomycosis as an infectious disease. CP 659 (discussing Dr. Johnson's employment as the Director of the Infectious Disease Consult Clinic, which includes a coccidioidomycosis clinic); CP 665 (discussing Dr. Johnson's publication titled "Guidelines for Treatment of Coccidioidomycosis. Clinical Infectious Disease" and Dr. Johnson's involvement with the Infectious Disease Society of America Guideline Committee for Coccidioidomycosis). Despite Gorre's arguments to the contrary, of the five medical experts who testified in this appeal, only one expressed the opinion that the Claimant had "clinically distinct diagnoses for both respiratory and infectious diseases for claims of eosinophilia/interstitial lung disease and for coccidioidomycosis." AB 28.

Further, Gorre's recitation of and references to his medical history throughout his brief are misleading. Even Dr. Goss testified all of the differential diagnoses that were inaccurately entertained along the way were ruled out. His only other expert, Dr. Johnson, testified he had one condition, Valley Fever, and no separate and distinct disease.

[13] Gorre provides no citations to the record in support of this claim. That is because there is nothing in the record to support it.

Moreover, Gorre asserts his onset of symptoms was February or March of 2007. AB 2. This alleged timing of onset is not supported by the contemporaneous medical records per the testimony of Drs. Ayars and Bardana and Dr. Bardana's summary of Gorre's clinical course. Dr. Ayars did not "demonstrate a [] a fundamental ignorance of the relevant time line." AB 34.

In sum, Gorre presented no credible evidence that coccidioidomycosis is considered a respiratory disease, that the infectious disease is also classified as a respiratory disease, or that he had a separate and distinct respiratory disease apart from the symptoms of his diagnosed infectious disease. The opinions of Drs. Goss and Johnson lack foundation. Even if Dr. Goss's testimony had not lacked foundation, and Gorre had presented some credible evidence, the Superior Court's finding that coccidioidomycosis is an infectious disease and there was no separate respiratory disease is supported by substantial evidence. As a result, this Court should affirm the Superior Court's finding that Gorre's only condition was coccidioidomycosis, which is properly classified as an infectious disease.

*c. RCW 51.32.185 does not create a new "presumptive occupational disease" cause of action.*

Throughout his brief Gorre makes reference to his condition as a "RCW 51.32.185 presumptive occupational disease." *See*, e.*g.*, AB, 3, 7, 23, 33, 34. Gorre seems to argue that RCW 51.32.185 creates a new cause of action for a "presumptive occupational disease" that is different than the occupational disease benefits provided by RCW 51.08.140. AB 43. Indeed, Gorre states that he "is entitled to presumptive occupational disease and occupational disease benefits." AB 34. What Gorre fails to do, however, is note that this very argument, as well as numerous others as to the import of RCW 51.32.185, was recently rejected by Division I of this Court in *Raum,* 286 P.3d 695. . The Court in *Raum* explicitly rejected this attempted obfuscation, stating as follows:

> Throughout his brief, Raum refers to a "presumptive disease claim" and seems to argue that RCW 51.32.185 creates an occupational disease claim somehow different than RCW 51.08.140's "standard occupational disease claim." Appellant's Br. at 25. We disagree. RCW 51.32.185(1) creates no new cause of action—it establishes a "*presumption*" that applies to certain firefighter occupational disease claims... RCW 51.32.185 does nothing more than create a rebuttable evidentiary presumption. We conclude the statute creates no occupational disease claim different from that defined in RCW 51.08.140.

*Raum v. City of Bellevue*, 286 P.3d at 705-06 (emphasis in original). The Court in *Raum* astutely rejected Counsel's arguments, and the City

respectfully submits this Court should apply its reasoning in *Raum* and affirm the Superior Court's and Board's rejection of Gorre's claim.

*d. RCW 51.32.185 does not create strict liability for claim allowance in the State of Washington.*

By asserting that the Department was required to allow his claim despite the medical evidence, Gorre implicitly argues that RCW 51.32.185 provides strict liability for claim allowance for firefighters who fall within its provisions. Although the City's position is that RCW 51.32.185 is inapplicable to Gorre's claim, if this Court finds it is applicable, the Court should nonetheless reject Gorre's attempts to read a strict liability standard into the statute. Gorre's position is that RCW 51.32.185 "means the firefighter does not have to prove causation; the causal connection has been made and is mandated by RCW 51.32.185. The firefighter only needs to present with a covered diagnosis that falls within the statute." AB 38. Despite Gorre's apparent contention that RCW 51.32.185 dispenses with the Industrial Insurance requirement that conditions must be shown to be proximately caused, on a more probable than not basis by an industrial injury or exposure, the evidentiary presumption does not require the Department, the Board, or any court to allow his claim under a theory of strict liability. In fact, the Court in *Raum* , rejected Gorre's argument that RCW 51.32.185 presents a different type of claim:

> RCW 51.32.185's presumption is not conclusive and may be rebutted by a "preponderance of the evidence." RCW 51.32.185(1). If the employer rebuts the presumption, the burden of proof returns to the worker to show he is entitled to benefits, i.e., that he suffers from an "occupational disease" as defined in RCW 51.08.140. If both parties present competent medical testimony, the jury must weigh the evidence to determine whether the worker's condition "arises naturally and proximately out of employment." RCW 51.08.140.

*Raum v. City of Bellevue*, 286 P.3d at 707-10.

Indeed, it is well-established in Washington that rebuttable presumptions are simply evidentiary presumptions and do not constitute evidence. Once the presumption has been rebutted, the presumption falls away without effect as properly occurred in this case. As the Washington Supreme Court stated in *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 42, 123 P.2d 780 (1942):

> The function of a presumption was concisely expressed in *Sullivan v. Associated Dealers*, 4 Wn.2d 352, 358-59, 103 P.2d 489: 'We have held so many times that it would seem to need no citation of authority, *that this presumption is not evidence*, and relates only to a rule of law as to which party shall first go forward and produce evidence to sustain the matter in issue; that it will serve in the place of evidence only until *prima facie* evidence has been adduced by the opposite party; *and that the presumption should never be placed in the scale of evidence. See, Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 P. 870, and cases therein cited.' (Italics ours.)
>
> When [a] presumption is overcome by proper evidence it ceases to exist and cannot be further considered by the court or jury, or used by counsel in argument.

*Bradley*, 13 Wn.2d at 42. Despite this seventy-year-old rule of law, Gorre urges this Court to transform what is plainly a rebuttable evidentiary presumption into near-insurmountable evidence. This Court should reject Gorre's unsupported position.

The legislative history of RCW 51.32.185 also reflects the Legislature's intent to avoid establishing an irrebuttable presumption and avoid providing strict liability by way of absolute claim allowance. The Legislature did not intend for the burdens of production and persuasion to remain at all times with employers or that the presumption would constitute affirmative evidence. In rejecting the irrebuttable presumption, which exists in the state of Maryland, the Legislature was aware that "Maryland's presumption of coverage is virtually irrebuttable because the presumption, standing alone, constitutes affirmative evidence." Memorandum from Bill Lynch, Staff Coordinator, to Washington State Legislature, Joint Select Committee on Industrial Insurance (July 25, 1986). As noted in *Raum*,

> The Engrossed Substitute S .B. 5801 Fact Sheet (1987) explained, "[the] Bill *does nothing more than shift the burden of proof* for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for fire fighters to L & I or self-insured employers." The House Bill Report, Senate Bill Report, and Final Legislative Report all contain language echoing the statutory language: "A rebuttable *presumption* is established ...;" "There is a rebuttable *presumption* ..."; "The *presumption* may be rebutted...."

> ESSB 5801 House Bill Report; SB 5801 Senate Bill Report; SSB 5801 Final Legislative Report. RCW 51.32.185 does nothing more than create a rebuttable evidentiary presumption.

*Raum v. City of Bellevue*, 286 P.3d at 705-06 (emphasis in original). This legislative history establishes the inaccuracy of Gorre's arguments that the Department, Board, and Judiciary must always apply the presumption and allow the claim under a theory of strict liability.

In addition, RCW 51.32.185 did not amend or change any of the appellate processes set forth in RCW 51.52. If the Legislature intended a different appellate process to govern an appeal under this section, it would have amended RCW 51.52 to so specify. *See, e.g.*, RCW 51.52.050(2)(c) (setting forth a different order of presentation of evidence in appeals of Orders finding claimant willful misrepresentation of entitlement to benefits). RCW 51.32.185(7)(a), the only provision in Title 51 which shifts claimants' Board-level attorneys' fees and costs to the Department and employers when claimants prevail in appeals from Department adjudications in RCW 51.32.185, provides that:

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

RCW 51.32.185(7)(a). If the Legislature intended RCW 51.32.185 to create strict liability for claim allowance at the Department level, thereby making the presumption irrebuttable, the provision contemplating claimants' appeals would be surplusage.

The only authority Gorre provides to overcome the obvious intent of the Legislature to create *only* a rebuttable presumption in favor of individuals with certain enumerated conditions, is inapposite foreign authority. AB 43-48. However, foreign authority is unhelpful when interpreting Washington industrial insurance law. Indeed, when interpreting Washington's industrial insurance laws "because of the differences in the statutes of other states, the decisions of their courts can be of little assistance." *Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 57, 240 P.2d 567 (1952). Compared with other jurisdictions, there are several unique aspects of Washington industrial insurance law and the role of the Department, the Board, and the Courts. These unique characteristics make it inappropriate to rely on authority from other jurisdictions, with workers' compensation systems vastly different from the State of Washington. *Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467, 482-83, 745 P.2d 1295 (1987) ("Our Industrial Insurance Act is unique and the opinions of other state courts are of little assistance in interpreting our Act."). *Dennis*, 109 Wn.2d at 482-83; Gorre's reliance on foreign

authority to establish a separate cause of action or strict liability is misplaced.

2. GORRE DID NOT INCUR ANY CONDITION THAT AROSE NATURALLY AND PROXIMATELY FROM DISTINCTIVE CONDITIONS OF HIS EMPLOYMENT WITH THE CITY OF TACOMA.

Regardless of whether the Court finds that RCW 51.32.185 applies to Gorre's claim, which the City submits it does not, substantial evidence supports that the presumption was rebutted or RCW 51.32.185 does not apply to Gorre's claim. In either case, Gorre must establish that the Superior Court's determination that he does not have an occupational disease that arose naturally and proximately from distinctive conditions of his employment with the City of Tacoma Fire Department is not supported by substantial evidence. CP 942.[14] Gorre cannot meet this burden.

RCW 51.08.140 defines an "occupational disease" as "such disease or infection as arises naturally and proximately out of employment." The causal connection between a claimant's condition and his employment must be established by competent medical testimony that shows that the condition is probably, not merely possibly, caused by the employment.

[14] Even if this Court were to determine that RCW 51.32.185 applies in this case, the proper standard of review is still whether the Superior Court's findings are supported by substantial evidence, and whether those findings support the Superior Court's determination that Gorre does not have an occupational disease under RCW 51.08.140. *Raum v. City of Bellevue*, 286 P.3d at 707 (quoting RCW 51.08.140).

*Dennis*, 109 Wn.2d at 477. The Washington Supreme Court has addressed what is required for a disease to arise "naturally" out of employment:

> We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, or unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

*Dennis*, 109 Wn.2d at 481 (emphasis in original). A disease is proximately caused by employment conditions when "there [is] no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the... employment." *Simpson Logging Co. v. Dep't of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448 (1949).

Here, the only competent, relevant and admissible medical evidence was that of Drs. Ayars, Bardana, and Gorre's treating infectious

disease physician, Dr. Bollyky. Only Drs. Ayars and Bardana had a comprehensive set of Gorre's medical records to review the onset, timing and nature of his symptoms and medical history. Only Drs. Ayars and Bardana had competent evidence regarding Gorre's travel and residence history and the nature of Gorre's work. Expert medical opinions concerning causal relationship "do[] not have sufficient probative value to support an award" when they are not based on all material facts. *Sayler v. Dep't of Labor & Indus.*, 69 Wn. 2d 893, 896, 421 P.2d 362 (1966). The opinions of Drs. Johnson and Goss supporting a proximate cause to Gorre's work under either theory were completely lacking in foundation and were purely speculative. Neither physician was aware of Gorre's prior residence in an endemic area, neither physician was aware of Gorre's travels to an endemic area in October 2005, and neither physician had Gorre's medical history. At a minimum, the opinions are not credible. Rather, substantial evidence supports the Superior Court's findings that Gorre's Valley Fever, an infectious disease, became symptomatic in December 2005, he acquired the condition in Nevada, and he "did not contract any respiratory condition that distinctive conditions of his occupation as a firefighter for the City of Tacoma naturally and proximately caused." CP 290.

Gorre erroneously suggests that the City was required to establish exactly what caused his condition. AB 44. There is no such requirement in Washington workers' compensation law that an employer or the Department must prove what caused a claimant's condition when proving a condition is not work-related. Rather, the worker must prove that that claimed condition is work related based on expert medical evidence on a more probable than not basis. *Ruse v. Dep't of Labor & Indus.*, 138 Wash. 2d 1, 6-8, 977 P.2d 570 (1999). Even in cases where the employer is the appealing party and required to proceed first with its case, once an employer has presented evidence that the worker's condition is not industrially-related, the burden shifts to the worker to establish his entitlement to benefits by strict proof. Where the issue is a workers' entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympia Brewing Co. v. Dep't Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dep't of Labor & Indus.*, 52 Wn. 2d 33, 323 P.2d 241 (1958). *See also*, *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 192, 286 P.2d 1038 (1955).

The Superior Court's determination that Gorre's coccidioidomycosis was not naturally and proximately caused by his employment is supported by substantial evidence as outlined above. Gorre cannot establish otherwise. Instead, the evidence, when evaluated in the

light most favorable to the City, supports only one conclusion, that Gorre's coccidioidomycosis was not naturally and proximately caused by his employment based on the evidence summarized above. The opinions of Drs. Ayars and Bardana, the only fully informed opinions, are substantial evidence supporting the Superior Court's findings. Hence, this Court should affirm the Superior Court's decision.

3. THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT THE SUPERIOR COURT'S FINDING THAT GORRE HAD NO RELEVANT HISTORY OF SMOKING.

Because substantial evidence supports the Superior Court's finding that the only condition that Gorre suffered from is an infectious disease and not a respiratory disease, the application of RCW 51.32.185(5)'s provision regarding smoking is inapplicable. However, if this Court were to find RCW 51.32.185 applicable, the statute is also inapplicable to Gorre's claim because of his history of tobacco use. The Superior Court found that Gorre "was not a smoker." CP 942. However, the Superior Court's finding is contrary to the medical evidence in this case as summarized above in the testimony of Drs. Bardana, Eckert and Weinstein.

RCW 51.32.185(5) provides that RCW 51.32.185 does not apply to a firefighter who has a history of tobacco use. Per that subsection, the Legislature required the Department to define by rule the extent of tobacco

use which would exclude a firefighter from the provisions of RCW 51.32.185. Per the resulting regulations, a former smoker is defined as someone who has a history of tobacco use, has smoked tobacco products at least one hundred times in his/her lifetime, but as of the date of manifestation did not smoke tobacco products. Wash. Admin. Code § 296-14-315. The subsequent regulations provide relevant periods of use between five and fifteen years prior to disease manifestation but only for asthma, lung cancer, and emphysema/COPD/chronic bronchitis. Wash. Admin. Code § 296-14-325. Because the regulations are silent as to respiratory symptoms caused by coccidioidomycosis, although Gorre has an established smoking history within the fifteen-year period prior to the filing of this claim,[16] even were the history established beyond the fifteen-year period, Gorre's smoking history still bars applicability of RCW 51.32.185 to his claim because the statutory language, which is unlimited as to time period, is the default period during which Gorre's smoking history is relevant.

Gorre has repeatedly denied that he has ever been a smoker. CP 374, 376, 378, 379. However, these self-serving reports are not supported by the contemporaneous records. This ten-year history of smoking equated

[16] Wash. Admin. Code § 296-14-325 provides that in cases of COPD, emphysema, chronic bronchitis, and lung cancer if the fire fighter is a former smoker who smoked within fifteen years of the date of manifestation of the disease, the fire fighter is not entitled to RCW 51.32.185's presumption . Wash. Admin. Code § 296-14-325(b)-(c)

to approximately 480 instances of smoking. This exceeds the regulatory requirement of 100 instances of smoking contained in Wash. Admin. Code § 296-14-315.

4. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT FAILED TO STRIKE GORRE'S INADMISSIBLE EVIDENCE.

At the Superior Court, Gorre attempted to introduce new evidence by appending the report of Martin Rose (CP 873-877), the Declaration of Dr. Goss (CP 879-881), and the letter of Dr. Bollyky to his briefing and improperly referenced excluded information regarding Matthew Simmons. The City objected to this new evidence and filed a Motion to Strike. CP 885-91. The Superior Court did not rule on the motion. Where a court does not rule on a Motion to Strike prior to its judgment, the court "effectively denie[s]" the motion. *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002). The Superior Court's failure to strike Gorre's inadmissible evidence was error. This Court reviews the Superior Court's decision to admit or exclude evidence for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The Superior Court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* "A trial court's decision is manifestly unreasonable if it 'adopts a view "that no reasonable person would take."'" *In re Pers. Restraint of Duncan*, 167

Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Here, the Superior Court abused its discretion when it failed to exclude evidence offered by Gorre for the first time on appeal and previously excluded evidence as to Simmons. Gorre should have been prohibited from offering new exhibits as evidence in this case, which is prohibited by RCW 51.52.115: "[T]he court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the Superior Court as provided in RCW 51.52.110[.]" RCW 51.52.115.The Superior Court's review of a Board decision is limited to the evidence presented to the Board and contained in the Certified Appeals Board Record. RCW 51.52.115. *Sepich v. Dep't of Labor & Indus.*, 75 Wn. 2d 312, 316, 450 P.2d 940 (1969). The evidence should have been limited to the evidence presented to the Board. Statutory and judicial authority prohibited Gorre from introducing any new exhibits as evidence during the Superior Court appeal. The exhibits offered by Gorre at the Superior Court are inadmissible evidence and should have been stricken. The Superior Court's failure to exclude this evidence, also inadmissible per Evidence Rule 801 and Evidence Rule 403 constituted an abuse of discretion. The

Rose Environment Report was offered and referenced for the truth of the matter asserted, is hearsay. Evidence Rule 801. In addition, the report should been stricken because it is unduly prejudicial. Evidence Rule 403. Gorre could have called the author of this report, Martin Rose, as an expert at the Board level. If he had done so, the City would have had the opportunity to cross-examine Mr. Rose. Likewise, had Gorre offered the report into evidence at hearings, the City could have objected or called Mr. Rose in rebuttal. The City was deprived of the opportunity to examine the author of this report, either on direct or cross-examination. Even if this report had some bearing on the case, due to this lack of full examination, any probative value the report had is substantially outweighed by the danger of unfair prejudice. Evidence Rule 403. This report and all references to it should have been stricken. See e.g., AB 3.

Gorre also improperly offered the declaration of Dr. Goss. After Dr. Goss authored his declaration, he testified at the Board in this matter. Dr. Goss's declaration was not offered into evidence at the Board during his perpetuation testimony. Because his testimony was offered under oath and subject to cross-examination, it is this testimony, not the pre-hearing declaration, that was before the Superior Court for consideration. The

Declaration is not evidence, is hearsay and is unduly prejudicial. Evidence Rule 801; Evidence Rule 403.[17]

Gorre's Superior Court references to Matthew Simmons's alleged medical diagnosis and his related statements regarding his travels and work constitute inadmissible hearsay and should have been stricken. The City attempted to gather Mr. Simmons' records to objectively verify his claims and to ascertain the nature of his alleged condition. Gorre moved to quash the City's discovery. BR 576-604. In a May 27, 2010 hearing, the IAJ quashed the City's subpoena for Mr. Simmons's records. The IAJ ruled that because Mr. Simmons's medical situation was irrelevant in this case he would "not allow testimony with regards to [Mr. Simmons's] medical problems, diagnoses, whatever he may have developed in his work as an – I believe EMT for Rural Metro." Tr. 5/27/10, p. 5, ll. 13-26. When Mr. Simmons testified, Gorre's counsel attempted to elicit testimony regarding his medical conditions. The IAJ again sustained the City's objection, refusing to even allow the testimony in colloquy. Tr. 6/7/10, p. 94, l. 13-p. 96-l. 8. Gorre's unsupported and misleading claims regarding Mr. Simmons's alleged medical conditions lacked foundation, supporting expert medical testimony, and were hearsay. Evidence Rule 801. These baseless claims were inappropriate because the City was

[17] Gorre also improperly appended a letter from Dr. Bollyky to his Superior Court briefing. The letter was withdrawn at trial. VRP 3/30/12, 4, ll. 15-17.

precluded from gathering the records required to determine the veracity of the claims and with which to cross-examine Mr. Simmons or determine the identity of his physicians so the City could call them as witnesses regarding Mr. Simmons's claims. The references and proferred testimony should have also been excluded under Evidence Rule 403.

5. THE SUPERIOR COURT ERRONEOUSLY FAILED TO AWARD STATUTORY COSTS TO THE EMPLOYER.

The Superior Court erred in failing to award the City statutory costs under RCW 4.84.010 and RCW 4.84.090. Under RCW 51.52.140, the rules of civil practice apply to industrial insurance appeals. *Id.* As a result, RCW 4.84, governing fees at the Superior Court, applied in its entirety to this case. *Allan v. Dep't of Labor & Indus.,* 66 Wn. App. 415, 832 P.2d 489 (1992). Under RCW 4.84.010 and RCW 4.84.090, statutory costs are authorized to the prevailing party at the Superior Court. Because the City prevailed at the Superior Court, it was entitled to reasonable costs. This includes reasonable deposition transcript costs under RCW 4.84.010(7). The Superior Court, however, failed to award the City deposition transcript costs of $830.30. VRP 6/8/12 9; CP 942. Under *Allan*, 66 Wn. App. 415, this decision was error. The Superior Court's denial of costs should be reversed and this Court should award the City its statutory costs of $830.30. In addition, RCW 4.56.110 provides for post-

judgment interest which should be awarded on these costs. RCW 4.56.110.

## G. CONCLUSION

Based on the foregoing points and authorities, the City requests that this Court affirm the Board's and Superior Court's decisions rejecting Gorre's claim and award its costs.

RESPECTFULLY SUBMITTED this 17th day of December, 2012.

PRATT, DAY & STRATTON, PLLC

By _____
Marne J. Horstman, # 27339
Eric J. Jensen, # 43265
Attorneys for Respondent/Cross-Appellant,
City of Tacoma

# APPENDIX A

PRATT, DAY & STRATTON
JUN 08 2012
COPY RECEIVED

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

**STATE OF WASHINGTON**
**PIERCE COUNTY SUPERIOR COURT**

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

JUDGMENT SUMMARY (RCW 4.64.030)

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



ORIGINAL

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

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

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

## II. CONCLUSIONS OF LAW

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

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

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

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

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

## III. JUDGMENT

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

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

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

///

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

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

DATED this 8th day of ~~May~~ June, 2012.

RONALD C. CULPEPPER
Judge

Presented by:
ROBERT M. McKENNA
Attorney General

Pat L. DeMarco, WSBA #16897
Assistant Attorney General

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

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

Pratt, Day& Stratton, PLLC

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

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



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BEFORE TI BOARD OF INDUSTRIAL INSUR, CE APPEALS
STATE OF WASHINGTON

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

APPEARANCES:

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

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

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

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

## DECISION

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

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

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

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

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

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

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

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

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

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

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

Mr. Gorre's Relevant Background

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

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

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

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

## The Medical Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## FINDINGS OF FACT

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

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

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

4. Valley Fever is an infectious disease.

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

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

## CONCLUSIONS OF LAW

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

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

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

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

Dated: December 8, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY — Chairperson

FRANK E. FENNERTY, JR. — Member

LARRY DITTMAN — Member

# APPENDIX B

Appendix B

| Date Range | EMS | Investigate Only | Fire | False Alarm | Staging/ Standby | Hazardous Condition | Search/ Rescue | Clean- | Total |
|---|---|---|---|---|---|---|---|---|---|
| 6/1/05-12/31/05 | 268 | 37 | 7 | 2 | 3 | 2 | 0[1] | 1 | 320 |
| 1/1/06-12/31/06 | 450 | 58 | 20 | 11 | 8 | 1 | 4 | 4 | 556 |
| 1/1/07-12/31/07 | 342 | 117 | 24 | 35 | 1 | 4 | 7 | 0 | 530 |

(Davis, p. 160, l. 21-p. p. 163, l. 20).

[1] Assistant Chief Davis' testimony was erroneously recorded as 30 search and rescue calls. Davis, p. 161, l. 24.

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STATE OF WASHINGTON

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DIVISION II

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| EDWARD O. GORRE,<br><br>Appellant,<br><br>v.<br><br>CITY OF TACOMA and DEPARTMENT OF LABOR AND INDUSTRIES,<br><br>Respondents. | No. 43621-3-II<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on the 17th day of December, 2012, I filed and served the **Respondent/Cross-Appellant's Brief and this Certificate of Service** upon the following parties, addressed as follows:

**ORIGINAL AND ONE COPY VIA FIRST-CLASS MAIL TO:**

David C. Ponzoha
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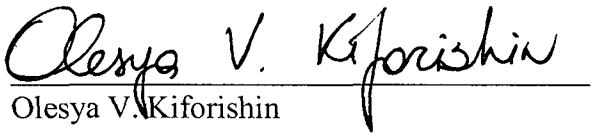
DATED this 17th day of December, 2012, at Tacoma, Washington.



Olesya V. Kiforishin