

No. 67213-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL RAUM and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON

Appellants,

v.

CITY OF BELLEVUE,

Respondent.

APPELLANT'S OPENING BRIEF

Ron Meyers
Ken Gorton
Zoe Wild
Attorneys for Appellant
Michael Raum

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA # 13169
WSBA # 37597
WSBA # 39058

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENT OF ERROR2

III. STATEMENT OF THE CASE4

 A. Lt. Raum’s attending physician testimony.....7

 1. Dr.Maidan.....7

 2. Dr.Kim.....8

 B. Employer’s hired experts.....11

 1. Dr. Thompson.....11

 2. Dr. Yang.....16

 C. Overview of the City’s arguments.....19

IV. ARGUMENT22

 A. Standard of Review22

 1. Superior Court.....22

 2. Court of Appeals (Generally).....22

 3. Court of Appeals (Jury Instructions).....23

 B. Statutes governing Lt. Raum’s claim.....24

 C. Jury Instruction No. 14 constitutes reversible error because it incorrectly omits and/or negates Lt. Raum’s favorable presumption.....25

 D. The Special Verdict Form constitutes reversible error because it attempts to incorrectly combine the presumptive

	<u>statute with the standard occupational disease statute.....</u>	27
E.	<u>The Special Verdict Form constitutes reversible error because it fails to list “aggravation under Question No. 2.....</u>	30
F.	<u>Substantial evidence does not exist to find against Lt. Raum. The Jury’s decision should be overturned as a matter of law and public policy.....</u>	
1.	<u>Case law applying the presumptive disease statute require more than just speculation by the employer’s experts to overcome its burden of proof.....</u>	31
2.	<u>The Board’s legal interpretation is to be given substantial weight. The Jury Instructions and Special Verdict Form made this impossible.....</u>	33
3.	<u>Lt. Raum is entitled to benefits if his employment was one of several proximate causes. Jury Instruction No. 15 provides this law, but again fails to explain that the presumptive standard is very different.....</u>	34
4.	<u>Lt. Raum’s treating medical practitioners are to be given special consideration.....</u>	36
5.	<u>The purpose of the Industrial Insurance Act is remedial in nature and is to be liberally construed in favor of the injured worker.....</u>	37
G.	<u>The presumptive disease statute, RCW 51.32.185, was enacted to protect injured firefighters like Lt. Raum. It was not designed to be used as a shield against liability by the City.....</u>	39
1.	<u>Standards for preponderance of evidence - Lt. Raum’s condition cannot be rebutted by speculation, conjecture, or conclusory statements.....</u>	40

2.	<u>Other jurisdictions have entered strong, well-reasoned presumptive disease rulings in favor of public servants in similar cases.</u>	41
H.	<u>The Court erred by striking significant testimony regarding Lt. Raum’s occupational exposure to toxins, as well as his fitness requirements for being a firefighter.</u>	43
1.	<u>Firefighter hiring requirements.</u>	44
2.	<u>Firefighter employment exposures.</u>	45
I.	<u>Lt. Raum should be awarded reasonable attorney fees and costs by statute.</u>	46
V.	CONCLUSION.	47

TABLE OF AUTHORITIES

Cases

<i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002).....	38
<i>Brand v. Department of Labor and Industries</i> , 139 Wn.2d 659, (1999).....	46
<i>Chalmers v. Department of Labor & Indus.</i> , 72 Wn.2d 595, 434 P.2d 720 (1967).....	37
<i>City of Bremerton v. Shreeve</i> , 55 Wash. App. 334, 777 P.2d 568 (1989).....	35
<i>City of Frederick et al. v. Shankle</i> , 136 Md. App. 339, 765 A.2d 1008 (2001).....	32
<i>Cook v. City of Waynesboro</i> , 300 S.E.2d 746, (Va. 1983).....	32
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	38
<i>Cunningham v. City of Manchester Fire Dep’t.</i> , 525 A.2d 714, (N.H. 1987).....	32, 33
<i>Dennis v. Department of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	30, 38
<i>Dependency of H.W.</i> , 92 Wash. App. 420, 961 P.2d 963 (1998).....	40
<i>Doty v. Town of South Prairie</i> , 155 Wn.2d 527, 120 P.3d 941 (2005).....	34
<i>Fairfax County Fire & Rescue Dept. v Mitchell</i> , 14 Va App 1033, 421 SE2d 668 (1992).....	41
<i>Grimes v. Lakeside Industries</i> , 78 Wash. App. 554, 560,	

897 P.2d 431 (1995).....	22
<i>Groff v. Department of Labor & Indus.</i> , 65 Wn.2d 35, 395 P.2d 633 (1964).....	37
<i>Harrison Memorial Hospital v. Gagnon</i> , 147 Wn.2d 1011, 56 P.3d 565 (2002).....	41
<i>Hi-Way Fuel Co. v. Estate of Allyn</i> , 128 Wash. App. 351, (2005).....	46
<i>In re Sego</i> , 82 Wn.2d 736, 513 P.2d 831, (1973).....	40
<i>Jackson v. Workers' Compensation Appeals Bd.</i> , 133 Cal. App. 45h 965, 35 Cal. Rptr. 3d 256 (3d Dist. 2005).....	31
<i>Loushin v. ITT Rayonier</i> , 84 Wash. App. 113, 924 P.2d 953 (1996).....	37
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wash. App. 677, 162 P.3d 450 (2007).....	33, 34
<i>McClelland v. ITT Rayonier, Inc.</i> , 65 Wash. App. 386, 828 P.2d 1138 (1992).....	22
<i>McCoy v. City of Shreveport Fire Dept.</i> , 649 So.2d 103 (1995, La. App. 2d Cir).....	43
<i>McDonald v. Dep't of Labor and Industries</i> , 104 Wash. App. 617, 17 P.3d 1195 (2001).....	35
<i>Meche v. City of Crowley Fire Dep't.</i> , 688 So 2d 697 (1997, La App 3d Cir), cert den 692 So 2d 1088 (La).....	32
<i>Miller v. Dep't of Labor & Industries</i> , 200 Wash. 674 (1939).....	35, 36
<i>Miller v. Likins</i> , 109 Wash. App. 140, 34 P.3d 835 (2001).....	40
<i>Montgomery County v Pirrone</i> , 109 Md App 201, 674 A2d 98 (1996).....	42

<i>Presnell v. Safeway Stores, Inc.</i> , 60 Wn.2d 671, 374 P.2d 939 (1962).....	40
<i>Ravsten v. Department of Labor & Indus.</i> , 108 Wn.2d 143, 736 P.2d 265 (1987).....	22, 34
<i>Robertson v. North Dakota Workers Compensation Bureau</i> , 2000 ND 167, 616 NW.2d 844 (ND 2000).....	42
<i>Ruse v. Department of Labor & Industries</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	23
<i>Spalding v. Department of Labor & Indus.</i> , 29 Wn.2d 115, 186 P.2d 76 (1947).....	37
<i>Superior v. Dep't of Indus. Labor & Human Relations</i> , 267 N.W.2d 637, (Wis. 1978).....	32
<i>Thompson v. King Feed & Nutrition Serv., Inc.</i> , 153 Wn.2d 447, 105 P.3d 378 (2005).....	23
<i>Washington Cedar and Supply Co. v. Dep't of Labor & Indus.</i> , 137 Wash. App. 592, 154 P.3d 287 (2007).....	33
<i>Weatherspoon v. Department of Labor & Indus.</i> , 55 Wash. App. 439, 777 P.2d 1084 (1989).....	22
<i>Worden v. County of Houston</i> , 356 N.W.2d 693, (Minn. 1984).....	32
<i>Young v. Department of Labor & Indus.</i> , 81 Wash. App. 123, 913 P.2d 402 (1996).....	23, 37

Statutes

RCW 51.04.010.....38

RCW 51.08.140.....1, 24, 27, 29

RCW 51.12.010.....38

RCW 51.32.185.....1, 5, 13, 18, 23, 24, 25, 27, 28, 29, 31, 35, 39, 41, 45, 46

RCW 51.52.115.....22, 34

RCW 51.52.140.....23, 46

I. INTRODUCTION

Lt. Raum is a career firefighter with the City of Bellevue. He served as a firefighter for 19 years and responded to thousands of emergency situations before he suffered from three separate heart problems. Each of these events occurred while Lt. Raum was on duty. Lt. Raum requested benefits from his employer, including payment of his medical bills and time loss, which were denied.

Lt. Raum appealed this decision with the Board of Industrial Insurance Appeals and won. The Board found that Lt. Raum was entitled to benefits because his cardiac condition was an occupational disease under RCW 51.08.140 and a presumptive occupational disease under RCW 51.32.185. The second statute states that “any heart problem experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities” is presumed to be an occupational disease.

Inexplicably, the City appealed this decision to Superior Court, where a jury trial was held. The jury was provided with a misleading and incomplete set of jury instructions and special verdict form. According to one jury member, most jurors wanted to find for Lt. Raum but were “forced” to find for the City because of the erroneous language on the special verdict form. *Declaration of Ron Meyers*. This has resulted in manifest injustice

against a 19-year veteran firefighter who has been denied benefits. Lt. Raum respectfully requests that the Court review this decision, and find in his favor on the following issues.

II. ASSIGNMENTS OF ERROR

1. The Superior Court committed reversible error when it denied Lt. Raum's request to use an appropriate special verdict form and appropriate jury instructions.

A. The Court should have provided a special verdict form that set forth the law regarding the "presumptive disease" statute, that is, that a firefighter who suffers from "any heart problem experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities" is presumed to have suffered from an occupational disease. The verdict form selected by the Court is actually a jumble of the "presumptive disease" statute and the occupational disease statute and is, therefore, misleading.

B. The Court should have provided a special verdict form that set forth the correct law regarding "aggravation" of a pre-existing injury, which also entitles an injured worker to benefits. The one selected by the Court fails to mention aggravation in any way.

C. The Court should have adopted jury instructions that clearly set forth

the “presumptive disease” standards and the “occupational disease” standards as two different ways in which to find that Lt. Raum is entitled to benefits. Instead, the jury instructions provide both standards, one after the other, in a manner that is confusing and can be interpreted as one overall standard. Jury Instruction 13 appears to say an occupational disease is “presumed” when a heart condition occurs, then Jury Instruction 14 appears to cancel the presumption by saying a worker must prove that the occupational disease arose out of employment. This appears to shift the burden back to Lt. Raum, when the burden is really on the City (both under the “presumption” statute and because the Board found in favor of Lt. Raum).

2. There is an absence of substantial evidence to support the jury’s decision to deny Lt. Raum benefits under either statute. The City has the burden of proof to rebut the “presumption” statute, and the burden of proof to overcome the Board’s decision that Lt. Raum suffers from an occupational disease. While the City presented arguments about eating habits and smoking while in high school, it was not enough evidence to overcome these strong presumptions given Lt. Raum’s three heart problem incidents “any heart problem experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities”. The jury’s decision should

be overturned as a matter of law and public policy.

3. The Superior Court committed reversible error when it refused to allow testimony, already in the Board record, that explained the unique characteristics of firefighting, including toxic exposure and fitness requirements. This testimony would have established Lt. Raum's exposure to toxins and stress, as well as previous fitness levels, thereby permitting the jury to conclude Lt. Raum's 19-year career was responsible for his occupational disease.

III. STATEMENT OF THE CASE

Lt. Raum is a career firefighter with the City of Bellevue. TR 37(10-15). He has served as a firefighter for 19 years. TR 37(16-19). In order to become a firefighter, Lt. Raum was required to undergo a battery of tests including a full medical examination. TR 41(11-23). He passed all tests including a treadmill stress test, blood tests, visions tests and strength tests. TR 41(11-23). He also received training and certification as an EMT as part of his employment. TR 68(25-26), 69(1-8).

Lt. Raum smoked on and off for a couple of years in high school, but has not smoked for approximately 25 years. TR 70(1-16), 108(21-26), 109(1-9). However, when he began his career as a firefighter, Lt. Raum was exposed to second hand smoke at the fire station for many years. TR 70(17-26), 71(1-26), 72(1-18), 73(4-22). In addition to smoke exposure at

the workplace, he was exposed to diesel fuel fumes in the fire station. TR 74(10-26), 75(1-26), 76(1-7).

As a long-term firefighter with the City of Bellevue, Lt. Raum was exposed to smoke, fumes, toxic chemicals, bodily fluids, disruption of circadian rhythms, and stressful, life-threatening situations. TR 56(8-25). Each time the bells in the fire station would ring, signifying an emergency, Lt. Raum's heart rate would increase, adrenaline would pump, and, because he worked 24 hour shifts, his circadian rhythm would be disrupted. TR 51(7-21), 54(2-12). When responding to fires, he was often exposed to smoke, including grassland fire smoke, toxic chemicals from burning electronics, burning asbestos, burning plastic, burning insulation, carbon monoxide, and many other unknown toxic fumes. TR 57(14-26), 58(1-13), 60(12-23), 67(24-26), 68(1-9), 76(8-26), 77(1-9).

During the course of his employment, Lt. Raum had three separate incidents of heart problems, as defined by RCW 51.32.185. The first occurred in February 2008 while he was at Fire Station No. 9 in Bellevue. TR 80(13-26), 81(1-5). He was involved in conducting a training session to prepare for mandatory annual physical evaluations. TR 80(13-26), 81(1-5). Lt. Raum was working out on an elliptical machine at near maximum level of intensity. TR 80(13-26), 81(1-5). About 10 minutes into his workout, he began feeling pressure in his chest. TR 86(14-26), 87(1-5). He described the

feeling as a pressure in the left side of his chest that radiated up his neck into the side of his jaw. TR 87(17-20).

This same chest pressure sensation occurred a second time at Fire Station 9 while he was working out. TR 87(6-23). Lt. Raum slowed down or stopped the workout, and the pressure went away each time. TR 87(3-4), 87(22-23). Lt. Raum was not particularly worried about these two episodes, because, in addition to being in excellent physical condition, he underwent regular wellness exams through Washington Institute of Sport Medicine that included “12 way” stress tests. TR 88(1-7).

The third episode occurred when Lt. Raum was responding to a two-vehicle collision that was blocking a main intersection during commute hours. Lt. Raum instructed his crew members on what to do, and then ran up to the vehicles to perform emergency medical triage on the accident victims. TR 88(11-26), 89(1-9). While running to the vehicle, Lt. Raum experienced the same pressure in his chest, but at a greater intensity than before. TR 88(11-26), 89(1-9). He was forced to stop until the pressure went away, leaving his partner to check on the accident victims. TR 88(11-26), 89(1-9).

Lt. Raum was diagnosed with having suffered a heart attack and underwent surgery to have a stent implanted. Lt. Raum eventually recovered and returned to duty, however, he incurred substantial time loss and medical bills as a result.

Prior to these events, Lt. Raum took very good care of himself. He ate well and exercised. TR 14(14-26), 15(1-16). He had no complaints of heart pain, chest pain, or shortness of breath. TR 17(26), 18(1-11), 24(9-15), 79(11-13).

Lt. Raum has been married since October of 1992. TR 23(15-16). He and his wife have three children. TR 22(18-23). Lt. Raum's mother is still alive and healthy at age 70. TR 16(5-10). His grandparents on his mother's side lived into their late seventies or eighties. TR 16(1-4). His grandparents on his father's side lived into their eighties, and were active and healthy up until the end of their lives. TR 15(21-25). His father passed away at age 37 due to a childhood illness; rheumatic fever. Rheumatic fever is not genetic. TR 16(11-15), 16(24-26); *see also Deposition of Dr. Thompson*, 40(1-9).

A. Lt. Raum's attending physician testimony.

Lt. Raum first began treatment at Eastside Cardiology Associates in 2005. Dr. Maidan and Dr. Kim are both cardiologists at Eastside Cardiology Associates. Claimant first saw Dr. Maidan, and then began seeing Dr. Kim in 2008.

1. Dr. Maidan.

Dr. Maidan is Board Certified in Internal Medicine and Cardiology. He first saw Lt. Raum on August 29, 2005. *Deposition of Dr. Maidan*, 19(4-6).

Dr. Maidan was able to speak from his own experience that firefighters have a higher risk of cardiovascular disease and cardiovascular death than the general public. *Id.* at 11(23-25), 12(1). He explained that firefighters are “exposed to circumstances that increase the risk of cardiovascular disease.” *Id.* at 16(12-24). He listed such risks as smoke inhalation, chemical exposure, high levels of sudden exertion, and fight-or-flight/hyperadrenergic response, among others. *Id.* at 16(12-24). The doctor noted that firefighters are often subjected to all of these conditions at the same time, which then significantly impacts the heart. *Id.* at 16(12-24).

Dr. Maidan stated unequivocally that there is no way to segregate the cause of a firefighters heart disease between work exposures and stresses or genetic predisposition. *Id.* at 17(7-16), 49(2-11). Dr. Maidan noted that Lt. Raum had above average functional capacity during a stress test on July 31, 2009. *Id.* at 20(2-17).

2. Dr. Kim’s testimony.

Dr. Kim is Board Certified in Cardiology. *Deposition of Dr. Kim*, 6(20-22). He is also Board Certified in Interventional Cardiology. *Id.* He only treats patients with heart problems. *Id.* at 8(8-10). He sees about 20 patients a day and works five days a week. *Id.* at 8(11-14). Dr. Kim first saw Lt. Raum on December 27, 2008. *Id.* at 16(23-25).

Dr. Kim took over Lt. Raum’s care when he went to the hospital with

an “acute emergency” or “basically, a heart attack.” *Id.* at 19(23-25), 20(1-4). Lt. Raum was taken to the cardiac catheterization lab and Dr. Kim put a stent in his critically clogged coronary artery. *Id.* at 19(23-25), 20(1-4). Lt. Raum was eventually discharged, but Dr. Kim has continued to evaluate and treat him. Dr. Kim opined that Lt. Raum’s occupational exposures were responsible, at least in part, for his atherosclerosis. *Id.* at 31(14-19). Dr. Kim noted it would be impossible to determine what portion of Lt. Raum’s heart problem was caused by his employment as a firefighter and what portion was caused by other factors. *Id.* at 31(20-25).

Dr. Kim had Lt. Raum’s full medical records from his treatment at Eastside Cardiology Associates, which included a stress test in 2005. This stress test, which was conducted by Dr. Maidan, showed that Lt. Raum did not have any clinically significant atherosclerosis as late as 2005. *Id.* at 35(25), 36(1-4). However, by the time he underwent another stress test in 2008, Lt. Raum did have clinically significant atherosclerosis. *Id.* at 18(2-7).

Dr. Kim acknowledged hypertension or high blood pressure was mentioned in Lt. Raum’s chart, but then stated that he did not think it was an accurate diagnosis. *Id.* at 40(21-23). The doctor explained that as he reviewed Lt. Raum’s chart, he noticed that in 2005 Lt. Raum did not have high blood pressure or hypertension. The same was true in March of 2008. *Id.* at 41(1-7). The doctor further explained that the diagnosis was present

because of a medication given for Lt. Raum's borderline heart attack. However, he stated that Lt. Raum's blood pressure, while not normal, did not require treatment. *Id.* at 44(2-10), 52(12-20).

Dr. Kim explained that Lt. Raum's multiple exposure to toxins, smoke and chemicals from his firefighting duties, can cause damage to the coronary arteries. *Id.* at 31(14-19). He further stated that the allocation of the disease between toxic exposure and high blood pressure was not discernable, by himself, or by anyone else. *Id.* at 31(23-25). Dr. Kim noted Lt. Raum's high cholesterol. However, given Lt. Raum's performance on multiple stress tests, Dr. Kim felt the cholesterol, and any other addressable risk factors, such as diet and exercise, were well addressed.

In sum, both Dr. Maidan and Dr. Kim acknowledged the toxins and stressors firefighters are exposed to as a regular part of their daily work environment. Doctors Maidan and Kim also acknowledge that it is impossible to determine, through current medical science, how much of Lt. Raum's condition is caused by genetic factors and how much is caused by employment related conditions. In other words, when the presumption that Lt. Raum's condition was created by his occupation is taken into consideration, it cannot be rebutted by medical evidence to the contrary. Lt. Raum should be granted benefits. Furthermore, the City's hired experts acknowledge there are exposures, stressors and dangers for firefighters, as set

forth below.

B. Employer's hired experts.

1. Dr. Thompson's testimony.

Dr. Thompson is a well-seasoned defense expert who, since graduating from medical school in 1946, approximately 65 years ago, has never once testified on behalf of injured persons, claimants or plaintiffs.

Testimony of Dr. Thompson, 3(23-24), 70(8-10).

Dr. Thompson examined Lt. Raum on only one occasion. *Id.* at 10(7-18). He never treated Lt. Raum or established a doctor/patient relationship with him. *Id.* at 10(7-18). Dr. Thompson incorrectly believed Lt. Raum was smoking as recently as 2001. *Id.* at 12(5-6). Once counsel for Lt. Raum directed Dr. Thompson to the correct place in his records, the doctor was able to see that Lt. Raum quit smoking in 1983. *Id.* at 17(22-26), 18(9-12).

Dr. Thompson had difficulty recalling other dates as well. He noted that Lt. Raum had stents placed in his coronary artery. *Id.* at 16(3-10). However, when asked if this was done after February of 2008, Dr. Thompson initially testified it occurred before February 2008. *Id.* Dr. Thompson was also incorrect in his recollection of other dates, including Lt. Raum's years of employment as a firefighter and his age. *Id.* at 17(13-19).

While Dr. Thompson acknowledged Lt. Raum had a history of heart

related complaints occurring during the course of his employment, the doctor referred to only “two episodes of discomfort while on an exercise training machine on duty.” *Id.* at 16(23-26), 17(1-12). Dr. Thompson did not mention the third episode involving an emergency response at a motor vehicle collision. *Id.* It was not until he was directed to the record of the third heart problem incident that Dr. Thompson even acknowledged that it occurred. *Id.* at 42(9-18).

The doctor noted Lt. Raum had a flat abdomen without a lot of fat. *Id.* at 21(4-8). The doctor had previously implied that Lt. Raum’s body mass index (BMI) was high. However, he had to admit that with the flat belly he noted on examination, and the fitness he observed in Lt. Raim’s physical condition, that a high BMI in this case did not necessarily mean he was overweight. *Id.* at 37(26), 38(1-18). The doctor admitted there are variations in the accuracy of a BMI rating, including dense muscle mass, which can skew the rating higher. *Id.*

Dr. Thompson speculated that Lt. Raum’s “heart problem” was caused by genetic risk and referenced his fathers death at age 37. *Id.* at 27(12-26), 1-2. Somehow, without having access to any actual medical records surrounding the condition, treatment or death of Lt. Raum’s father, Dr. Thompson diagnosed coronary disease as the sole cause of death of his father (rather than heart damage from rheumatic fever). *Id.* He went so far

as to say Lt. Raum's father "felt fine" right before he died, which is impossible to determine from the information on file. *Id.*

Dr. Thompson never even reviewed the death certificate for Lt. Raum's father. *Id.* at 47(20-24). He never saw an autopsy report on Lt. Raum's father. *Id.* at 47(20-24). Moreover, Dr. Thompson admitted that he had no idea how old Lt. Raum's grandparents were when they passed away, but acknowledged it could be of significance if they lived over 60 or 70 years (and would be of significance if they lived over 80 years). *Id.* at 46(18-26).

Dr. Thompson admitted that Lt. Raum did not have diabetes. *Id.* at 37(4-18). He testified that the significance of a diagnosis for diabetes is "very often associated with coronary disease." *Id.* Claimant had multiple tests for diabetes, all of which were normal. *Id.* The doctor was also unaware that Lt. Raum suffered from carbon monoxide exposure on five different occasions. *Id.* at 56(23-26).

Dr. Thompson made the bizarre assumption that since Lt. Raum has no college degree he would likely have been employed in an even more stressful job if he had not become a firefighter. *Id.* at 30(19-26), 31(1-8). The doctor does not explain his assumption or address the unique stressors related to employment as a firefighter that the Legislature decided to address with RCW 51.32.185. Instead, the doctor decided that firefighters "love their jobs" so they don't experience negative stress. *Id.* at 43(21-26), 55(1-3). In

fact, the doctor testified about PTSD and made the statement that it is caused by someone being in “an unfair situation.” *Id.* He testified that proper training will offset the stress of being a firefighter. *Id.* at 77(1-25). His testimony to the effect that firefighters are not in such a situation and, instead, have “a wonderful job,” which is apparently stress free, evidences at best a superficial understanding of firefighter duties and responsibilities.

The doctor described the duties of a firefighter as fighting fires, doing home consultations and cleaning up the fire station. *Id.* at 50(13-20). When given the chance, he declined to add any other duties. *Id.* He did not acknowledge their duties as first responders, EMT’s, paramedics, their exposures to toxic chemicals, fumes, smoke or bodily fluids, or the fact that they work 24-hour shifts that are filled with danger and adrenaline. *See e.g. Id.* at 50(26), 51(1-2). Dr. Thompson differentiated firefighters from policemen by saying that firefighters help people, which is “an exciting thing.” *Id.* at 54(1-4), 54(10-15), 59(25-26).

The doctor decided that having been on call as a doctor was exactly the same as a firefighter being on call to fight fires. *Id.* at 77(1-13). The doctor then made another bizarre statement by declaring that soldiers and physicians do not feel stress because they are “trained”. *Id.* at 59(1-4). He implied the same is true for firefighters. *Id.* However, he then admitted that firefighting is a dangerous occupation. *Id.* at 68(7-16). *See also* Exhibit 3 of

BIIA Record, *New England Journal of Medicine* article titled “Emergency Duties and Deaths from Heart Disease among Firefighters in the United States.”

Finally, when confronted with the statistics regarding firefighters’ increased health risks, Dr. Thompson was unable to provide an answer to fit his theories. *Id.* at 84(22-26), 85(1-9). Specifically, Dr. Thompson was presented with the following statistics from the *New England Journal of Medicine*: Firefighters are 12.1 to 136 times more likely to die during fire suppression than when not fighting fires; 2.8 to 14.1 times more likely to die during fire alarm response; 2.2 to 10.5 times more likely to die during a return from fighting a fire or responding to an alarm, and 2.9 to 6.6 times more likely to die during physical training at work. *See* Exhibit 3 of BIIA Record. Dr. Thompson responded that he could not explain those statistics in light of his opinion that firefighters do not have stress because they love their job.

Dr. Thompson was not able to provide persuasive or credible testimony showing that on a more probable than not basis, a genetic risk factor was the cause of Lt. Raum’s coronary artery disease than the specific workplace conditions of smoke inhalation, chemical exposures, high levels of sudden exertion, and the adrenaline or hyperadrenergic response. Nor was Dr. Thompson able to determine what caused Lt. Raum’s condition, or when

his condition actually began. Accordingly, the testimony of Dr. Thompson did not rebut the presumption that Lt. Raum's heart condition was an occupational disease.

2. Dr. Yang's testimony.

Dr. Yang never saw or examined Lt. Raum. *Deposition of Dr. Yang*, 17(17-18). Dr. Yang only examined the medical records that he was provided by the City. *Id.* For treatment between 2001 to 2005, Dr. Yang only had records of the examinations of Dr. Marinkovich and the Washington Institute of Sports Medicine and Health. *Id.* at 22(5-10). The doctor acknowledged that these records were limited, and were sometimes only annual exams. *Id.* Moreover, the doctor did not have any medical records from 2005 to 2008; so that entire time period was missing from his evaluation of the records. *Id.* at 40(5-9), 68(7-14).

The doctor had no record of Lt. Raum experiencing heart problems following strenuous activity at work, or while responding to a call. *Id.* at 7-13. Dr. Yang did not have any records regarding Lt. Raum's multiple exposures to carbon monoxide. *Id.* at 79(7-11). The doctor had no idea how old Lt. Raum's grandparents were when they died. *Id.* at 14-18. He also did not know if Lt. Raum's mother was still alive. *Id.* None of this apparently impaired his confidence to provide a diagnosis without ever having examined Lt. Raum, and without having access to anything resembling a complete

medical file.

Dr. Yang reviewed Lt Raum's stress test from October 2001. *Id.* at 25(1-5). The doctor acknowledged that Lt. Raum did not have any abnormalities indicative of coronary-artery disease. *Id.* Dr. Yang also had to acknowledge that a fight or flight response could increase levels of hormones that elevate blood pressure and pulse, in turn damaging the heart or arteries. *Id.* at 82(17-25), 82(1-2). While Dr. Yang focused on a genetic component between high cholesterol and cardiovascular disease, he also admitted that it was difficult to determine whether or not a person inherited high cholesterol or heart disease. He did not provide persuasive or credible testimony that genetics were solely responsible for Lt. Raum's coronary artery disease, rather than the specific workplace conditions Lt. Raum experienced while on duty over his lengthy career.

Dr. Yang tried to blame Lt. Raum's condition on hypertension because Lt. Raum's blood pressure measured high during a select few office visits in 2001. However, Dr. Yang then admitted that it is very difficult to diagnose hypertension because blood pressure measurement is often highly variable between medical office visits, even when the same person is taking the measurement every time. *Id.* at 51(3-9). Dr. Yang finally admitted that if hypertension actually existed in Lt. Raum's case, it was mild. *Id.* at 51(3-9).

Dr. Yang then provided his legal conclusion that coronary artery disease does not fall under the firefighter presumptive statute RCW 51.32.185 because it is not a problem that develops in only 24 or 72 hours. *Id.* at 53(25), 54(1-25). This, however, misstates the law. First, the statute does not use the word “develop” but states “any heart problems experienced”. RCW 51.32.185. *See also Deposition of Dr. Yang, 75(23-25), 76(1-6).* Clearly, this is an incorrect interpretation of a legal statute by a doctor who does not support its application. Under Dr. Yang’s personal interpretation, the only heart problem that would be covered under RCW 51.32.185 would be one that begins and ends in 24 to 72 hours, without any factors that occurred before this in any way. This is a nonsensical application of the “presumptive disease” statute.

Second, the statute was created to encompass a variety of heart conditions. This is clearly the legislative intent by the usage of the phrase “heart problems” rather than “heart attack.” The doctor further reveals his bias by stating he does not believe there is a link between firefighters and heart problems. *Id.* at 65(7-12). However, this is not his determination to make, as the Legislature has already made that determination.

Dr. Yang also referred to Lt. Raum’s cholesterol as a cause of his heart condition. He listed a vast number of possible causes but was unable to determine which, if any of them, caused the condition. His list of risk

factors included things that Lt. Raum did not have, such as hypertension. *Id.* at 51(3-9). The only thing he said with certainty was that Lt. Raum's employment did not do it, though he was unable to explain this further. His testimony is not credible.

C. Overview of the City's arguments.

The City would like to make much of the fact that Lt. Raum's father passed away at an early age. TR 92(6-12). However, his father likely had a weakened heart from a childhood illness, not from any genetic condition. TR 16(11-15), 92(6-12). Specifically, his father had rheumatic fever. TR 16(24-26), 92(6-12). Other than his father, Lt. Raum's family has lived notably long and healthy lives. TR 34(14-26), 35(1-21).

The City has also implied that smoking contributed to Lt. Raum's condition in order to rebut the presumption that Lt. Raum's heart condition is related to his employment. However, Lt. Raum stopped smoking more than 20 years prior to his heart condition. TR 21(6-7). In fact, during his entire career as a firefighter, Lt. Raum never smoked. TR 71(23-25). WAC 296-14-315 through 330 sets forth that a former smoker is entitled to the presumption if he last smoked at least two years or more prior to the cardiac event. Accordingly, Lt. Raum is not barred from the presumption statute due to his status as a former smoker, but, rather, entitled to the benefit of the presumption.

Lt. Raum was exposed to second-hand smoke at the fire station during the course of his employment. TR 70-73. He was also exposed to diesel fumes for approximately 10 years of his career as a firefighter while at the fire station. TR 74-76. No doctor disputes that this type of exposure is harmful. TR 57(11-26), 58(1-6). *See also Deposition of Dr. Yang*, 80(21-25); 81(1-24).

Statutory protection under the presumptive occupational disease statute provides additional protection to firefighters due to their repeated smoke inhalation, chemical exposures, high levels of sudden exertion, and hyperadrenergic response that are an integral part of firefighting. *Deposition of Dr. Maidan*, 16(12-24). This additional protection is provided, at least in part, because of the difficulty of showing, with any reasonable medical probability, whether it was the unique stressors of firefighting, genetics, cholesterol, or high blood pressure that caused a heart problem. *Id.* at 16(25), 17(1-16).

The presumption places the burden on the City to demonstrate that Lt. Raum's exposures as a firefighter did not contribute to his heart problems. This is not an easy standard to meet, and was clearly not intended to be so. The City's two doctors attempted to make this argument despite of the lack of medical science available to make such a determination, and despite the fact that neither one of them ever established a doctor/patient relationship

with Lt. Raum. When pressed, they never provided a solid reason for their opinions, just conclusory statements.

Dr. Thompson, the City's hired expert, made the sweeping conclusion that Lt. Raum's condition was anything but work related after examining Lt. Raum one time. Based on his testimony, *supra*, he clearly misunderstood several important key factors when doing so. Moreover, this is the same position he has taken every time during his career as a hired expert witness (e.g., he admitted to never having testified in favor of an injured worker).

Dr. Yang, the City's physician, also concluded Lt. Raum's condition cannot be work related despite having never having examined him, and despite having limited medical records and/or missing years of records from a key three year time frame. When pressed, Dr. Yang admitted that exposure to chemicals, stress and smoke can cause heart problems, but never explained how or why Lt. Raum's exposure was different in any way.

In sum, both of the City's experts ignored the presumptive disease statute that presumes an occupational causation and shifts the burden of proof to the City to show Lt. Raum's condition is not related to his employment. Considering the overwhelming testimony regarding Lt. Raum's long term exposure to smoke, fumes, toxins, and high levels of stress, as well as the statistical likelihood that firefighters will die from heart conditions, the City failed to meet its burden. Lt. Raum was and is entitled to his benefits under

the presumptive disease statute.

IV. ARGUMENT

A. Standard of Review.

1. Superior Court.

In an appeal of a BIIA decision, the superior court holds a *de novo* hearing but does not hear any evidence or testimony other than that included in the BIIA record. RCW 51.52.115. *See also, Grimes v. Lakeside Industries*, 78 Wash. App. 554, 560, 897 P.2d 431 (1995). The findings and decisions of the Board are *prima facie* correct and the burden of proof is on the party challenging them. RCW 51.52.115. *See also, Ravsten v. Department of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987).

On review, the superior court may substitute its own findings and decision for the Board only if it finds “‘from a fair preponderance of credible evidence’, that the Board’s findings and decision are incorrect.” *McClelland v. ITT Rayonier, Inc.*, 65 Wash. App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Department of Labor & Indus.*, 55 Wash. App. 439, 440, 777 P.2d 1084 (1989)).

2. Court of Appeals (Generally).

For claims under the Industrial Insurance Act, “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 conclusions of law flow from the findings.” *Young v. Department of Labor & Indus.*, 81 Wash. App. 123, 128, 913 P.2d 402 (1996) (citations omitted). *See also Ruse v. Department of Labor & Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). Here, the presumption was in favor of Lt. Raum, and the City failed to provide substantial evidence to rebut the presumption.

3. Court of Appeals (Jury Instructions).

When, as here, the parties submitted the case to a jury, the jury instructions are reviewed in the same manner as other civil cases. RCW 51.52.140. Jury instructions are reviewed *de novo*, “and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party.” *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). A clear misstatement of the law is prejudicial. *Id.*

Here, Lt. Raum was prejudiced because the jury instructions negated the effect of RCW 51.32.185. Jury Instruction No. 13 provides the “presumption,” that Lt. Raum’s condition was caused by his employment. However, Jury Instruction No. 14 them immediately negates this presumption (and the City’s burden of proof) by stating Lt. Raum “must prove” his condition is work related.

Lt. Raum was also prejudiced by the decision by the court regarding the special verdict form, which is a defective and incorrect combination of

the “presumption” statute and the occupational disease statute. It is ambiguous and confusing, and does not provide the correct law. Moreover, it also fails to provide “aggravation,” which is also a permissible way to award benefits under RCW 51.08.140.

B. Statutes governing Lt. Raum’s claim.

RCW 51.08.140 "Occupational disease."

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

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

(1) In the case of firefighters . . . there shall exist a prima facie presumption that: (a) respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

. . .

(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.

C. Jury Instruction No. 14 constitutes reversible error because it incorrectly omits and/or negates Lt. Raum's favorable presumption.

The two jury instructions at issue on appeal are attached as Exhibit A. Jury Instruction No. 13 sets forth the presumption that heart problems experienced by a firefighter are caused by his or her employment. Jury Instruction No. 14 then states that “[a]n occupational disease is defined by law as ... the worker must prove that it arose naturally and proximately out of employment.” The latter instruction does not explain that it too comes from a statute. As written, it appears to trump Jury Instruction No. 13.

In a normal occupational disease case, Jury Instruction No. 14 regarding proximate cause would be appropriate because it sets forth the standards that must be met by the injured worker (e.g., the worker must prove that the condition arose naturally and proximately out of employment). However, under the presumptive disease statute, firefighting is already presumed to be the proximate cause of a firefighter's heart problems. Jury Instruction No. 14 would have been appropriate only if this case was a standard occupational disease claim. This case, however, is both an occupational disease claim and a presumptive disease claim.

In a presumptive disease claim, the firefighter does not need to prove that his condition arose naturally and proximately out of his employment. RCW 51.32.185 already provides the presumption that the disease arose

naturally and proximately out of his employment. The jury was never instructed that these are separate and distinct statutes, each with different standards for awarding benefits.

In order to avoid confusing the jury, it was necessary for the Court to make clear that there are two separate and different standards for awarding benefits to Lt. Raum. This did not occur. To the contrary, the Court provided Jury Instruction No. 13, which sets forth the presumption. It then provided Jury Instruction No. 14, which appears to directly contradict the presumption in the previous instruction. Nowhere do the instructions explain that these are two separate and distinct standards. In fact, Jury Instruction No. 14 states that “[a]n occupational disease is defined by law as ... the worker must prove that it arose naturally and proximately out of employment.” This appears to be modifying or negating the previous instruction, rather than providing a second or alternative way benefits can be awarded.

Jury Instruction No. 14 should have explained that benefits could be awarded under either the presumption in Jury Instruction No. 13 or a straightforward finding of causality under Jury Instruction No. 14. There was no reason to instruct the jury that Lt. Raum must prove causation when the presumptive statute exists. Additional instructions about causation under the standard occupational disease statute only served to negate the presumption and confuse the jury—thereby creating the real danger that the jury applied the causation language against Lt. Raum (rather than applying the presumption

and requiring the City to rebut it by a preponderance of the evidence).

The instruction was prejudicial because it provided only one standard of causation, when there were two standards under two different statutes that the jury needed to understand in order to properly evaluate the evidence and make a decision on the merits. This was confusing to the jury. The instruction made it impossible for the jury to properly perform its duty and resulted in manifest injustice against Lt. Raum.

D. The Special Verdict Form constitutes reversible error because it attempts to incorrectly combine the presumptive statute with the standard occupational disease statute.

The Special Verdict Form is attached as Exhibit B. It was improper as a matter of law because Question No. 1 included the phrase “and which arose naturally and proximately from the distinctive conditions of his employment as a firefighter.” However, this is not an element of the firefighter presumptive disease claim under RCW 51.32.185. This phrase is only applicable to standard occupational disease claims under RCW 51.08.140. The entire sentence reads as follows:

QUESTION NO. 1: Was the Board of Industrial Insurance Appeals correct in deciding that on February 17, 2008 Michael Raum experienced heart problems within twenty-four hours of strenuous physical exertion due to firefighting activities and which arose naturally and proximately from the distinctive conditions of his employment as a firefighter?

The Board found that Lt. Raum is entitled to benefits under the presumptive disease statute. It also found that he was entitled to benefits under the standard occupational disease statute. These are two separate statutes with two different standards of causation. However, in Question No. 1, the Court improperly attempted to “hybrid” these two separate statutory mandates, rendering the key statute, RCW 51.32.185, irrelevant. This was not only prejudicial to Lt Raum, it rendered it impossible for the jury to properly apply the law to the facts.

Question No. 1 combines two statutes into one sentence, thereby again indicating to the jury that there is only one standard rather than two separate and distinct ways in which the Board found Lt. Raum eligible for benefits. *See previous arguments regarding Jury Instructions No. 13 & 14, supra.* The verdict form should have been separated into two different questions: The first permitting the jury to find for Lt. Raum under the presumptive disease statute (e.g., did the City meet its burden of rebutting the presumption by a preponderance of the evidence?), the second permitting the jury to find for Lt. Raum under the occupational disease statute (e.g., did the facts support the Board’s decision that Lt. Raum was entitled to benefits for establishing his disease arose naturally and proximately from his occupation?).

The requirement that a condition be found to arise naturally and proximately from the unique conditions of employment is only a requirement

for a standard occupational disease claim under RCW 51.08.140, not a firefighter presumptive disease claim under RCW 51.32.185. The first statute states: “‘Occupational disease’ means such disease or infection as *arises naturally and proximately out of employment* under the mandatory or elective adoption provisions of this title.” It is clear that “naturally and proximately” is generally a requirement for an occupational disease claim, but that language is not to be found anywhere in the firefighter presumptive statute. RCW 51.32.185 removes that requirement by providing that these conditions “*are* occupational diseases under RCW 51.08.140.”

The legislature has done away with the “naturally and proximately” requirement for firefighter presumptive disease claims. The verdict form incorrectly inserts that language into the statute, which violates the clear purpose of the statute, and renders it useless. If a jury is asked to determine an RCW 51.32.185 claim on the basis of RCW 51.08.140 requirements, then the Legislature purpose of drafting and enacting RCW 51.32.185 has been violated. It is neither the Court’s responsibility nor within the Court’s discretion to add or remove language from statutes by rewriting two statutes into one misleading and confusing sentence.

The misstatement is such that the jury was unable to apply presumptive disease law properly to the facts. The jury was unable to evaluate and decide Lt. Raum’s claim as a presumptive disease claim, or to understand the difference between the two separate and distinct statutes.

E. The Special Verdict Form constitutes reversible error because it fails to list “aggravation” under Question No. 2.

A worker is entitled to benefits if the employment either causes a disabling disease, or aggravates a preexisting disease so as to result in a new disability. *Dennis v. Department of Labor & Indus.*, 109 Wash.2d 467, 474, 745 P.2d 1295 (1987) (“[C]ompensation may be due where disability results from work-related aggravation of a preexisting non-work-related disease.”). In an aggravation case, the employment does not cause the disease, but it causes the disability because the employment conditions accelerate the preexisting disease to result in the disability. Even if Lt. Raum had a pre-existing genetic condition, he is still entitled to benefits if his employment “aggravated” those problems, regardless of initial causation.

“Aggravated by” is a key phrase that was left out of Question No. 2 on the Special Verdict Form. This misstates the law in Washington and constitutes reversible error. This question states as follows:

QUESTION NO. 2: Was the Board of Industrial Insurance Appeals correct in its determination that Michael Raum’s heart condition is an occupational disease that arose naturally and proximately from the distinctive conditions of his employment as a firefighter?

Absent from this question (and the other question) on the Special Verdict Form is any way for the jury to find that Lt. Raum had a pre-existing condition that was aggravated by his employment.

In spite of clear case law and statutory law providing recovery for an

employee whose condition was aggravated by his employment, the jury was not given that option. Lt. Raum was materially prejudiced as a result, and the jury's decision should be overturned as a matter of law and public policy.

F. Substantial evidence does not exist to find against Lt. Raum. The Jury's decision should be overturned as a matter of law and public policy.

1. Case law applying the presumptive disease statute require more than just speculation by the employer's experts to overcome its burden of proof.

In order to overcome the presumption established in RCW 51.32.185, the City must show by a preponderance of the evidence that Lt. Raum's heart condition was acquired by some specific cause outside his almost 20 years of employment as a firefighter. The City must also prove that firefighting was not a proximate cause. The City failed to meet either burden.

In *Jackson v. Workers' Compensation Appeals Bd.*, 133 Cal. App. 45h 965, 969, 35 Cal. Rptr. 3d 256 (3d Dist. 2005), the Court reviewed a similar presumption statute in a worker's compensation case, including a physician's testimony that there was nothing specific to the deceased correctional officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack. The Court found that such testimony insufficient to rebut the statutory presumption that the correctional officer's heart problems arose out of and in the course of his employment.

In *Meche v. City of Crowley Fire Dep't.*, 688 So 2d 697 (1997, La App 3d Cir), cert den 692 So 2d 1088 (La), the Court reviewed a similar presumption statute and the testimony of cardiologists that the firefighter's employment had not contributed to his condition, but that the condition had some other cause. The Court found that such testimony was not affirmative evidence, and that the Employer failed to meet its burden of proving that the firefighter's employment could not have contributed to his condition.

Many other cases agree that a presumptive statute cannot be overcome by expert testimony that simply challenges the premise of the presumption. Instead, to overcome the presumption, an employer must produce clear medical evidence of a cause for the disease, outside of claimant's employment. Idiopathic or unknown causes are not sufficient. *City of Frederick et al. v. Shankle*, 136 Md. App. 339, 765 A.2d 1008 (2001), also see the following as cited in *Frederick*: *Worden v. County of Houston*, 356 N.W.2d 693, 695-96 (Minn. 1984); *Cook v. City of Waynesboro*, 300 S.E.2d 746, 748 (Va. 1983); *Superior v. Dep't of Indus. Labor & Human Relations*, 267 N.W.2d 637, 641 (Wis. 1978); *Cunningham v. City of Manchester Fire Dep't.*, 525 A.2d 714, 718 (N.H. 1987).

Specifically in *Cunningham*, the court addressed a situation where a doctor attacked the premise of the presumption. The doctor stated that the claimant's heart disease was not related to employment, and pointed to the uncertainty in the medical community regarding the causation of heart

disease. The doctor also referenced studies that show an absence of a correlation between firefighting and heart problems. The doctor opined there was no medical evidence that the claimant's employment as a firefighter played any role in the development of his heart disease. The Court in Cunningham determined that although the medical community may disagree as to the role of firefighting in the development of heart problems, the Legislature had made a decision to presume a causal connection.

Therefore, the testimony from the City's two physicians is insufficient to rebut the presumption by a preponderance of credible, competent evidence. The City's testimony is insufficient to justify overturning the Board's well-reasoned, well-articulated decision to award Lt. Raum benefits under both the presumptive disease statute and the occupational disease statute.

2. The Board's legal interpretation is to be given substantial weight. The Jury Instructions and Special Verdict Form made this impossible.

The Court shall grant "substantial weight" to the Board's legal interpretation, specifically since the issue at bar falls within the agency's expertise in a special area of law. *Malang v. Dep't of Labor & Indus.*, 139 Wash. App. 677, 684, 162 P.3d 450 (2007).

Courts give great weight to an agency's interpretation of a regulation within its area of expertise and accord substantial weight to those interpretations. *Washington Cedar and Supply Co. v. Dep't of Labor &*

Indus., 137 Wash. App. 592, 154 P.3d 287 (2007); *Malang v. Dep't of Labor & Indus.*, 139 Wash. App. 677, 684, 162 P.3d 450 (2007) (L&I's interpretation of IIA given deference); *Doty v. Town of South Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005) (BIIA's interpretation entitled to great deference).

In all court proceedings under Title 51 RCW, the findings and decisions of the Board are prima facie correct and the burden of proof is on the party challenging them. RCW 51.52.115. A party attacking the decisions must support its challenge only by a preponderance of the evidence. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn2d 143, 146, 736 P.2d 265 (1987).

In the instant case, as set forth above, the confusing and misleading Jury Instructions and Special Verdict Form made it impossible for the jury to know, understand and apply the Board's legal reasoning when it found Lt. Raum was entitled to benefits—both under the presumptive disease statute and the occupational disease statute. In sum, the facts presented by the City are not substantial and do not support a finding against Lt. Raum, which strongly suggests that the jury was confused as to the presumption and two different statutes.

3. Lt. Raum is entitled to benefits if his employment was one of several proximate causes. Jury Instruction No. 15 provides this law, but again fails to explain that the presumptive standard is very different.

The term “proximate cause” means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of and without which such condition would not have happened. WPI 15.01 and Comment. There may be one or more proximate causes of a condition. *Id.* For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition. *McDonald v. Dep’t of Labor and Industries*, 104 Wash. App. 617, 17 P.3d 1195 (2001). This standard is altered in RCW 51.32.185 cases. In such cases, the firefighter’s employment is presumptively determined to be the/a proximate cause of his covered condition.

In Industrial Insurance cases, “[T]he ‘multiple proximate cause’ theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all preexisting frailties and bodily infirmities.” *City of Bremerton v. Shreeve*, 55 Wash. App. 334, 340, 777 P.2d 568 (1989).

Miller v. Dep’t of Labor & Industries, 200 Wash. 674 (1939), is the seminal case on proximate causation involving industrial injuries. When an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not the

pre-existing physical condition. *Miller*, at 682.

However, the presumptive disease statute *presumes* that the firefighter suffers from an occupational disease when he has been diagnosed with a heart problem. Jury Instruction No. 15 is the standard “proximate cause” instruction. It does not set forth any explanation regarding the presumption that exists in this case. Rather, it states that “For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions or incident must be a proximate cause of the alleged condition ...”

Again, this implies that Lt. Raum must prove his condition was a proximate cause, rather than that, on appeal, the City has the burden under either statute to prove its case. This further compounds the confusion between the presumptive disease statute and the occupational disease statute, especially considering the confusion between Jury Instructions 13 & 14 discussed above.

A reasonable jury member could read Jury Instruction No. 15 and conclude that for Lt. Raum “to be entitled to benefits under the Industrial Insurance Act, the work conditions or incident must be a proximate cause ...” and, therefore, Lt. Raum bears the burden of proof to make this showing. This is especially true considering there are no instructions therein to the contrary, and no mention of the presumption standards whatsoever.

4. Lt. Raum’s treating medical practitioners are to be given special consideration.

In workers' compensation cases, the court must give special consideration to the opinions of attending physicians because the attending physicians are not merely expert witnesses hired to give a particular opinion consistent with one party's view of case. *Young v. Department of Labor and Industries*, 81 Wash.App. 123, 913 P.2d 402 (1996); *Chalmers v. Department of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964); *Spalding v. Department of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947).

Significantly, the opinions of the worker's treating medical practitioners are to be given special consideration by the trier of fact in all industrial insurance cases. *Loushin v. ITT Rayonier*, 84 Wash. App. 113, 124-25, 924 P.2d 953 (1996).

In the instant case, Lt. Raum's physicians provided clear, cogent testimony that his employment was a proximate cause of his heart problems. Moreover, the City failed to provide any concrete testimony to the contrary, and failed to meet its burden by providing substantial evidence as to some specific external cause. This Court reviews the Superior Court's verdict under a "substantial evidence" standard, and should therefore overturn the jury's verdict as being unsupported by the evidence and/or as evidencing a misunderstanding and forced misapplication of the law.

5. The purpose of the Industrial Insurance Act is remedial in

nature and is to be liberally construed in favor of the injured worker.

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

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

Therefore, in the instant case, any and all doubts must be resolved in the favor of Lt. Raum and in the interests of ensuring a fair and just decision. As set forth above, there are serious errors in the Jury Instructions and the Special Verdict Form that constitute reversible error. Moreover, the City’s

evidence does not meet its burden of proof. Therefore, the Court should overturn the Superior Court's decisions and verdicts.

G. The presumptive disease statute, RCW 51.32.185, was enacted to protect injured firefighters like Lt. Raum. It was not designed to be used as a shield against liability by the City.

The Legislature mandated into law a causal connection between the dangerous public service profession of firefighting, and various diseases including respiratory disease, certain cancers, infectious diseases and “any heart problems” experienced within 72 hours of exposure to smoke, fumes, or toxic substances, or, with 24 hours of strenuous physical activity. This law 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 need have a relevant diagnosis that falls within the statute.

In this case, Lt. Raum was diagnosed with “heart problems” arising from three separate workplace incidents. The diagnosis was made by two attending board certified cardiologists and by other doctors, including the City's own experts. This diagnoses is all that was required from Lt. Raum. The City has the burden of proving that firefighting did not cause, or contribute to, Lt. Raum's heart problems. In other words, the City has the burden of showing that all causes of Lt. Raum's heart problems originated outside of employment as a firefighter. Simply stated, this is nearly an impossible task.

The City, by simply presenting other potential speculative causes of heart problems, is not presenting a preponderance of credible and admissible evidence. In fact, it is unclear how the City could proceed in order to prove, by a preponderance of evidence, that none of Lt. Raum's exposures to smoke, toxins, heavy metals, stress, adrenaline, severe physical activities, and other similar factors was not a proximate cause to his heart problems. There is nothing in the record that supports such a conclusion, and the Court should overturn this verdict.

1. Standards for preponderance of evidence – Lt. Raum's condition cannot be rebutted by speculation, conjecture, or conclusory statements.

A "preponderance of the evidence" is a judicial standard requiring that all of the evidence establish the proposition at issue is more probably true than not true. See, *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962); *Dependency of H.W.*, 92 Wash. App. 420, 961 P.2d 963 (1998); *In re Sego*, 82 Wn.2d 736, 739 n. 2, 513 P.2d 831, 833 n. 2 (1973).

Rank speculation, conjecture or conclusory allegations does not overcome the presumption. The City must overcome the presumption with something much, much more than wishful thinking or deceptive arguments. Speculation by the City's medical experts is not a preponderance of competent, admissible testimony as a matter of law. ER 702; ER 703; *Miller v. Likins*, 109 Wash. App. 140, 34 P.3d 835 (2001).

In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011, 56 P.3d 565 (2002), the Court ruled that the claimant's Hepatitis C was an occupational disease and that the evidence was sufficient to support an inference on a more probable than not basis that he acquired hepatitis while working at the hospital. This was true even though the claimant had a history of drug use, had numerous body piercings, numerous tattoos, and had worked as emergency medical technician in the Navy prior to her employment at the hospital. Here, as in *Harrison*, the emphasis is not on what else could have caused Lt. Raum's heart condition, but on whether his employment was one proximate cause and whether the City can prove otherwise. It cannot and did not.

2. Other jurisdictions have entered strong, well-reasoned presumptive disease rulings in favor of public servants in similar cases.

Failures of employers or state agencies to apply mandatory Legislative presumptive disease statutes like RCW 51.32.185 have not been tolerated by the Appellate Courts and Supreme Courts of other jurisdictions. In such jurisdictions, as in our jurisdiction, the burden of proof never starts with the claimant, but rather falls squarely on the shoulders of the employer or the government agency.

In *Fairfax County Fire & Rescue Dept. v Mitchell*, 14 Va App 1033, 421 SE2d 668 (1992), the court upheld the application of Virginia Code §

65.1-47.1 which provides “a rebuttable presumption that, absent a preponderance of competent evidence to the contrary, a causal connection exists between an individual’s employment as a salaried fire fighter and certain diseases. The court determined the presumption acted to “eliminate the need for a claimant to prove a causal connection between his disease and his employment.” The burden was put on the employer to prove otherwise as a matter of law.

In *Robertson v. North Dakota Workers Compensation Bureau*, 2000 ND 167, 616 NW.2d 844 (ND 2000) it was held that the statutory presumption that a law enforcement officer’s heart disease occurred in the line of duty shifts the burden of going forward with the evidence and the burden of persuasion from the claimant to the North Dakota Workers’ Compensation Bureau. This required the Bureau to prove that the heart disease was not suffered in the line of duty. The claimant’s fluctuating blood pressure readings before he began working in law enforcement were not sufficient evidence of heart disease to defeat the statutory presumption that his heart disease occurred in the line of duty.

In *Montgomery County v Pirrone*, 109 Md App 201, 674 A2d 98 (1996), a retired firefighter was entitled to the statutory presumption that his heart attack resulted from his employment for purposes of workers’ compensation, even though the heart attack occurred after his retirement. The court found both the burden of production and the burden of persuasion

remain fixed on the employer in determining the applicability of the statutory presumption of compensability. Neither ever shifts to the firefighter. The presumption constitutes affirmative evidence on the firefighter's behalf throughout the case, notwithstanding the production of contrary evidence by the employer. *Id.* The jury was properly instructed that it must only find that the firefighter's occupation was a factor in causing the heart disease, not the predominant factor.

In *McCoy v. City of Shreveport Fire Dept.*, 649 So.2d 103 (1995, La. App. 2d Cir), the court found medical evidence regarding a fireman's heart disease was legally insufficient to overcome or rebut the work-related causation presumption of Louisiana Revised Statute § 33.2581. The statute provides that the nature of a firefighter's work caused, contributed to, accelerated or aggravated heart disease or infirmity manifested after the first five years of employment. In order to rebut the statutory presumption, the defendant had to prove the negative - that the claimant's heart infirmity could not have resulted from his service as a fireman.

H. The Court erred by striking significant testimony regarding Lt. Raum's occupational exposure to toxins, as well as his fitness requirements for being a firefighter.

The Superior Court committed reversible error when it refused to allow testimony, already in the Board record, that explained the unique characteristics of firefighting, including toxic exposure and fitness

requirements. This testimony would have established Lt. Raum's exposure to toxins and stress, as well as previous fitness levels, thereby permitting the jury to conclude Lt. Raum's 19-year career was responsible for his occupational disease.

During trial, testimony at the BIIA from Kristy Raum, Appellant's wife, was stricken. This testimony included Ms. Raum's experiences and concerns when Lt. Raum would come home from work and explain to his wife that his work clothes needed to be separated from the baby clothes in the wash because he had been on a call with chemical exposures. TR 25(20-26), 28(1-17). Ms. Raum testified to the state that Lt. Raum would often be in after a day filled with tragic and traumatic calls and emergencies. TR 29(18-26), 30(1-26), 31(1-26), 32(1-26), 33(1-3). All such testimony from Ms. Raum was stricken by the trial court.

Lt. Raum testified about his personal experiences and exposures as a firefighter. This testimony was improperly excluded by the trial court. TR 43(14-26) - TR 51(1-6). All references to an exhibit setting forth estimates incidents and exposures, personally prepared by Lt. Raum, were excluded at the trial court level. All testimony from both lay and expert witnesses referencing this exhibit were also excluded.

1. Firefighter hiring requirements.

During the trial, there was testimony about the "Healthy Worker Effect" from expert witnesses. There was testimony that this effect stands for

the idea that employers, such as a fire department, which require extensive pre-employment health and fitness screening, end up with healthier workers. The screening is not just a basic requirement such as a simple drug test, or a driving test as some jobs require. There are tests for everything from diabetes or pre-diabetes, to asthma, to physical stamina, to a full blood screening. This is a significant aspect of a firefighter's employment that is unique to that profession. If the firefighter does not pass a battery of physical and medical tests, he will not be hired as a firefighter.

Testimony comparing firefighting to other occupations in order to show the difference in employment requirements and pre-employment screening is vital. Not only does it explain and provide context for the testimony regarding the "Healthy Worker Effect" but it demonstrates the inherent difference in health of firefighters over other workers. Firefighters must meet high standards for fitness and health; standards that the general public do not have to meet. If the jury does not have this information, the "Healthy Worker Effect" has no meaning. Further, the jury would have no way of understanding the importance of the higher rate of heart problems, respiratory disease and cancers experienced by firefighters compared to the general public.

2. Firefighter employment exposures.

RCW 51.32.185 was enacted to provide additional protection to firefighters. The Legislature determined this was necessary given the

exposure to smoke, fumes and toxic substances that firefighters experience as a part of their employment. “The legislature finds that the *employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances.*” [1987 c 515 § 1.] [bold italics emphasis added.] The jury should have been allowed to hear such evidence, which was the basis for the enactment of the statutory presumption.

Testimony was presented to the jury that Mr. Raum had a genetic basis for his “heart problems” although this was all based on speculation and conjecture. However, the evidence of the same type that the Legislature used in making the law was excluded from the jury. This caused material prejudice to Lt. Raum and constitutes reversible error.

I. Lt. Raum should be awarded reasonable attorney fees and costs by statute.

The award of attorney fees and costs in this appeal is controlled by both RCW 51.32.185(7) and RCW 51.52.140, which apply to fees and costs at the BIIA, the superior court and appellate courts when Board decisions are reviewed. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wash. App. 351, 363-64 (2005). Under both statutes, Lt. Raum is entitled to attorney fees and costs for all levels of appeal if his right to relief is sustained. *Brand v. Department of Labor and Industries*, 139 Wn.2d 659, 669-70 (1999). Lt. Raum respectfully requests attorney fees and costs, and will itemize such fees and costs by separate motion.

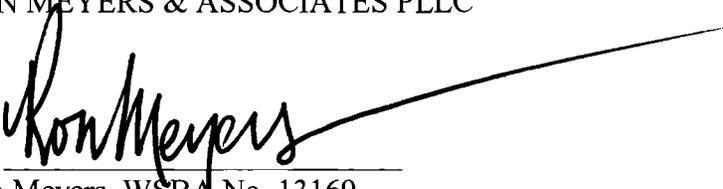
V. CONCLUSION

If the presumption standards and burden of proof are not correctly applied in firefighter presumptive disease cases, or if speculative and nominal medical testimony is allowed to undermine the statute, the presumption will lose all meaning and the clear legislative mandate will be subverted. Here, the Jury Instructions and Special Verdict Form should have specified the correct standards for presumption and aggravation. They did not. Here, the City was required to present substantial evidence to rebut the presumption. It did not.

Even without the benefit of the presumptive disease statute, reasonable minds could not differ on the causal connection between Lt. Raum's heart problem and his thousands of career exposures to toxins, smoke and extreme stress. Manifest injustice has occurred in this case, and Lt. Raum respectfully requests that the Court intervene and enter an award in his favor for the reasons set forth above.

DATED: November 1, 2011

RON MEYERS & ASSOCIATES PLLC

By: 
Ron Meyers, WSBA No. 13169
Ken Gorton, WSBA No. 37597
Zoe Wild, WSBA No. 39058
Attorneys for Lt. Raum

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL RAUM and
DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON

Appellants,

v.

CITY OF BELLEVUE,

Respondent.

DECLARATION OF RON MEYERS

Ron Meyers
Ken Gorton
Zoe Wild
Attorneys for Appellant
Michael Raum

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA # 13169
WSBA # 37597
WSBA # 39058

DECLARATION OF RON MEYERS

PURSUANT TO RCW 9A.72.085, Ron Meyers of Ron Meyers & Associates PLLC, declares as follows:

1. I am an attorney of record for the Appellant. The facts set forth in this declaration and attached APPELLANT'S OPENING BRIEF are true and correct to the best of my knowledge and belief. Said facts are those that would be admissible in evidence, and are based upon personal knowledge as to their existence. I am competent to testify regarding these matters.

2. Juror Debbie S. called me on the same day as the decision in this matter and relayed the following information:

- a. The members of the jury were confused by the jury instructions.
- b. The members of the jury felt they had no alternative but to find for the employer because of the wording of the verdict form.
- c. The members of the jury noted there was no option for a presumptive disease verdict.
- d. The members of the jury noted there was no option for an aggravation verdict.

- e. Following the verdict, Debbie S. went to the superior court judge and explained the concerns of the jury.
 - f. The judge gave Debbie S. my phone number to discuss the errors in instruction and verdict form noted by members of the jury.
- 3. Attached hereto as Exhibit A is a true and correct copy of Jury Instructions No.'s 13 & 14 as given to the jury.
 - 4. Attached hereto as Exhibit B is a true and correct copy of the Special Verdict Form as signed by the jury on April 21, 2011.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 15th day of November, 2011 at Lacey, Washington.



Ron Meyers, WSBA No. 13169

Exhibit A

CITY OF BELLEVUE,
Plaintiff,

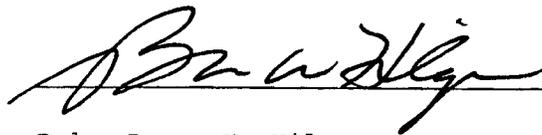
v.

MICHAEL A. RAUM and STATE OF
WASHINGTON DEPARTMENT OF
LABOR & INDUSTRIES,
Defendants.

Cause No. 10-2-33392-4 SEA

COURT'S INSTRUCTIONS TO THE JURY

April 21, 2011

A handwritten signature in black ink, appearing to read "Bruce W. Hilyer", is written over a horizontal line.

Judge Bruce W. Hilyer

No. 13

A statute provides that heart problems experienced by a firefighter within twenty-four hours of strenuous physical exertion due to firefighting activities are presumed to be an occupational disease. This presumption of occupation 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 non-employment activities.

JURY INSTRUCTION NO. 14

An occupational disease is defined by law as:

...such disease or infection as arises naturally and proximately out of the employment.

The fact that a worker contracts a disease while employed does not mean it is an occupational disease. To establish that a disease is occupational, the worker must prove that it arose naturally and proximately out of employment.

A disease arises naturally out of employment if the disease is a natural incident or consequence of distinctive conditions of a worker's particular employment as opposed to conditions coincidentally occurring in a worker's workplace. A disease does not arise naturally out of employment if it is caused by conditions of everyday life or all employments in general.

A disease arises proximately out of employment if the conditions of a worker's employment proximately caused or aggravated the worker's disease.

Exhibit B

FILED
KING COUNTY WASHINGTON

APR 15 2011

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF BELLEVUE,
Plaintiff,

v.

MICHAEL A. RAUM and STATE OF
WASHINGTON DEPARTMENT OF
LABOR & INDUSTRIES,
Defendants.

Cause No. 10-2-33392-4 SEA

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION NO. 1: Was the Board of Industrial Insurance Appeals correct in deciding that on February 17, 2008 Michael Raum experienced heart problems within twenty-four hours of strenuous physical exertion due to firefighting activities and which arose naturally and proximately from the distinctive conditions of his employment as a firefighter?

ANSWER: NO ("Yes" or "No")

QUESTION NO. 2: Was the Board of Industrial Insurance Appeals correct in its determination that Michael Raum's heart condition is an occupational disease that arose naturally and proximately from the distinctive conditions of his employment as a firefighter?

ANSWER: NO ("Yes" or "No")

SIGN AND DATE THIS VERDICT AND NOTIFY THE BAILIFF.

Signed this 21 day of April, 2011.

A handwritten signature in black ink, appearing to read "P. Polson", written over a horizontal line.

Presiding Juror

PETER POLSON

No. 67213-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL RAUM and
DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON

Appellants,

v.

CITY OF BELLEVUE,

Respondent.

DECLARATION OF SERVICE

Ron Meyers
Ken Gorton
Zoe Wild
Attorneys for Appellant
Michael Raum

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA # 13169
WSBA # 37597
WSBA # 39058

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ORIGINAL

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS: 1. APPELLANT'S OPENING BRIEF; and
 2. DECLARATION OF SERVICE.

ORIGINAL AND ONE COPY TO:

Richard D. Johnson, Court Administrator/Clerk
Washington State Court of Appeals
Division I
600 University St
One Union Square
Seattle, WA 98101-1176

COPIES TO:

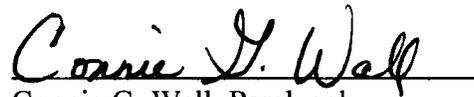
Attorneys for Appellant Department of Labor and Industries:
Beverly Norwood Goetz, Senior Counsel and H. Regina Cullen, AAG
Office of the Attorney General
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188

Via U.S. Postal Service
 Via Facsimile:
 Via Hand Delivery / courtesy of ABC Legal Messenger Service
 Via Email: beverlyg@atg.wa.gov

Defendant City of Bellevue:
Cheryl A. Zakrzewski, Esq.
City of Bellevue
450 110th Ave NE
PO Box 90012
Bellevue, WA 98009-9012

- Via U.S. Postal Service
- Via Facsimile:
- Via Hand Delivery / courtesy of ABC Legal Messenger Service
- Via Email: gschrag@schraglaw.com

DATED this 2nd day of November, 2011, at Lacey, Washington.



Connie G. Wall, Paralegal