Supreme Court No.

Court of Appeals No. 43621-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

EDWARD O. GORRE,

Respondent,

v.

THE CITY OF TACOMA

Petitioner,

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

Defendant.

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is the City of Tacoma (City), Respondent Edward O. Gorre's (Gorre) self-insured employer under RCW Title 51, the Industrial Insurance Act.

II. COURT OF APPEALS' DECISION

The City seeks review of the Court of Appeals, Division II's, decision in *Gorre v. City of Tacoma*, __ Wn. App. __, 324 P.3d 716 (2014), issued on April 23, 2014, reconsideration granted in part with amendments on July 8, 2014, and again on July 15, 2014.[1]

III. ISSUES PRESENTED

1. Did the Court of Appeals erroneously usurp the Board's and trial court's fact-finding duty of determining whether a medical condition qualifies as a respiratory or infectious disease, a question of medical fact to be decided by the finder of fact based on the evidence?
2. Did the Court of Appeals improperly consider irrelevant and prejudicial fact evidence it gathered and investigated, *ex parte*?
3. Did the Court of Appeals err in relying on statutory construction doctrines in interpreting what it identified as an unambiguous statute?
4. Did the Court of Appeals improperly rule on a factual dispute not before it by impermissibly reweighing the evidence presented at trial?

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[1] Copies of the Opinion, Order Granting Reconsideration in Part and Amending Opinion, and Order Amending Order are contained in Appendix A.

5. Did the Court of Appeals erroneously find as a matter of law, despite explicit limiting language in the statute, that the statutory presumption found at RCW 51.32.185[2] applies to all "infectious diseases."

IV. STATEMENT OF THE CASE

This case involves applicability of the statutory evidentiary rebuttable presumption and attorney fee-shifting provisions of RCW 51.32.185 to firefighter Gorre's claim. Gorre filed an application for workers' compensation benefits in April 2007.[3] CP 701. The Department of Labor & Industries (Department) denied the claim. CP 290. Following Gorre's protest, on March 26, 2008, the Department cancelled the rejection order and allowed the claim. *Id.* The City protested allowance and submitted records concerning Gorre's condition. CP 786. On March 24, 2009, the Department ordered Gorre's claim rejected. CP 290.

Gorre appealed the Department's order to the Board of Industrial Insurance Appeals (Board). *Id.*[4] Ultimately, following hearings and Proposed Decision, the Board granted review to make additional Findings of Fact, including Findings of Fact that Valley Fever is an infectious

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[2] RCW 51.32.185 is attached as Appendix B.

[3]Gorre was ultimately diagnosed was coccidioidomycosis, Valley Fever. Slip Op. 5, 28.

[4]Gorre's Motion for Summary Judgment, in which he argued that RCW 51.32.185 applied to his claim, and his condition should be allowed as an occupational disease as a matter of law, was denied. BR 163-176, 690-966, 993-1003, Tr., 1/12/10. He gathered medical declarations and filed a second Motion for Summary Judgment, which was denied. BR 1005-1512, Tr., 3/8/10. The Industrial Appeals Judge (IAJ) determined whether Gorre's condition was an infectious disease or respiratory disease was a question of fact, considered the rebuttable presumption had been rebutted at the Department, and denied Gorre's motion (Tr. 3/8/10, pp. 22-23), and the matter proceeded to hearings to determine whether Gorre's condition was an occupational disease regardless of the evidentiary presumption. CP 941. The IAJ issued a Proposed Decision and Order on October 1, 2010. BR 125-127, CP 284.

disease, and Gorre did not contract any work-related respiratory condition. *See In re: Edward O. Gorre*, BIIA Dec. 09 13340 (2010). Gorre appealed the Board's order to Pierce County Superior Court. CP 941. After a bench trial, the Superior Court adopted the Board's Findings and Conclusions as its own and made one additional Finding affirming the Department's March 24, 2009 rejection order. CP 942. Gorre filed a Notice of Appeal to the Court of Appeals, Division II, which reversed in part and affirmed in part. CP 944-50; *See Gorre*, 324 P.3d 716.[5] The Court held that evidence supported the Superior Court's finding that Gorre suffered from a single medical condition, *id.* at 731; that Gorre's Valley Fever was, as a matter of law, a "respiratory disease," and thus presumptively an "occupational disease" *id.* at 732-33; and that Gorre's Valley Fever was also, as a matter of law, an "infectious disease," and thus presumptively an "occupational disease" *id.* at 733-34. The Court parsed the medical term "respiratory disease" with a dictionary analysis of "respiratory" and "disease" to encompass every "discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing" to determine Gorre's Valley Fever falls under RCW 51.32.185. *Gorre*, 324 P.3d at 733. The Court seemingly found that *all* infectious diseases, *whether listed in the statute or not*, entitle covered employees to the presumption.[6] [7] The Department moved for

[5] The City subsequently filed a Notice of Cross-Appeal. CP 951-58.

[6] The Court of Appeals' construction of RCW 51.32.185 will arguably result in *each and every communicable disease* that exists anywhere, *whether endemic to or existing in Washington and the locale of employment,* being treated as a condition falling under

reconsideration, and the Court of Appeals altered one footnote and eliminated another. *See Order Granting Reconsideration in Party and Amending Opinion and Order Amending Order* at Appendix A.[8] The City petitions this Court for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). This Court should grant review because the decision of the Court of Appeals is in conflict with decisions of this Court, with other decisions of the Court of Appeals, and with the Constitution of the State of

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RCW 51.32.185, an expansion contrary to the legislative intent explained by the Court in *Raum,* 171 Wn. App. 124, 153, 286 P.3d 695, 710 (2012) *review denied,* 176 Wn. 2d 1024, 301 P.3d 1047 (2013).

[7] The Court remanded the case to the Board for reconsideration of Gorre's claim "with instructions (1) to accord Gorre RCW 51.32.185's evidentiary presumption of occupational disease and (2) to shift the burden of rebutting this presumption to the City to disprove this presumed occupational disease by a preponderance of the evidence that the disease did not arise naturally or proximately out of Gorre's employment." *Id.* at 719.

[8] Prior to the Court's amendment on reconsideration, the Court had stated that "evidence in the record *is* insufficient." Though the Court attempted to soften its language on this issue, the change of "is" to "appears" is wholly insufficient to change the meaning of the Court's unlawful reweighing of the factual disputes determined by the trial court. *See infra* at 14-16. The Court of Appeals also eliminated a footnote containing an obvious misstatement of the law regarding purportedly relaxed standards for evidence before the Board. Although the Court eliminated this footnote, the Court failed to reexamine the conclusions it reached based on its failure to recognize that the Board applies the Civil Rules of *evidence* and procedure, not the relaxed standards of the Administrative Procedure Act, including, potentially, the Court's application of the statutory *evidentiary* presumption of RCW 51.32.185, error which requires this Court's review.

Washington, and the decision of the Court of Appeals raises issues of substantial public interest that should be determined by this Court. *Id.*

1. THE COURT OF APPEALS, DIVISION II'S, DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS, DIVISION I'S, DECISION IN *RAUM V. CITY OF BELLEVUE*, 171 WN. APP. 124.

This Court should grant the City's petition because the decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals, Division I in *Raum v. City of Bellevue*, 171 Wn. App. 124.[9] In *Raum*, the Court of Appeals held that whether a particular condition falls under RCW 51.32.185 is a question of fact to be determined by the finder of fact based on the evidence submitted at trial.[10] [11]. In addition, the Court in *Raum* held that the finder of fact's determinations regarding the application of the presumption are entitled to deferential "substantial evidence" review. *See Raum*, 171 Wn. App. at 155.

Division I's holding in *Raum* is in direct opposition to Division II's holding in *Gorre*. As noted above, the Court in *Gorre* held that which conditions fall under RCW 51.32.185 and are entitled to the presumption is a question of law, to be parsed by judges, not one of fact to be decided

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[9] *Raum v. City of Bellevue*, 171 Wn. App. 124 is attached as Appendix C.

[10] In *Raum*, the finder of fact was a jury. That this case was decided by a judge after a bench trial, instead of by a jury, does not, in any way, impact the Court's rational or holding.

[11] *Raum*, 171 Wn. App. at 146 ("The special verdict form's question 1 *allowed the jury to consider whether the evidentiary presumption applied.*" (emphasis added)); 144 ("The jury instructions [] *allowed Raum to argue that he was entitled to RCW 51.32.185's evidentiary presumption* and that the City failed to rebut the presumption. They also allowed Raum, if he did not qualify for the presumption, to present evidence that his heart condition arose naturally and proximately from his employment." (emphasis added)).

by the finder of fact based on admissible evidence presented and subject to the adversarial process. *See supra* at 3-4. Division II's determination that which conditions fall under RCW 51.32.185 is a question of law subject to judicial interpretations of "respiratory disease" and "infectious disease" versus Division I's determination that which medical conditions fall under RCW 51.32.185 is a question of fact is significant conflict between divisions that will remain and will result in disparate outcomes. The impact of this dichotomy is patent; had Division II's analysis that the "respiratory diseases" entitled to the presumption include every "discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing," *Gorre*, 324 P.3d at 733, been applied to Raum's trial evidence that "Raum reported experiencing … *shortness of breath with exertion.*" *Raum*, 171 Wn. App. at 133 (emphasis added), the Court would have determined as a matter of law that Raum's cardiovascular disease was also a "respiratory disease" to which RCW 51.32.185 applied. Instead, the Court in *Raum* properly avoided such an analysis and unequivocally found that "as enacted and later amended, the presumption was not intended to create a legal conclusion that firefighters have a higher incidence of *cardiovascular disease*." *Raum*, 171 Wn. App. at 153 (emphasis in original). Absent intervention from this Court, these divergent results will continue to occur based solely on whether Superior Court jurisdiction of a

claim is in Division I or Division II.[12] This Court should grant the City's petition, resolve the conflict between Divisions I and II, and determine applicability of RCW 51.32.185 is a question of fact.[13]

2. THE COURT OF APPEALS IMPROPERLY CONSIDERED IRRELEVANT AND PREJUDICIAL FACTUAL EVIDENCE GATHERED AND INVESTIGATED EX PARTE BY THE COURT OF APPEALS.

In workers' compensation cases, the reviewing superior and appellate courts are *statutorily precluded* from reaching beyond the record created at the Board under the Rules of Civil Procedure and Rules of Evidence and certified to the Superior Court by the Board. RCW 51.52.110; RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn. 2d 312, 316, 450 P.2d 940 (1969) ("The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board. ... The only evidence presented on appeal is that contained in the Board record."). "[R]eviewing court[s] will not consider matters outside the trial record." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Here, the Court of Appeals failed to adhere to RCWs 51.52.110 and 51.52.115 and the decisions of this Court. Instead of considering the

[12] Because Superior Court review of workers' compensation cases generally lies in the county of a worker's residence or county where the injury or occupational disease occurred, employers and claimants will be able to forum shop and dictate which Division would decide any further appeal. RCW 51.52.110. Gorre could have filed his appeal in King County, resulting in Division I review. Gorre, Tr. 6/7/10, p. 176.

[13] If this Court grants review and holds that whether a condition is "respiratory" or "infectious" is a factual question, there is substantial evidence in the Certified Appeal Board Record to support the Board's and Superior Court's factual finding that Valley Fever is solely an infectious disease. *See* CP 290, 471, 511, 659, 665.

"the precise record-no more and no less-considered by the trial court," *Raum*, 59 Wn.2d at 816, the Court conducted its own investigation, perhaps while still under the erroneous understanding that the relaxed rules of the APA applied. The Court of Appeals cites and relies upon no less than five sources of factual information that were not submitted by the parties or considered by the Board or the trial court on review of the Certified Appeal Board Record. *See Gorre*, 324 P.3d at 720 n.5; 720 n.7; 720 n.10; and 726 n.22.[14] The Court's failure to consider only the evidence in the Certified Appeal Board Record violates RCW 51.52.110 and 51.52.115and this Court's decisions and is patently erroneous. For example, at footnote 10 of the Court's opinion the Court asserts that

> *Although the medical experts in this case explained that Valley Fever was not endemic to Washington State as of 2010, recent Coccidioides diagnoses have been reported in eastern Washington, and Coccidioides immitis (the fungal cause of Valley Fever) has been recently identified in eastern Washington soil. See* April 4, 2014, Seattle & King County Public Health health advisory report (http://www.kingcounty.gov/healthservices/health/communicable/providers.aspx).

Id. (emphasis added). It is clear from this finding that the Court conducted its own investigation into one of the central factual disputes in this case.[15]

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[14] That the parties have no way to know what additional facts the Court may have discovered during its independent factual investigation underscores the error, if not impropriety, of such activity.

[15] The Court cites material outside the record for the purposes of refuting multiple expert medical opinions in the evidentiary record. Indeed, the Court's authority is especially offensive to the rule that an appeals court should consider only the record considered by the trial court given that it would have been impossible for the trial court to have considered the Court's citation *published more than three years after the administrative hearings in which the Certified Appeal Board Record was created and after both submission of briefing and oral argument at the Court of Appeals.*

In addition, the Court's source of authority in this case is erroneous given the statutory prohibition on the Court's consideration of evidence outside the Certified Appeal Board Record. Indeed, in addition to violating the RCWs 51.52.110 and 51.52.115 and this Court's decisions, the material cited by the Court should not have been considered; it is irrelevant, unfairly prejudicial, confusing, misleading and is inadmissible untested hearsay. ER 402, ER 403, ER 801, and ER 802.[16]

The Court's *ex parte* factual investigation not only offends RCWs 51.52.110 and 51.52.115and this Court's decisions but also raises issues of substantial public concern that require this Court's intervention. "[J]udges who access the Internet to obtain supplemental information for a case risk overstepping their roles and skirting fairness to the parties." David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, PROF. LAW., 2005, at 9. Such *ex parte* fact finding erodes the confidence of the parties, the public, and other judges[17] in the propriety and impartiality of their

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[16] This material the Court used to support its finding does not support the Court's conclusion that Valley Fever was endemic to Washington during the period at issue: 2005-2007. As the April 4, 2014 advisory states, "[t]his is the first time that Coccidioides has been detected in soil in Washington." Seattle & King County Public Health: Communicable Disease Epidemiology and Immunization Section, *Health Advisory: Valley Fever Agent identified in Washington State Soil, 4 April 2014* http://www.kingcounty.gov/healthservices/health/communicable/providers/advisories.aspx (follow "Valley Fever Agent identified in Washington State Soil" hyperlink) (2014).

[17] *See, e.g. N.Y.C. Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co.*, 3 Misc. 3d 925, 774 N.Y.S.2d 916 (2004) (citing Prince, Richardson on Evidence § 2-202 (Farrell 11th ed)) ("In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of

decisions and is of special concern in appellate cases where the parties have no notice. When considering extrinsic evidence gathered by the Court "[t]he importance of providing a party with notice and opportunity to be heard cannot be overstated." Coleen M. Barger, *Challenging Judicial Notice of Facts on the Internet Under Federal Rule of Evidence 201*, 48 U.S.F. L. REV. 43, 68 (2013).[18] Indeed, "reliance on independent research risks error while undermining the confidence of the public and parties in the work of both the appellate and trial courts." Jeffrey C. Dobbins, *New Evidence on Appeal*, 94 MINN. L. REV. 2016, 2060 (2012) (footnotes omitted).[19]

The propriety and legality of judges conducting *ex parte* investigations is a hotly debated issue of substantial public concern. The practice implicates RCWs 51.52.110 and 51.52.115, decisions of this Court, and principles of fairness and due process. This Court is the only forum available to the City to raise this important issue of public concern.

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undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance.").

[18] If the Court of Appeals felt that the materials it consulted were the type that could have been judicially noticed under ER 201, the Court should have given the City "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed" and made findings regarding whether the materials are "(1) generally known within the territorial jurisdiction of the [] court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201. The Court of Appeals failed to do so.

[19] "This lack of notice and an opportunity to respond is especially problematic when courts use information from the Internet to evaluate or resolve parties' substantive factual disputes." David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, PROF. LAW., 2005, at 7-8.

The Court of Appeals' improper *ex parte* investigation into disputed factual issues in this case requires this Court's intervention.

3. THE COURT OF APPEALS IMPROPERLY APPLIED STATUTORY CONSTRUCTION TO ITS "PLAIN LANGUAGE" ANALYSIS.

Although the Court of Appeals failed to make an explicit ruling on whether it found RCW 51.32.185 ambiguous, the Court purported to conduct a "plain language" analysis of RCW 51.32.185 indicating it found the statute unambiguous. *See, e.g., Gorre*, 324 P.3d at 730 ("Under the plain language of the RCW 51.32.185(1)"); 733 ("The plain language of subsection (4)"); 734 ("we read the plain language of RCW 51.32.185(4)"; "nothing in the plain statutory language suggests").

"[I]t is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction." *Johnson v. Dep't of Labor & Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949). Yet, when conducting its purported "plain language" analysis of RCW 51.32.185, the Court strayed beyond the plain language of RCW 51.32.185 and selected two doctrines of statutory construction that are only to be applied to ambiguous statutes, in violation of the decisions of this Court, the Court of Appeals, and the constitutional doctrine of separation of powers.[20]

[20]The Court of Appeals selected the elements of a full "ambiguous statute" analysis that supported its decision while completely ignoring elements of statutory construction, such as RCW 51.32.185's legislative history and the doctrine of *expressio unius est exclusio alterius*, that cut decisively against the Court's desired interpretation. *See infra* at 17-19

First, the Court of Appeals relied heavily on the doctrine of "liberal construction." The Court of Appeals held that

> [b]ecause Washington's Industrial Insurance Act 'is remedial in nature,' *we must construe it 'liberally* ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.' *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). When engaging in statutory interpretation, our fundamental objective is to give effect to the legislature's intent. *Campbell*, 146 Wn.2d at 9–10, 43 P.3d 4. Thus, *such liberal construction is particularly appropriate for statutes addressing firefighter injuries*, whose employment exposes them to smoke, fumes, and toxic or chemical substances and for whom our legislature enacted special workers' compensation protections: Recognizing that firefighters as a class have a higher rate of respiratory disease than the general public, our legislature declared that for industrial insurance purposes respiratory disease is presumed to be occupationally related for firefighters. LAWS OF 1987, ch. 515, § 1... Our legislature has clearly stated its intent to provide benefits for firefighters, whose jobs constantly expose them to a broad range of dangers while protecting the public; and again, *we are to construe these benefits liberally*.

Gorre, 324 P.3d at 732-34 (2014) (emphasis added). However, "[r]ules 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)..

Here, the Court of Appeals found RCW 51.32.185 to be an unambiguous statute capable of a "plain language" analysis. Hence, its use of the doctrine of "liberal construction" in interpreting RCW 51.32.185 is

a legislative act and an unconstitutional usurpation of the constitutionally defined powers of the Legislature. The Court of Appeals, "cannot, under the guise of construction, substitute [its] view for that of the Legislature[,]" as it did in this case. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 421, 832 P.2d 489 (1992). This Court should grant review to correct this obvious constitutional error.

Second, the Court of Appeals purported to attempt to avoid absurd results by construing the "plain language" of RCW 51.32.185. The Court of Appeals stated that

> [W]e construe statutes to avoid absurd results. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Our legislature has clearly stated its intent to provide benefits for firefighters, whose jobs constantly expose them to a broad range of dangers while protecting the public; and again, we are to construe these benefits liberally.[21] Thus, it would be absurd to read this statutory provision as limiting the covered infectious diseases to only those four expressly enumerated: Such absurd construction would mean that a firefighter exposed to methicilin-resistant staphylococcus aureus (MRSA) or other staphylococcus aureus (staph infections), for example, would not be covered under the statute.[22]

Gorre, 324 P.3d at 734 (footnotes added). The Court's use of this rule of statutory construction to make its "plain language" analysis is a violation

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[21] That the Court of Appeals combines two types of unconstitutional and unlawful "interpretation" tools here to reach its desired result further underscores its error.

[22] In addition to unlawfully applying the "absurd results" doctrine to an unambiguous statute, the Court's reading of RCW 51.32.185 is erroneous. Although on its face RCW 51.32.185 does not apply to MRSA or other staph infections, just as it does not apply to all sexually transmitted diseases beyond those codified, all workers, including firefighters and healthcare workers, are entitled to workers' compensation coverage for these conditions when contracted in the course of employment on a more probable than not basis. The Court of Appeals fails to recognize that RCW 51.32.185 does not dictate claim rejection or allowance.

of previous decisions by this Court and the Court of Appeals. "[I]t is a well-settled rule that 'so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.'" *DeLong v. Parmelee,* 157 Wn.App. 119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller,* 72 Wash. 154, 158, 129 P. 1100 (1913)). The Court of Appeals ignored this Court's admonishment that the Court shall "resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle 'that the drafting of a statute is a legislative, not a judicial, function.'" *Sedlacek v. Hillis,* 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson,* 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)). Instead, the Court utilized select doctrines of statutory construction to "construe" RCW 51.32.185 to solve what the Court felt was a public policy problem with the statute (exclusion of MRSA and other staph infections from the infectious diseases entitled to the presumption). This Court should grant review to correct the Court's error in rewriting the statute.

4. THE COURT OF APPEALS IMPROPERLY RULED ON A FACTUAL DISPUTE NOT BEFORE THE COURT OF APPEALS BY IMPERMISSIBLY REWEIGHING THE EVIDENCE PRESENTED AT TRIAL.

The Court of Appeals' "function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in Superior Court. [The Court is] not to reweigh or rebalance the competing testimony and inferences, or to apply anew the

burden of persuasion," even if the Court believes with verdict is wrong. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002) (footnotes omitted).

Here, the Court of Appeals unlawfully reweighed the testimony and inferences. Specifically, the Court found that the City's case was based solely upon the argument that "(1) because Valley Fever is not native to Washington, Gorre's trip to Las Vegas or time spent in California constituted exposure to non-employment activity that caused his Valley Fever; and (2) therefore, Gorre's Valley Fever did not arise naturally and proximately from the course of his employment." *Gorre*, 324 P.3d at 732 n.38[23] and that "the following existing evidence in the record before us on appeal appears insufficient to rebut the presumption that Gorre's Valley Fever is an occupational disease under RCW 51.32.185:(1) that Valley Fever is not native to western Washington, and (2) that Gorre travelled to Nevada during his employment as a City firefighter." *Gorre*, 324 P.3d at 719 n.3. The Court of Appeals decided that the Superior Court incorrectly decided the above factual issues and substituted its own findings. Such a usurpation of trial court's role by the Court of Appeals is in conflict with this Court and the Court of Appeals' decisions barring such actions. This

[23] These comments by the Court of Appeals, in addition to being an unlawful reweighing of factual issues decided by the trial court, is a wholly incomplete recitation of the substantial evidence supporting the Board's and trial court's decisions. See e.g., CP 290, 334, 388, 395-396, 463-464, 479, 465, 480, 483, 489, 518-519, 521, 534, 513, 521, 559, 561, 856-857.

Court should grant review to reverse the Court of Appeals' unlawful reweighing of the trial court's factual findings.

5. THE COURT OF APPEALS' DECISION TO ELIMINATE RESTRICTIONS ON THE INFECTIOUS DISEASES COVERED BY RCW 51.32.185 CONFLICTS WITH DECISIONS OF THE COURT AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

Here, the Court of Appeals held that "we read the plain language of RCW 51.32.185(4) as reflecting the legislature's intent to include 'infectious diseases' in general, not to limit them to only the four specified diseases to which it 'extended' coverage for firefighters who contract these four named diseases." *Gorre*, 324 P.3d at 734. However, a plain language analysis of RCW 51.32.185, numerous rules of statutory construction, and a review of the statute's legislative history establish that the Legislature did not contemplate all infectious diseases, including Valley Fever, would fall under RCW 51.32.185. The Court's error in eliminating all restrictions on the infectious diseases covered by RCW 51.32.185 is contrary to the Legislature's intent, is in conflict with decisions of this Court and the Court of Appeals, and constitutes an issue of substantial public interest that should be determined by this Court.

First, the Court of Appeals' "plain language" analysis of the term "extend" is erroneous. Instead of the contorted definition of "extend" used by the Court of Appeals to reach its intended result, the definition of extend as applied to the term in the context of RCW 51.32.185, is "to

reach in scope or application."[24] Using this definition of extend, RCW 51.32.185(4) reaches in scope or application any firefighter who has contracted human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis. This reading of RCW 51.32.185(4) provides no support for the Court of Appeals' suggestion that "the legislature's intent to expand the scope of qualifying 'infectious diseases,' not to limit them." *Gorre*, 324 P.3d at 734. Instead, it supports the Board's and Superior Court's decisions that the Legislature provided a defined, codified, and exclusive list of infectious diseases covered by RCW 51.32.185.

Even assuming *arguendo* that the language of RCW 51.32.185 is ambiguous, well-established rules of statutory construction and a review of the legislative history establish that Valley Fever is not an "infectious disease" to which the statute was intended to apply. The Court of Appeals, in reaching its desired conclusion, ignored both rules of statutory construction and the legislative history of RCW 51.32.185. First, 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).. As a result, it is error for the

[24] Merriam-Webster.com, extend, http://www.merriam- webster.com/dictionary/extend (last visited July 16, 2014).

Court the treat RCW 51.32.185 as applying to the entire universe of infectious diseases instead of the diseases codified by the Legislature. Further, "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 Com'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000). As Division II has recognized, but failed to apply here, "[t]he 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).

Moreover, statutes should not be construed in a manner which renders any portion of such statute meaningless or superfluous. *Cockle*, 142 Wn.2d at 808-809. The result reached by the Court of Appeals, that Valley Fever is an infectious disease covered by RCW 51.32.185 because of the general language of RCW 51.32.185(1), renders RCW 51.32.185(4) entirely meaningless. In ignoring these rules of construction, the Court of Appeals improperly rewrote the statute, usurping the legislative function and creating serious constitutional questions concerning separation of powers.

In addition, the legislative history of RCW 51.32.185 supports that subsection (4) provides the exclusive list of infectious diseases. As originally proposed, RCW 51.32.185 contained no limitation on which infectious diseases fell within the statute's presumption. *See* H.B. 2663,

57th Leg., Reg. Sess. (Wa. 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. The Court of Appeals ignored the legislative history of RCW 51.32.185.[25]

The Court of Appeals "interpretation" of RCW 51.32.185 seemingly eliminates all restrictions on the infectious diseases covered by RCW 51.32.185 and is a substantial issue of public concern because the Court of Appeals has subverted the intent of the Legislature. It is also an issue that this Court should resolve because of the implications of the decision for Washington cities, counties and fire districts that employ individuals who may fall under RCW 51.32.185 and will require benefits for conditions never intended or even considered by the Legislature at unknown cost to and affect on Washington cities, counties and fire districts and departments.[26] Such a result certainly "involves [] issue[s] of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

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[25] The Court of Appeals makes a number of unsupported statements regarding the intent of the Legislature. The Court of Appeals states, without the benefit of any citation, that "it appears that the legislature included this statutory list so that firefighters could benefit from the statutory presumption of a benefit-qualifying occupational disease if they contracted one of four specified serious infectious diseases perhaps not otherwise readily recognized as occupational diseases: HIV, hepatitis, meningitis, and tuberculosis." *Gorre*, 324 P.3d at 734.

[26] If this Court does not intervene, the Court of Appeals' construction of RCW 51.32.185 will arguably result in *each and every communicable disease, even those existing exclusively* outside of Washington, as falling under RCW 51.32.185. Arguably, the Court of Appeals has removed all limitations on the application of a statute intended to provide firefighters with an evidentiary rebuttable presumption and fee-shifting in limited circumstances.

VI. CONCLUSION

Based on the foregoing points and authorities, the City requests that this Court grant its petition and accept review.

RESPECTFULLY SUBMITTED this 7th day of August, 2014.

PRATT, DAY & STRATTON, PLLC

By _____
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City of Tacoma

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD O. GORRE,

Appellant and
Cross Respondent,

v.

CITY OF TACOMA,

Respondent and
Cross Appellant,

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

No. 43621-3-II

ORDER AMENDING ORDER GRANTING RECONSIDERATION IN PART AND AMENDING OPINION

The court amends the first and second sentences of the first paragraph of the Order Granting Reconsideration in Part and Amending Opinion, filed today, July 8, 2014, to correct a date and to substitute "published" for "unpublished" so that these sentences now read as follows:

> Respondent Department of Labor & Industries (Department) has filed a motion for reconsideration of our published opinion filed on April 23, 2014. We grant the Department's motion for reconsideration, in part, by making the following changes to our published opinion filed April 23, 2014: . . . .

IT IS SO ORDERED.

DATED this 15th day of July, 2014.

Hunt, P.J.

For the Court:
Hunt, P.J., Worswick, J., Penoyar, J.P.T.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD O. GORRE,

Appellant and
Cross Respondent,

v.

CITY OF TACOMA,

Respondent and
Cross Appellant,

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

No. 43621-3-II

ORDER GRANTING RECONSIDERATION IN PART AND AMENDING OPINION

Respondent Department of Labor & Industries (Department) has filed a motion for reconsideration of our published opinion filed on May 7, 2014. We grant the Department's motion for reconsideration, in part, by making the following changes to our unpublished opinion filed April 23, 2014:

(1) On page 3, we modify the first sentence of footnote 3, which reads, "In so doing, we note that the following existing evidence in the record is insufficient to rebut the presumption that Gorre's Valley Fever is an occupational disease under RCW 51.32.185," as follows:

We add the phrase "before us on appeal" after "we note that the following existing evidence"; and we delete the word "is" before "insufficient" and replace "is" with "appears." With these changes, the first sentence of footnote 3 now reads:

> In so doing, we note that the following existing evidence in the record before us on appeal appears insufficient to rebut the presumption that Gorre's Valley Fever is an occupational disease under RCW 51.32.185"

(2) On page 40, we delete footnote 50, which states:

> An administrative court is not bound to follow the civil rules of evidence; on the contrary, relevant hearsay evidence is admissible in administrative hearings. *Nisqually Delta Ass'n v. City of Dupont*, 103 Wn.2d 720, 733, 696 P.2d 1222 (1985); *Pappas v. Emp't Sec. Dept.*, 135 Wn. App. 852, 857, 146 P.3d 1208 (2006); *Hahn v. Dep't of Ret. Sys.*, 137 Wn. App. 933, 942, 155 P.3d 177 (2007). *See also* RCW 34.05.452(1), which summarizes the relaxed evidentiary standards in administrative hearings and broad discretion for the presiding officer.

With these changes, footnote 51 on the following page shall be renumbered to footnote 50.

We otherwise deny the Department's motion for reconsideration.

IT IS SO ORDERED.

DATED this 8th day of July, 2014.

Hunt, P.J.

We concur:

Worswick, J.

Penoyar, J.P.T.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD O. GORRE,

Appellant and
Cross Respondent,

v.

CITY OF TACOMA,

Respondent and
Cross Appellant,

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

No. 43621-3-II

PUBLISHED OPINION

HUNT, J. — Tacoma firefighter Lieutenant Edward O. Gorre appeals the superior court's affirmance of the Board of Industrial Insurance Appeals' denial of his occupational disease claim under RCW 51.32.185[1]. Gorre argues that we should reverse because (1) he had separate diagnoses of "Valley Fever" and eosinophilic lung disease, which qualified for RCW 51.32.185's evidentiary presumption of occupational disease for firefighters; (2) the Board and the Department of Labor and Industries (Department) failed to apply this statutory presumption of occupational disease, which improperly shifted the burden of proof to him (rather than

[1] We acknowledge that at the time Gorre filed his first claim for benefits, April 2007, the 2002 version of RCW 51.32.185 was in effect. Shortly thereafter, the statute was amended in July 2007, adding sections 6 and 7, which discuss the definition of "firefighting activities" and attorney fees, respectively. RCW 51.32.185(6) and (7). Because these 2007 statutory amendments did not substantively affect the legal issues here, we reference the new statute as the parties do in this appeal.

properly requiring the City of Tacoma to rebut this presumption); and (3) the evidence failed to rebut the presumption that he did not have an occupational disease that arose naturally and proximately from the course of his employment.

The City of Tacoma cross appeals (1) the superior court's finding that Gorre was not a smoker, which would preclude application of the statutory evidentiary presumption; (2) the superior court's consideration of Gorre's evidence outside the Board's record; and (3) the Board's failure to award the City's deposition costs incurred before the Board.

We reverse the superior court's findings of fact and conclusions of law that (1) Gorre did not have an occupational disease under RCW 51.08.140 based on its improper finding that he failed to prove a specific injury during the course of his employment, (2) Gorre did not contract any respiratory conditions that arose naturally and proximately from distinctive conditions of his employment with the City, and (3) the Board's decision and order are correct; we also reverse the underlying corresponding Board findings. Holding that the superior court did not abuse its discretion in failing to strike Gorre's evidence, we affirm the superior court's finding that Gorre was not a smoker. Further holding that both the Board and the superior court erred in failing to apply RCW 51.32.185's evidentiary presumption of occupational disease to Gorre's claim, (1) we reverse both the Board's denial of Gorre's claim and the superior court's affirmance of the Board's denial[2]; and (2) we remand to the Board with instructions to follow RCW 51.32.185, to

[2] Because we reverse and remand, we do not address the City's argument that the superior court abused its discretion in denying the City's request for deposition costs.

accord Gorre the benefit of this presumption, and to shift to the City the burden of rebutting the presumption of occupational disease by a preponderance of the evidence.[3]

FACTS

I. BACKGROUND AND MEDICAL HISTORY

Edward Omar Gorre grew up and lived for 18 years in Fair Oaks, California. After graduating from high school, he attended California colleges. Gorre served in the United States Army in Operation Desert Storm from 1988 to 1990, when he returned to California and lived in Sacramento for four years. In 1997 Gorre moved to the Tacoma area, where he worked as a professional firefighter and firefighter paramedic for the City of Tacoma from March 17, 1997, to May 2007. As a prerequisite for this employment, Gorre passed a demanding test of physical strength and stamina and a physical examination that included blood testing and x-rays. In 2000 he became a firefighter paramedic; in 2007 he became a fire medic lieutenant.

Over the course of his career as a firefighter and paramedic, Gorre responded to thousands of residential, commercial, industrial, and wild fires. His duties also included fire suppression, search and rescue, and "overhaul," which involves looking for seeds of fire to make sure the fire does not start up again. Administrative Record (AR) at 1055. He was exposed to smoke, diesel, chemicals, and mold when responding to fire calls, "Hazmat"[4] calls (hazardous material spills), lockouts (from cars and houses), daily building inspections, car incidents, and

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[3] In so doing, we note that the following existing evidence in the record is insufficient to rebut the presumption that Gorre's Valley Fever is an occupational disease under RCW 51.32.185: (1) that Valley Fever is not native to western Washington, and (2) that Gorre travelled to Nevada during his employment as a City firefighter.

[4] AR at 1058.

medic calls. Such exposures frequently placed him in close contact with patients with fever, H1N1 flu virus[5], and other respiratory diseases. Gorre did not wear respiratory protection when he fought wildfires, inspected manufacturing plants, dug trenches, or responded to medical calls. Similarly, Gorre did not wear a "self-contained breathing apparatus" (SCBA) during overhauls[6]; instead, his face was completely exposed. AR at 1055.

Between 2000 and 2005, Gorre and his colleague, Darrin S. Rivers, travelled to California and Las Vegas several times for vacation, including a trip to Las Vegas in November 2005. Two years later, beginning in February or March 2007, after ten years on the job, Gorre experienced fatigue, night sweats, chills, and joint aches. On April 17, he filed an accident report with the City, stating that during a lung biopsy his physician, Dr. Paul Sandstrom, had found evidence of an inhalation injury. Dr. Sandstrom's biopsy revealed upper lobe pulmonary infiltrates[7] and granulomous lesions[8]. Dr. Sandstrom referred Gorre to Dr. Christopher Goss, a pulmonary specialist, who began treating Gorre on May 2, after his lung biopsy. Dr. Goss initially diagnosed Gorre with hypersensitivity pneumonitis, a respiratory disease, and treated him with steroids; almost a year later, on March 19, 2008, Dr. Goss again saw Gorre and

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[5] H1N1, also known as the avian flu or swine flu, infects the human upper respiratory tract. *See* http://www.cdc.gov/h1n1flu/qa.htm.

[6] It was not common practice amongst firefighters to wear an SCBA for overhaul; and the City did not require them until 2007.

[7] A "pulmonary infiltrate" is a descriptive term used by radiologists to describe an abnormal density (such as pus or fluid) or infection in the lungs.
See http://www.aic.cuhk.edu.hk/web8/Very%20BASIC%20CXR%20lungs.html.

[8] "Granulomous lesions" in the lungs refer to chronic inflammations.
See http://www.mrcophth.com/pathology/granuloma.html.

continued to believe that the respiratory disease affecting Gorre was hypersensitivity pneumonitis.

The next month, in April, Gorre saw a dermatologist, who evaluated a nodular skin lesion on his forehead. Its biopsy showed that Gorre had coccidioidomycosis, also known as "Valley Fever."[9] Dr. Paul Bollyky, from the University of Washington Infectious Diseases Clinic, also diagnosed Gorre with Valley Fever[10] and initiated therapy.

II. PROCEDURE

A. Adminsitrative Denial of Industrial Insurance (Workers' Compensation) Benefits

Gorre filed a form with the City reporting his occupational injury; he also filed an application for workers' compensation benefits with the Department of Labor and Industries. He reported that Dr. Sandstrom had "found evidence of [an] inhalation exposure upon biopsy of lungs"[11]; but he did not include medical testimony, doctors' notes, or records to support his claim of inhalation exposure. In the application blank asking for the address where his injury had occurred, Gorre did not specify a location. Gorre also submitted Dr. Peter K. Marsh's evaluation

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[9] AR at 3.

[10] Valley Fever is caused by Coccidioides immitis, a fungus organism that lives in sterile soil in desert areas such as Mexico, the Sonoran desert and other areas of California and Arizona, Nevada, and other southwestern states. This organism produces spores that become airborne when the soil is disturbed; when inhaled, these spores cause Valley Fever in humans. Symptoms of Valley Fever surface between two to six weeks on average after exposure and include flu like symptoms or a transient lung disease that affect a patient's respiratory functions. Although the medical experts in this case explained that Valley Fever was not endemic to Washington State as of 2010, recent Coccidioides diagnoses have been reported in eastern Washington, and Coccidioides immitis (the fungal cause of Valley Fever) has been recently identified in eastern Washington soil. *See* April 4, 2014, Seattle & King County Public Health health advisory report (http://www.kingcounty.gov/healthservices/health/communicable/providers.aspx).

[11] AR at 872.

that Gorre had Hepatitis C exposure, which was likely work related. The City requested Gorre's medical report, records, and chart notes from Dr. Sandstrom and Edmonds Family Medicine; but it received no response.

The City denied Gorre's lung disease claim. In February 2008, the Department also denied Gorre's lung disease claim, saying it was not an occupational disease under RCW 51.08.140. Gorre requested reconsideration, asserting that he had eosinophilic pneumonia/hypersensitive pneumonitis, which were lung diseases considered presumptive occupational diseases under RCW 51.32.185(1)(a). On March 26, the Department issued an order stating that the City was responsible for Gorre's Hepatitis C exposure and for Gorre's interstitial lung disease, finding that both hepatitis C[12] and interstitial lung disease were occupational diseases and that the City would pay Gorre all medical and time loss benefits.

In September 2008, the City asked Dr. Garrison Ayars to determine Gorre's condition and to consider the RCW 51.32.185 statutory presumption of occupational disease for firefighters.[13] In October, the City sent Dr. Ayars' evaluation to Dr. Goss, stating that if Dr. Goss did not respond, the City would assume he concurred with Dr. Ayars' evaluation. In March 2009, Dr. Goss responded that he disagreed with Dr. Ayars' evaluation.

[12] The next month, however, the Department sent notification that it would be issuing a new order stating that it could not include Gorre's hepatitis C with his lung disease claim.

[13] RCW 51.32.185 creates a presumption of occupational disease for firefighters who have respiratory disease, heart problems, cancer, and infectious diseases. RCW 51.32.185(1). If a firefighter qualifies for this statutory presumption, the burden of proof shifts to the employer to show by a preponderance of the evidence that the firefighter's condition does not qualify as an occupational disease. RCW 51.32.185(1).

On March 24, 2009, the Department (1) cancelled its March 26, 2008 order stating that the City was responsible for Gorre's interstitial lung disease; and (2) instead denied Gorre's claim on grounds that there was no proof of specific injury, his condition was not the result of industrial injury, and his condition was not an occupational disease under RCW 51.08.140.

B. Appeal to Board of Industrial Insurance Appeals

Gorre appealed to the Board of Industrial Insurance Appeals and moved for summary judgment. He argued that (1) he was entitled to the presumption of occupational disease set forth in RCW 51.32.185; (2) the Department had failed to apply this RCW 51.32.185 presumption of occupational disease; and (3) under RCW 51.32.185, the burdens of proof, production, and persuasion rested on the City. The City responded with declarations from Dr. Emil Bardana, Dr. Ayars, Angela Hardy, Britta Holm, and Jolene Davis, among others.

1. Industrial Appeals Judge hearing and ruling

The Board's Industrial Appeals Judge (IAJ) ruled that for the statutory occupational disease presumption to apply, Gorre had to provide at least some supporting medical information or an affidavit from one of his doctors—some evidence other than a mere allegation that he had a lung condition.[14] The IAJ denied Gorre's motion for summary judgment because he had failed to provide such medical evidence to support his motion.

Gorre brought a second motion for summary judgment, this time attaching 39 exhibits, which included a medical report and declaration from Dr. Goss, a copy of Rose Environmental's mold inspection at Gorre's residence, Dr. Royce H. Johnson's deposition, and correspondence

[14] Gorre conceded that he had not submitted any affidavits or declarations with his motion for summary judgment.

between Gorre and the City. The IAJ ruled that (1) interpretation of RCW 51.32.185 was a matter of first impression, (2) whether Valley Fever is a respiratory disease or infectious disease is a question of fact, and (3) the Department had acted appropriately and had "correctly applied the presumption"[15] because "Valley [F]ever is not enumerated in the statute."[16] Administrative Report of Proceedings (ARP) (Mar. 8, 2010) at 88834. Instead of applying the statutory presumption of disease for firefighters, RCW 51.32.185, the IAJ elected to treat Gorre's case as a "normal"[17] occupational disease claim under RCW 51.08.140; this election shifted to Gorre the burden of proving that during the course of his employment he had suffered an occupational exposure that caused his Valley Fever. The IAJ held hearings in June and July 2010.

(a) Gorre's deponents

Dr. Christopher H. Goss (deposed May 6, 2010)

Dr. Goss, a University of Washington associate professor of medicine and an adjunct associate professor of pediatrics, is board certified in pulmonary medicine; he specializes in pulmonary and critical care, and pediatrics. He began treating Gorre in May 2007, after Dr. Sandstrom referred Gorre for a review of Gorre's lung biopsy and for an opinion on the possible etiology of Gorre's eosinophilic lung disease.[18] Gorre first reported symptoms of fevers,

[15] Administrative Report of Proceedings (ARP) (Mar. 8, 2010) at 88835.

[16] The Department never issued a ruling under RCW 51.32.185.

[17] ARP (Mar. 8, 2010) at 88835.

[18] We note that the IAJ decision and Board decision refer to the depositions and declarations of Dr. Goss, Dr. Paul Bollyky, and Dr. Johnson as "testimony" and state that they "testified." But the transcript does not reflect that they gave live testimony at the hearing in lieu of or in addition to their deposition testimonies and declarations. *See* AR at 122-23.

dyspnea, an abnormal chest x-ray, an abnormal chest computerized tomography (CT) scan, and a positive response to antibodies in his serum. Dr. Goss interpreted Gorre's biopsy report as consistent with hypersensitivity pneumonitis, a lung disease that qualified as a respiratory disease in patients sensitive to aeroallergens.

At the time Dr. Goss treated Gorre, Gorre had a bump that was not biopsied until months later, which later developed into Valley Fever. Dr. Goss hypothesized that Gorre had developed two diseases: (1) initially, eosinophilic lung disease, likely contracted from exposure to aerosolized dust from his fire fighting duties; and (2) Valley Fever, likely contracted as a youth in California and lying dormant/without symptoms but later disseminated by the steroids used to treat Gorre's eosinophilic lung disease. Dr. Goss defined "eosinophilic lung disease" as a broad category of lung diseases that present with pulmonary infiltrates and eosinophils (a specific kind of white blood cell); Dr. Goss stated that eosinophilic lung disease is a respiratory disease. Administrative Record Exhibits (ARE) at 18877.

Dr. Goss further opined that more probably than not, Gorre's initial lung condition related to his employment as a firefighter, and that Gorre did not contract Valley Fever in Washington state. Dr. Goss referred Gorre to the University of Washington's Infectious Diseases Clinic for Valley Fever treatment.

Dr. Royce H. Johnson (deposed January 7, 2010)

Dr. Johnson, a licensed medical doctor since 1971 and board certified since 1974, was Chief of Infectious Diseases and Chair of the Department of Medicine at California's Kern Faculty Medical Group and Kern Medical Center. He ran a large Valley Fever (coccidioidomycosis) clinic in California; and he has published papers and book chapters and

lectured extensively on Valley Fever. Dr. Johnson opined that Valley Fever is transmitted through inhalation exposure to arthroconidia (fungal spores) in the soil, which can travel up to 75 miles; arthroconidis "set up housekeeping" in the lungs and usually cause pneumonic disease, sometimes eosinophilic lung disease. AR at 1164. Valley Fever symptoms take about two to six weeks to appear from the time of exposure. According to Dr. Johnson, Valley Fever occurs throughout the southwest United States, northwest Mexico, Central America, and in South America, not anywhere outside the western hemisphere, and in general not as far north as the state of Washington.

When he treated Gorre in January 21, 2009,[19] Dr. Johnson did not agree with Dr. Goss's theory that Gorre's ingestion of steroids during his eosinophilia treatment had disseminated a dormant cocci organism; instead, it was the other way around—the cocci had caused the pneumonia with eosinophilia to develop. Nevertheless, Dr. Johnson opined that, more likely than not, Gorre had acquired Valley Fever as part of work activity with the City of Tacoma Fire Department, notably when dealing with fires and vehicle problems on I-5. Dr. Johnson further opined that even though Valley Fever is not endemic to Washington, it is possible for cocci spore to spread through importation of substances into Washington.

(b) Gorre's witnesses

Gorre

Gorre testified that during his career as a City firefighter and emergency medic, he responded to about 3,000 residential fires and engaged in various activities such as pulling down

[19] Dr. Johnson did not have Gorre's medical records before Dr. Ayars' September 3, 2008 report.

ceilings, ripping out walls, and crawling through and moving furniture looking for fire survivors. He had also responded to about 600 industrial fires and 2,500 vehicle, dumpster, electrical, and hazardous fires; and he had encountered 6,000 exposures to chemicals and 15,000 exposures to diesel fumes. Most of the time, he, like the other firefighters, did not wear a self-contained breathing apparatus (SCBA), which directly exposed him to smoke, fumes, and toxic substances. Gorre similarly lacked respiratory protection when (1) entering houses containing cat and human feces; (2) responding to calls in nursing homes, where he had close contact with patients with respiratory diseases; (3) inspecting chicken processing plants, where he was exposed to chicken feathers and droppings; (4) inspecting wood manufacturing plants filled with sawdust; (5) deep trenching into soils to set up rigging systems; and (6) fighting wildfires.

Gorre's fire fighting job with the City also required him to dig foundations for rescue operations at construction sites. He frequently responded to multiple casualty incidents on the main I-5 corridor, rescuing and assessing victims and suppressing tractor trailer fires; these freeway calls exposed him to blood, muck, dirt, diesel exhaust, and brake dust. Gorre was also exposed to various molds: There was green mold growing around the windows and covering the air conditioner filters at the fire station where he worked; he was also exposed to mold and different mushroom spores of mushrooms growing on walls at various houses to which he was called for emergency response. Gorre further testified that he was not a smoker. Gorre had tried a cigarette once in fourth grade and in high school, smoked cigars on special occasions, and chewed tobacco when he played baseball.

Darrin S. Rivers

Rivers had worked for the City as Gorre's Emergency Medical Technician partner. He testified that off duty, he and Gorre had travelled to California and Nevada several times between 2000 to 2005, and that they had made a couple houseboat trips to Lake Shasta in 2000 and 2001 and a couple trips to Las Vegas to play golf.

Rivers testified that in their line of work, firefighters are exposed to all forms of particulates from residential and commercial fires. When responding to house fires, firefighter paramedics are exposed to smoke from combustion products, such as wood and wood frames, and toxic chemicals from the burning of couches, polyesters, clothing, carpet, and drapes. Depending on the type of structure or business, commercial fires expose firefighters to chemicals, acetones, and paints, among other products of combustion: For example, as a firefighter, Rivers had been exposed to animal feces all over the floors, mold and fungi growing on carpets, and hazardous material spills. Firefighters do not always wear SCBA: For example, it was common practice for firefighters not to wear SCBA when responding to medical calls or when tearing out ceilings to look for small hidden fires during an overhaul. Even if a firefighter wears SCBA, after taking it off, the firefighter still exposes himself to soot and products of combustion that linger on helmets and bunker gear.

When responding to emergency medical service calls, firefighters come in close contact with patients who have respiratory infections and with infectious bacteriological or viral disease processes. When responding to freeway collisions, firefighters are exposed to fuel and other spills, antifreeze, and materials blown by freeway speed traffic.

Glen Zatterberg

Zatterberg, a City firefighter, testified that firefighters were exposed to mold in various circumstances at "Station No. 9"[20] where Gorre worked: (1) Station 9 had aluminum windows that collected condensation, and mold would be found around those windows; and (2) Station 9 also had in-window air conditioning units, whose filters were not cleaned regularly and which developed mold problems. Firefighters were also exposed to inhaling diesel exhaust and house fires. During initial deployment, firefighters would not wear SCBA until they entered a building's interior. And before 2007, firefighters were not required to wear SCBA when removing ceilings and looking for places with hidden fires during overhauls.

Matthew Simmons

Simmons, an employee of Rural Metro Ambulance, testified that he had been on numerous calls with Gorre. Simmons described the sick patients and poor conditions of residences that Gorre and Simmons faced in their line of work. Simmons mentioned he had similar respiratory symptoms and health problems, but the Board disallowed this specific testimony about Simmons' health conditions.

(c) City's deponent and witnesses

Dr. Paul Laszlo Bollyky (deposed June 25, 2010)

Dr. Bollyky is a physician researcher at the Benaroya Research Institute and an infectious disease doctor at the University of Washington. He stated that (1) most people with Valley Fever end up contracting the flu or a transient lung disease that rarely requires any therapy, and (2) there was no way to tell where and how a patient had acquired Valley Fever. Dr. Bollyky

[20] ARP (June 7, 2010) at 88133.

treated Gorre after his biopsy tested positive for Valley Fever. When he wrote Gorre's medical report in March 2009, Gorre's Valley Fever diagnosis was uncontroverted and it was Valley Fever that probably caused the symptoms that Gorre's doctors initially diagnosed. Dr. Bollyky further opined it was unlikely that steroid injections could disseminate Valley Fever, that Valley Fever was not endemic to western Washington, that all his Valley Fever patients had either travelled to or migrated from a Valley Fever endemic area, and that in light of Gorre's having lived in California and traveled to places where coccidioidomycosis was endemic, the most likely probability was that he had acquired Valley Fever in those places.

Dr. Garrison H. Ayars

Dr. Ayars, an allergy and immunology physician, testified that Valley Fever is endemic to the Sonoran desert, California, southern Nevada, Arizona, New Mexico, and Texas. He described Valley Fever symptoms as pulmonary symptoms that generally occur within one to three weeks of exposure, but which do not surface until years later for some individuals. Although not personally aware of any Valley Fever cases in Washington state, he had reviewed department of health records reporting that there were 15 Valley Fever cases in Washington within a ten-year period, the majority of which had involved Valley Fever acquired outside Washington.

Dr. Ayars started treating Gorre in September 2008, at which time he had Gorre's medical records from Drs. Goss and Johnson, plus Gorre's records from Edmonds Family Medicine, Tacoma General, Lakeshore Clinic, University of Washington, and the Skin Cancer Clinic of Seattle. Dr. Ayars felt that Gorre had no acute significant inhalation exposure or lung injury. Dr. Ayars disagreed with Dr. Goss's opinion that Gorre's ingestion of treatment steroids

had caused his Valley Fever to disseminate; Dr. Ayers based this opinion on Gorre's Valley Fever symptoms, such as skin problems, that do not happen with eosinophilia. Dr. Ayars opined that (1) Gorre had only one diagnosis, Valley Fever, and no separate independent respiratory disease; (2) Gorre did not contract Valley Fever in Washington; (3) Gorre's having lived in California from 1994 to 1997 and travels all over California since that time provided significant exposure to the Valley Fever organism in an endemic area; and (4) Gorre's symptom onset in February 2006 suggested he had been exposed to the Valley Fever spores when he was in Las Vegas in December 2005 and, thus, it was likely he had contracted Valley Fever in Nevada and had brought it with him to Washington.

Dr. Emil J. Bardana, Jr.

Dr. Bardana is a physician and allergist with a research background in occupational resin exposure and causation issues. In September 2009 he reviewed Gorre's medical reports and letters from Dr. Ayars and Dr. Goss; Dr. Bardana issued a report in October. He testified that there is no such thing as an eosinophilic lung disease, which is an ambiguous term for a group of disorders that have eosinophilic lung inflammation, not a specific disease. He further testified that eosinophilic lung disease in firefighters is almost a non-issue, and hypothesized that Gorre had developed pulmonary eosinophilic syndrome as a result of his Valley Fever, likely contracted during his golf trip to Las Vegas.

Dr. Bardana testified that Valley Fever, a fungal infection, is endemic in the southwestern part of the United States, Nevada, Utah, New Mexico, and Texas. He opined that (1) Gorre did not have separate and distinct respiratory diseases or conditions apart from Valley Fever symptoms; and (2) given that Gorre had been in Las Vegas in October 2005 and developed

symptoms of Valley Fever starting in December 2005, his trip to Las Vegas could have been his primary exposure to Valley Fever. Dr. Bardana further noted that Gorre's medical records showed that, despite a chewing tobacco history, Gorre's exposure to tobacco had been minimal.

Dr. Payam Fallah Moghadam

Mycologist Dr. Fallah testified that the Valley Fever organism exists in sterile soil; he opined that it is confined to places such as the lower Sonoran desert, Utah, southern Utah, Nevada, southern Nevada, New Mexico, Arizona, Texas, and the San Diego/Mexico border. He further testified that this organism (1) does not exist in the fertile soil of western Washington; (2) cannot be found in Pierce County, anywhere along the I-5 corridor, or in western Washington grasslands and wildlands; and (3) cannot withstand fire, and will die off at 125 to 130 degrees fahrenheit.

Dr. Marcia J. Goldoft

Washington State Department of Health epidemiologist Dr. Goldoft testified that she tracks "notifiable" conditions[21] of infectious or communicable diseases in Washington State, that Valley Fever is not a "notifiable" condition in Washington State, and that Valley Fever is not even "classified" by our state Department of Health because it is rare in Washington. ARP (June 24, 2010) at 88536. From 1997 to 2009, there were 15 reported cases of Valley Fever in Washington, reported as "rare diseases" to the Department of Health, with none confirmed as originating from exposures in Washington State. ARP (June 24, 2010) at 88536.

[21] "Notifiable" conditions are those that require reporting under the Washington Administrative Code. ARP (June 24, 2010) at 88535.

Drs. Buckley Allan Eckert and Stuart Mark Weinstein

Dr. Eckert, an internal medicine physician, testified that he had evaluated Gorre on March 8, 2007. At the time, Gorre had night sweats, periodic bouts of fever, Coxsackievirus[22], and bilateral finger numbness. Dr. Eckert also testified that Gorre was a former smoker, who had quit smoking in 1990. Dr. Weinstein, a Harborview Medical Center physician, testified that he had evaluated Gorre on April 18, 2002. At that time, Gorre said he had been a non-smoker since age 30, when he quit smoking cigars, which he had begun at age 20.

(d) IAJ's ruling

The IAJ issued a proposed decision and order affirming the Department's March 2009 denial of Gorre's claim. Specifically, the IAJ made the following findings of fact, summarized as follows: (1) In February 2006, Gorre developed symptoms of, and his doctor later diagnosed him with an infectious disease, Valley Fever, and Gorre did not develop a respiratory disease or a lung condition; and (2) Gorre's Valley Fever did not arise naturally and proximately from his occupation as a firefighter for the City. Based on these findings, the IAJ issued the following conclusions of law, summarized as follows: (1) Gorre did not incur any disease that arose naturally and proximately from distinctive conditions of his employment with the City's fire department under RCW 51.08.140, and (2) the Department's March 24, 2009 order was correct.

[22] Coxsackievirus is a group of viruses responsible for a variety of diseases in humans, such as human herpangina, hand-foot-and-mouth disease, epidemic pleurodynia, and aseptic meningitis. *See* STEDMAN'S MEDICAL DICTIONARY 406 (26th Ed. 1995).

2. Board's ruling on appeal

Gorre petitioned the Board to review (1) the IAJ's ruling that he had not suffered a respiratory disease under RCW 51.32.185; (2) the IAJ's ruling that the burden of proof was on him (Gorre) to show an occupational relationship between his disease and his job; (3) the IAJ's ruling that he did not suffer an occupational disease, even though he showed he had two respiratory diseases, eosinophilia and coccidioidomycosis (Valley Fever); (4) the IAJ's failure to apply the RCW 51.32.185 presumption of occupational disease, and (5) the IAJ's rulings that he did not develop any respiratory or infectious diseases in the workplace. The City cross-petitioned the Board (1) to review the IAJ's failure to issue a finding or a conclusion that Valley Fever is not a condition subject to RCW 51.32.185's statutory presumption; and (2) to issue a finding or conclusion that the City had rebutted this presumption, even if RCW 51.32.185 did apply.

The Board reviewed the IAJ's record of proceedings, concluded that the IAJ did not commit any prejudicial error, affirmed the IAJ's rulings, and added findings of fact and conclusions of law to clarify why Gorre's medical condition could not be presumed to be an occupational disease under RCW 51.32.185 and to explain why Gorre did not satisfy his burden of proof. The Board made the following findings of fact, summarized as follows: (1) Gorre's exposure to the Valley Fever organism occurred during a November 2005 golfing trip to Nevada, (2) Valley Fever is an infectious disease, (3) Gorre became symptomatic of Valley Fever in December 2005, and (4) Gorre did not contract any respiratory condition naturally and proximately caused by his occupation as a firefighter for the City of Tacoma. Based on these findings, the Board made the following conclusions of law, summarized as follows: (1) during

the course of his employment with the City, Gorre did not develop any disabling medical condition that the provisions of RCW 51.32.185 mandate be presumed to be an occupational disease, (2) Gorre did not incur any disease that arose naturally and proximately from distinctive conditions of his employment with the City, (3) the Department's March 24, 2009 order was correct. Ruling that Gorre had not met these burdens, the Board affirmed the Department's order denying Gorre's occupational disease claim.

C. Appeal to Superior Court

Gorre appealed the Board's decision and order to superior court, where he moved for summary judgment reversal of the Board's rulings. Gorre argued that the Board had failed (1) to apply the RCW 51.32.185 presumptions of firefighter occupational respiratory disease and infectious disease to his medical claims; and (2) to require the City to rebut these presumptions by a preponderance of credible, admissible evidence that his medical conditions did not arise from occupational exposure or from occupational aggravation of any preexisting condition.

The City filed a cross motion for summary judgment, arguing that (1) Gorre failed to establish a compensable claim under RCW 51.32.185; (2) under RCW 51.32.185, Valley Fever is not a presumptive occupational disease and, thus, the superior court should affirm the Board's ruling; (3) RCW 51.32.185 was also inapplicable because Gorre had a smoking history; (4) even if the statutory presumption applied, the City had rebutted it; and (5) Gorre's conditions did not arise naturally and proximately from conditions of his employment with the City.

Gorre then submitted the following exhibits: Rose Environmental's residential indoor environmental quality and mold evaluation, Dr. Goss's declaration, and Dr. Bollyky's letter. The City filed a motion to strike these exhibits and Gorre's reference to Simmons' testimony, arguing

that the superior court should prohibit Gorre from offering new exhibits and inadmissible testimony under RCW 51.52.115.[23] Gorre responded that (1) he had already submitted the Rose Environmental report to the Board; (2) Dr. Goss's declaration was already included as an exhibit in Gorre's renewed motion for summary judgment before the Board; (3) Dr. Bollyky had previously testified about the aforementioned letter and its contents during his deposition, which was part of the record; and (4) Simmons' testimony was admissible.

The superior court orally affirmed the Board's decision,[24] ruling that (1) it was "a little hard to support factually"[25] that Gorre had contracted Valley Fever in Washington; (2) Gorre did not have separate diseases of eosinophilia and interstitial lung disease because "what people were seeing were symptoms of the cocci that he did have"; and (3) Gorre was not a smoker—"[h]is testimony was that he smoked a little bit as a kid and had an occasional cigar. I don't think smoking was an issue here at all." Verbatim Transcript of Proceedings (VTP) (Mar. 30, 2012) at 55, 56. The superior court denied the City's request for deposition costs incurred at the Board level, finding that the City had incurred these costs for the Board action, not for the superior court action.

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[23] When the City asked the superior court to rule on its motion to strike Gorre's exhibits, Gorre voluntarily withdrew Dr. Bollyky's letter. The court stated it would rule on the motion to strike later, but it never did.

[24] The record does not show that the superior court ruled expressly on the parties' cross motions for summary judgment. Instead, it appears that the superior court followed the legislature's statutorily prescribed procedures for judicial review of administrative workers' compensation decisions, which we describe more fully in the standard of review section of this opinion's analysis section.

[25] Verbatim Transcript of Proceedings (VTP) (Mar. 30, 2012) at 54.

Ruling that a preponderance of the evidence supported the Board's findings of fact, the superior court issued a written ruling adopting the Board's findings of fact and conclusions of law and affirming the Board's denial of Gorre's occupational disease claim. The superior court entered additional findings of fact that Gorre was not a smoker, that he had coccidioidomycosis, that his symptoms were manifestations of his coccidioidomycosis, and that he did not have separate diseases of eosinophilia or interstitial lung disease. The superior court ordered Gorre to pay statutory attorney fees of $200 each to the City and to the Department under RCW 4.84.080, but it denied the City's request for deposition costs.

D. Appeal to Court of Appeals

Gorre appeals the superior court's rulings and affirmance of the Board's denial of his occupational disease claim. In particular he challenges the superior court's and the Board's failures (1) to recognize three separate statutorily presumptive occupational respiratory conditions; (2) to exclude prejudicial, confusing, and misleading evidence; and (3) to award him attorney fees and costs, including expert witness fees. The City cross-appeals the superior court's failure (1) to find that Gorre was a smoker, (2) to award the City deposition costs under RCW 4.84.010 and RCW 4.84.090[26], and (3) to rule on City's motion to strike and to exclude inadmissible documents and unsupported assertions.

[26] The legislature amended RCW 4.84.010 in 2007 and 2009; and amended RCW 4.84.090 in 2011. The amendments did not alter the statutes in any way relevant to this case; accordingly, we cite the current version of the statute.

ANALYSIS

Gorre argues that the superior court and the Board erred in (1) failing to apply RCW 51.32.185's presumption that firefighters' respiratory and infectious diseases are prima facie occupational diseases under RCW 51.08.140[27]; and (2) consequently, failing to place on the City the burden of rebutting this presumption. The City and Department respond that Gorre had only Valley Fever and no other separate disease and, thus, the superior court did not err in finding that he did not qualify for this evidentiary presumption of occupational disease under RCW 51.32.185.

On cross appeal, the City argues that the superior court erred in (1) finding that Gorre was not a smoker, (2) failing to strike the evidence Gorre presented at the superior court level, and (3) failing to award the City its deposition costs. Gorre responds that the superior court did not err in (1) finding that he was not a smoker, because the record does not support such a finding; (2) failing to grant the City's motion to strike evidence Gorre presented at the superior court level; and (3) denying the City statutory fees for deposition costs it incurred for the Board action. Except for those we can combine, we address each argument in turn.

I. STANDARD OF REVIEW

Unlike other administrative decisions, the legislature has charged the courts with reviewing workers' compensation cases "as in other civil cases." RCW 51.52.140. As Division One has clarified:

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[27] More specifically, Gorre asserts that he had separate diseases, Valley Fever and eosinophilia/interstitial lung disease, both of which constitute respiratory and infectious diseases qualifying for this presumption.

> Washington's Industrial Insurance Act includes judicial review provisions that are specific to workers' compensation determinations. In particular, the act provides that superior court review of a Board determination is de novo, that it includes the right to a jury trial, and that *the party seeking review bears the burden of showing that the Board's decision was improper*:
>
> > The hearing in the superior court shall be de novo, but the 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. . . . In all court proceedings under or pursuant to this title *the findings and decision of the board shall be prima facie correct* and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified.

Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 179, 210 P.3d 355 (emphasis added) (quoting RCW 51.52.115), *review denied*, 167 Wn.2d 1015 (2009).

Applying these statutory standards, the superior court treats the Board's decision as "prima facie correct under RCW 51.52.115" such that it "may substitute its own findings and decision for the Board's only if it finds from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect." *Rogers*, 151 Wn. App. at 180 (citing *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)). On appeal of the superior court's worker's compensation decision, however,

> "[w]e review whether *substantial evidence* supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings."

Rogers, 151 Wn. App. at 180 (emphasis added) (quoting *Watson v. Dep't of Labor & Indus.*, 133

Wn. App. 903, 909, 138 P.3d 177 (2006) (citing *Ruse*, 138 Wn.2d at 5).[28] In so doing, we also review de novo the legality of the Board's decisions, like the superior court, relying solely on the evidence presented to the Board. RCW 51.52.115; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024 (2013); *Dep't of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 269-70, 976 P.2d 637 (1999), *aff'd*, 140 Wn.2d 282, 966 P.2d 593 (2000).

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[28] As Division One further explained:

> This statutory review scheme results in a different role for the Court of Appeals than is typical for appeals of administrative decisions pursuant to, for example, the Administrative Procedure Act [ch. 34.05 RCW], where we sit in the same position as the superior court. To be clear, unlike in those cases, our review in workers' compensation cases is akin to our review of any other superior court trial judgment: "'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.'" *Ruse*, 138 Wn.2d at 5 (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). . . .
>
> > Our function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.
>
> *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002) (footnotes omitted). The Industrial Insurance Act itself encapsulates this rationale, providing that "[a]ppeal shall lie from the judgment of the superior court *as in other civil cases*." RCW 51.52.140 (emphasis added). . . . We do not review the trial court's factual determinations de novo.

Rogers, 151 Wn. App. at 180-181 (internal footnotes omitted).

II. GORRE'S VALLEY FEVER: QUALIFYING DISEASE FOR RCW 51.32.185 PRESUMPTION[29]

We agree with Gorre that (1) his contracting Valley Fever was a "respiratory disease," which qualifies for the statutory presumption of an "occupational disease" under RCW 51.32.185; (2) the Department, the IAJ, the Board, and the superior court all erred in failing to apply this statutory presumption to his worker's compensation claim; and (3) consequently, they erred in placing the burden on Gorre to prove his occupational disease instead of placing the burden on the City to rebut this statutory presumption.

A. RCW 51.32.185: Occupational Disease Presumption for Firefighters

We recognize that generally, in order to obtain workers' compensation benefits, the initial burden is on the worker to show that he or she developed an "occupational disease" that arose naturally and proximately out of employment. RCW 51.08.140; *Ruse*, 138 Wn.2d at 6. But our legislature carved out a unique exception for firefighters when it enacted RCW 51.32.185, which establishes a rebuttable evidentiary presumption that certain diseases contracted by firefighters are "occupational diseases" covered under the Industrial Insurance Act[30]. RCW 51.32.185 (1):

> In the case of firefighters as defined in [former] RCW 41.26.030(4) (a), (b), and (c) [(2009)] who are covered under Title 51 RCW . . . , there shall exist a

[29] Gorre appears to argue that RCW 51.32.185 creates a separate claim for an occupational disease other than those that the statute lists as recognized firefighter occupational diseases. We disagree. RCW 51.32.185(1) does not create a new cause of action; rather, it creates a rebuttable evidentiary "presumption" that specified firefighter diseases are "occupational" diseases for workers' compensation purposes. *See, e.g.*, *Raum*, 171 Wn. App. at 144. Instead, we agree with Division One of our court, which reviewed the legislative history behind RCW 51.32.185 and held that it does not create a separate occupational disease claim different from that in RCW 51.08.140; instead, "RCW 51.32.185 does [no] more than create a rebuttable evidentiary presumption." *Raum*, 171 Wn. App. at 144.

[30] Title 51 RCW.

> prima facie presumption that: (a) Respiratory disease[31]; . . . and (d) infectious diseases[32] are occupational diseases under RCW 51.08.140[33]. 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[34], physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

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[31] The legislature accompanied its 1987 promulgation of this evidentiary presumption with the following findings:

> The legislature finds that the employment of fire fighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that fire fighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for fire fighters.

LAWS OF 1987, ch. 515, § 1

[32] RCW 51.32.185(4) provides:

> 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.

(Emphasis added.)

[33] As is the case for any workers' compensation claim, RCW 51.08.140 defines "[o]ccupational disease" as "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, however, shifts the burden of disproving such occupational disease to the employer once the firefighter shows that he has a respiratory, infectious, or other qualifying disease under this statute.

[34] RCW 51.32.185(5) further provides:

> 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.

(Emphasis added).[35] For purposes of the instant appeal, we focus on only the respiratory and infectious occupational diseases that Gorre claims he suffered in the course of his employment as a City firefighter.

For the RCW 51.32.185(1) presumption of occupational disease to apply, the firefighter must show that he has one of the four categories of diseases listed in the same statutory subsection.[36] *Raum*, 171 Wn. App. at 147; WAC 296-14-310. Only two of these categories are at issue here: respiratory diseases and infectious diseases. Under the plain language of the RCW 51.32.185(1), once the firefighter shows that he has one of these types of diseases, triggering the statutory presumption that the disease is an "occupational disease," the burden shifts to the employer to rebut the presumption by a preponderance of the evidence by showing that the origin or aggravator of the firefighter's disease did not arise naturally and proximately out of his employment. *Raum*, 171 Wn. App at 141 (citing RCW 51.32.185(1)). If the employer cannot meet this burden, for example, if the cause of the disease cannot be identified by a preponderance of the evidence or even if there is no known association between the disease and firefighting, the

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[35] This statutory presumption furthers the legislature's intent that the Industrial Insurance Act be remedial in nature and "'reduc[e] to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.'" *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 474, 745 P.2d 1295 (1987) (quoting RCW 51.12.010).

[36] If the firefighter has some other type of disease, such that this evidentiary presumption does not apply, the burden of proof is on him to prove that the disabling condition is an "occupational disease" under RCW 51.08.140, which requires proving that the condition arose naturally and proximately out of his employment. *Raum*, 171 Wn. App. at 152.

firefighter employee maintains the benefit of the occupational disease presumption.[37]

B. Record Supports Agency's Finding Single Medical Condition: Valley Fever

Gorre asserts that he suffered from additional separate diseases, such as eosinophilia or interstitial lung disease. Whether he suffered from one or multiple diseases is a question of fact. As we previously noted, we apply the substantial evidence standard to the superior court's findings of fact, which, in turn, could "substitute its own findings and decision for the Board's only if it finds from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect." *Rogers*, 151 Wn. App. at 180; RCW 51.52.115. Again, this substantial evidence standard is highly deferential to the agency fact finder; and we do not weigh the evidence or substitute our judgment for the agency's judgment about witness credibility. *See Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007). Applying these standards here, we hold that the record supports the Board's and the superior court's

[37] The following factual issues may reappear on remand: To the extent that the parties elect not to relitigate these issues, we rule on Gorre's factual challenges as follows: Gorre argues that the superior court and the Board erred in (1) finding that he had only one medical condition, Valley Fever, and failing to acknowledge that he had two separate and distinct diagnoses—eosinophilia/interstitial lung disease and Valley Fever; (2) failing to acknowledge that either of these conditions qualified for the occupational disease presumption under RCW 51.32.185(1); and (3) failing to apply this statutory presumption, which would have shifted the burden to the City to show that his diseases did not arise from his firefighter employment.

We disagree with Gorre's first point and agree with the City's argument on cross appeal that, despite his respiratory symptoms, Gorre established only Valley Fever, and not an additional separate disease. But we agree with Gorre's second point—that Valley Fever is both a respiratory disease and an infectious disease for purposes of RCW 51.32.185(1)'s statutory presumption of an occupational disease, and with his third point—the Board and the superior court erred in failing to apply this statutory presumption to shift the burden of proving the disease's non-occupational origin to the City.

finding that Gorre suffered from a single medical condition, namely Valley Fever, which Board finding Gorre did not overcome by a preponderance of the evidence.

Only Dr. Goss believed that Gorre originally had a separate lung condition—eosinophilic lung disease, which when treated with steroids caused Gorre's onset of Valley Fever, a second disease. Gorre's other expert, Dr. Johnson, together with the other doctors and experts, disagreed with Dr. Goss's theory that Gorre's ingestion of steroids to treat eosinophilic lung disease disseminated a dormant cocci organism, which caused the onset of Gorre's Valley Fever. Rather, the other doctors and experts reached the opposite conclusion—it was the dormant Valley Fever cocci that caused Gorre's respiratory, flu-like symptoms (for example, pneumonia) to develop and manifest as Valley Fever. Dr. Bardana, for example, (1) testified that eosinophilic lung disease in firefighters is almost a non-issue; and (2) hypothesized that Gorre had developed pulmonary eosinophilic syndrome from his preexisting dormant Valley Fever such that Gorre had "one disease, . . . not two diseases," adding, "[I]t's crystal clear, and I think everybody except Dr. Goss agrees with that." ARP (June 24, 2010) at 88519.

We affirm the Board's and the superior court's findings that Gorre did not have separate symptoms of eosinophilia or interstitial lung disease and that he had only one medical condition, Valley Fever, from which his various respiratory symptoms flowed.

C. Gorre's Valley Fever—Statutorily Presumptive Occupational Disease

We next address the Board's and the superior court's findings that Gorre's Valley Fever was not an occupational disease under RCW 51.08.140 because he failed to prove a specific injury during the course of his employment and because he did not contract any respiratory conditions that arose naturally and proximately from distinctive conditions of his employment

with the City. We agree with Gorre that (1) the Board and the superior court erred in failing to apply the presumption of occupational disease in RCW 51.32.185 and instead placing the burden of proving an occupational disease on him[38]; and (2) Valley Fever constituted both a respiratory and infectious disease, either of which qualified for the evidentiary presumption of firefighter occupational disease under RCW 51.32.185.

1. Statutory interpretation

RCW 51.32.185(1)(a) and (d) creates a prima facie presumption of occupational disease for "respiratory diseases" and "infectious diseases." The statute does not define either of these types of diseases, although it provides examples of some infectious diseases. If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). When a statute is susceptible to more than one reasonable interpretation, however, it is ambiguous and we use canons of statutory construction or legislative history. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Here, we use these canons of statutory construction to discern whether the legislature intended to include Gorre's Valley Fever and its related respiratory symptoms in its "respiratory diseases" and "infectious diseases" qualifying for the occupational disease presumption under RCW 51.32.185(1).

[38] More specifically, when the Department and the Board failed to apply the statutory presumption, they erroneously placed on Gorre the burden to show that his respiratory symptoms arose from his firefighting occupation stress instead of starting with the presumption of a qualifying occupational disease under RCW 51.32.185(1) and looking to the City to rebut this presumption. This erroneous burden-shifting led to the Board's denying Gorre benefits based on its findings that (1) because Valley Fever is not native to Washington, Gorre's trip to Las Vegas or time spent in California constituted exposure to non-employment activity that caused his Valley Fever; and (2) therefore, Gorre's Valley Fever did not arise naturally and proximately from the course of his employment.

We discern a statute's plain meaning from the ordinary meaning of the language at issue, the context in which that statutory provision is found, related provisions, and the statutory scheme as a "whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If a statute does not define a term, however, we may look to common law or a dictionary for the definition. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). If a term is susceptible to two or more reasonable interpretations, it is ambiguous and we then look to other sources of legislative intent. *State v. Garrison*, 46 Wn. App. 52, 54-55, 728 P.2d 1102 (1986).

Because Washington's Industrial Insurance Act "is remedial in nature," we must construe it "liberally . . . in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). When engaging in statutory interpretation, our fundamental objective is to give effect to the legislature's intent. *Campbell*, 146 Wn.2d at 9-10. Thus, such liberal construction is particularly appropriate for statutes addressing firefighter injuries, whose employment exposes them to smoke, fumes, and toxic or chemical substances and for whom our legislature enacted special workers' compensation protections: Recognizing that firefighters as a class have a higher rate of respiratory disease than the general public, our legislature declared that for industrial insurance purposes respiratory disease is presumed to be occupationally related for firefighters. LAWS OF 1987, ch. 515, §1.

a. Gorre's Valley Fever is a respiratory disease under RCW 51.32.185.

RCW 51.32.185(1)(a) provides that "respiratory diseases" are presumptively occupational diseases under RCW 51.08.140. But Washington law does not define "respiratory disease" in this context. Webster's dictionary defines "respiratory" as "of or relating to respiration." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1934 (2002). WEBSTER'S defines "respiration" as "a single, complete act of breathing"[39] it defines "disease" as "a cause of discomfort or harm,"[40] or "an impairment of the normal state of the living animal or plant body or any of its components that interrupts or modifies the part of the vital functions." WEBSTER'S at 648 (definition 1b). Thus the dictionary definition of "respiratory disease" is a discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing.

The medical testimony established that Valley Fever impairs a person's respiratory system. Valley Fever expert Dr. Johnson opined that Valley Fever is transmitted through inhalation exposure to arthroconidia in the soil that impacts in the lungs, usually causing pneumonic disease. Although asserting that Valley Fever is an infectious disease (and not a respiratory disease), Dr. Ayars testified that (1) symptoms of Valley Fever are generally pulmonary symptoms such as coughs, fever, and sputum; (2) the cause of Valley Fever is through the production of arthrospores in the air that when breathed into the lungs, causes disease in humans; and (3) more severe Valley Fever leads to other pulmonary symptoms, such as abscesses in the lungs, chronic pneumonias, and meningitis. Dr. Bardana testified that in

[39] WEBSTER'S at 1934 (definition 1b).

[40] WEBSTER'S at 648 (definition 2a).

March 2007, Gorre's pulmonary function showed a small airway obstruction and 40 percent eosinophilia in his peripheral blood count, and a CT examination of his chest showed ground glass deformities and nodularities.

It was undisputed that Gorre had Valley Fever.[41] The record shows that Valley Fever is an airborne disease that humans contract through inhalation, that the organism causing Valley Fever impacts in the lungs, and that Valley Fever patients suffer respiratory symptoms and pulmonary symptoms. Accordingly, we hold that (1) Valley Fever meets the dictionary definition of "respiratory disease"—an abnormal condition impairing the normal physiological functioning of the respiratory system, which by definition includes the lungs, and therefore is a "respiratory disease" under RCW 51.32.185; and (2) the Board and the superior court erred in failing to characterize Gorre's Valley Fever as such.

b. Gorre's Valley Fever is an "infectious disease" under RCW 51.32.185.

RCW 51.32.185(1)(d) provides that "infectious diseases" are presumptively occupational diseases under RCW 51.08.140. Although Washington law does not define "infectious disease" in this context, RCW 51.32.185(4) lists four specific infectious diseases that do qualify: "Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis." The plain language of subsection (4) does not state that this list of four diseases is exclusive; rather it provides that "[t]he presumption established in subsection (1)(d) of this section shall be *extended to* any firefighter who has contracted any of the following diseases[.]" RCW 51.32.185(4) (emphasis added).

[41] The City disputed only Gorre's Valley Fever origin, arguing that Gorre's Valley Fever was not related to his employment as a firefighter.

The City and the Department argue that the legislature intended to limit the scope of qualifying infectious diseases to the ones specifically listed in RCW 51.32.185(4). Gorre counters that because there is no limiting language in the statute to suggest otherwise, Valley Fever constitutes an infectious disease under RCW 51.32.185. We agree with Gorre.

The statute's use of the term "extended to" evinces the legislature's intent to ensure inclusion of the four diseases enumerated in subsection (4) under RCW 51.32.185(1)(d)'s presumption of occupational disease status for firefighters' "infectious diseases" in general. RCW 51.32.185(1)(d). This reading is consistent with WEBSTER'S definition of "extend"[42] as meaning "to increase the scope, meaning, or application of" and definition of "extended"[43] as "to have a wide range" or "of great scope."

In addition, nothing in the plain statutory language suggests that the legislature intended this list of four diseases to be exclusive or even illustrative; rather, it appears that the legislature included this statutory list so that firefighters could benefit from the statutory presumption of a benefit-qualifying occupational disease if they contracted one of four specified serious infectious diseases perhaps not otherwise readily recognized as occupational diseases: HIV, hepatitis, meningitis, and tuberculosis. Thus, this list of four specific diseases illustrates the legislature's

[42] WEBSTER'S at 804 (definition 6b).

[43] WEBSTER'S at 804 (definition 4b).

intent to expand the scope of qualifying "infectious diseases," not to limit them.[44]

Furthermore, we construe statutes to avoid absurd results. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Our legislature has clearly stated its intent to provide benefits for firefighters, whose jobs constantly expose them to a broad range of dangers while protecting the public; and again, we are to construe these benefits liberally. Thus, it would be absurd to read this statutory provision as limiting the covered infectious diseases to only those four expressly enumerated: Such absurd construction would mean that a firefighter exposed to methicilin-resistant staphylococcus aureus (MRSA) or other staphylococcus aureus (staph infections), for example, would not be covered under the statute.

Construing the statutory framework as a whole, we read the plain language of RCW 51.32.185(4) as reflecting the legislature's intent to include "infectious diseases" in general, not to limit them to only the four specified diseases to which it "extended" coverage for firefighters who contract these four named diseases. Given all the experts who opined that Valley Fever is an infectious disease, we hold that Valley Fever is an "infectious disease" under RCW

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[44] In contrast, if the legislature had intended to limit the scope of infectious diseases covered under the statute, it would have used limiting language similar to the language it used in the immediately preceding subsection, RCW 51.32.185(3):

> The presumption established in subsection (1)(c) of this section shall *only* apply to any active or former firefighter who has cancer that develops or manifests itself after the firefighter has served at least ten years and who was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. The presumption within subsection (1)(c) of this section shall *only* apply to . . .

(Emphasis added). The legislature's use of the limiting term "only" in RCW 51.32.185(3) evinces its intent to limit the types of cancers covered under the statute. But there is no corresponding limiting language in RCW 51.32.185(4).

51.32.185(1)(d) and that therefore it qualifies for the evidentiary presumption that Valley Fever is an occupational disease under the Industrial Insurance Act.[45]

Because Gorre's Valley Fever is both a respiratory disease and an infectious disease under RCW 51.32.185(1), the evidentiary presumption of firefighters' occupational disease applies; the Board, and the superior court erred in considering Gorre's benefits claim without according him the benefit of this presumption and instead, treating it as a regular occupational disease claim under Title 51 RCW, improperly placing the initial burden of proof on Gorre. We reverse and remand for the Board to apply the statutory presumption to Gorre's claim, thus shifting the burden to the City to show by a preponderance of the evidence that Gorre's Valley Fever did not qualify as an occupational disease under RCW 51.32.185.

III. REMEDY[46]

Having held that Gorre's respiratory and/or infectious Valley Fever qualified for the presumption of firefighter occupational disease under RCW 51.32.185, we next address how to remedy the Board's and the superior court's failure to apply the presumption. To ensure that Gorre receives the legislature's clearly intended benefit of RCW 51.32.185(1), we remand to the Board to reconsider Gorre's application for industrial insurance benefits, with instructions to accord Gorre this statutory presumption of occupational disease and to place on the City the

[45] Title 51 RCW.

[46] Because we reverse and remand to the Board to reconsider Gorre's claim under the applicable law and the City does not prevail on appeal or on its cross appeal, we do not address the City's argument that the superior court erred in failing to award statutory fees for deposition costs it incurred at the Board level under RCW 4.84.010 and RCW 4.84.090.

burden of rebutting this presumption, if it can, by showing that Gorre's presumed occupational disease did not arise naturally and proximately from his employment.[47]

IV. City's Cross Appeal

On cross appeal, the City argues that the superior court (1) erred in finding that Gorre was not a smoker, (2) abused its discretion in "fail[ing] to strike" certain items of evidence, and (3) erred in failing to award its statutory costs. Br. of Resp't/Cross-Appellant at 45. The City's first and second arguments fail; because we reverse and remand, we do not address the third argument.

A. Gorre Not a Smoker under RCW 51.32.185(5)

The City argues that Gorre's smoking history should preclude application of RCW 51.32.185's occupational disease presumption to his benefits claim. Gorre responds that his medical records and history established that he was not a smoker and provided substantial evidence to support the Board's and the superior court's finding that he was not a smoker under RCW 51.32.185. And there is no evidence in the record to the contrary; thus, we agree with Gorre.

[47] Because the Board has not yet considered Gorre's application with the benefit of the statutory presumption and its burden-shifting consequence, it is premature for us to address the City and the Department's cross appeal request to hold that the City effectively rebutted the presumption by showing that Gorre did not incur any disease that arose naturally or proximately from his employment and, therefore, did not qualify as an "occupational disease." Br. of Resp't at 28; Br. of Resp't/Cross Appellant at 39. *See Raum*, 171 Wn. App. at 151.

The City is correct that RCW 51.32.185's evidentiary presumption of occupational disease does not apply to a firefighter who is a regular user of tobacco products or who has a history of tobacco use:

> 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.

RCW 51.32.185(5). The City is incorrect, however, that the evidence showed Gorre fell within this statutory tobacco user category.

Neither the legislature nor the common law has defined the extent of tobacco use that qualifies for this RCW 51.32.185(5) exclusion from the statutory presumption of occupational disease. But the Washington Administrative Code (WAC) has defined what constitutes a current and former smoker: A "current smoker" "is a regular user of tobacco products, has smoked tobacco products at least one hundred times in his [or] her lifetime, and as of the date of manifestation did smoke tobacco products at least some days." WAC 296-14-315. The record does not support a finding that Gorre is a current smoker under this definition. A "former smoker" "has a history of tobacco use, has smoked tobacco products at least one hundred times in his [or] her lifetime, but as of the date of manifestation did not smoke tobacco products." WAC 296-14-315. The record does not support a finding that Gorre was a former smoker under

this definition.[48] On the contrary, the record supports the Board's and the superior court's finding that he was not a "smoker" under RCW 51.32.185(5).

B. City's Motion To Strike Evidence Presented in Superior Court

The City next argues that the superior court should have stricken Gorre's new evidence: the Rose Environmental report about the indoor environmental quality at Gorre's residence, Dr. Goss's declaration about Gorre's medical history, Dr. Bollyky's letter about Gorre's Valley Fever and how Gorre's exposure was possibly work-related, and Matthew Simmons' testimony about his own medical conditions and how they potentially arose from his employment as a firefighter. Gorre responds that the superior court did not err in admitting this evidence because a superior court reviews a Board decision de novo. Again, we agree with Gorre.

A superior court reviews decisions under the Industrial Insurance Act de novo, relying on the certified Board record. *Raum*, 171 Wn. App. at 139 (citing RCW 51.52.115). Under RCW 51.52.115, a superior court may not receive evidence or testimony other than or in addition to the evidence before the Board unless there were irregularities in the Board's procedure. RCW

[48] The City argues that the testimonies of Dr. Bardana, Dr. Eckert, and Dr. Weinstein establish that Gorre was a former smoker. At most, however, the record shows that Gorre experimented with smoking cigarettes in his youth and had an occasional cigar between the ages of 20 and 30. City witnesses Dr. Eckert and Dr. Weinstein both testified that Gorre had quit smoking: Dr. Eckert stated that Gorre had quit smoking in 1990, and Dr. Weinstein testified that Gorre's intake form stated that he had quit smoking at age 30 (1998). Dr. Bardana testified that Gorre's records showed that he had a chewing tobacco history, which he had stopped in 1997, but that Gorre's history of sampling cigars and chewing tobacco amounted to minimal, minuscule amounts of tobacco exposure.

Gorre also testified that he was not a smoker, that he had tried a cigarette once in fourth grade and in high school, that he had smoked cigars on special occasions, and that he had chewed tobacco when he played baseball. Gorre also testified that he had written that he did not smoke on his October 12, 2007 intake form for Dr. Kirkwood Johnston, his rheumatologist. Gorre had similarly written on his May 2, 2007 intake form for Dr. Goss that he did not smoke.

51.52.115. A superior court has discretion to rule on a motion to strike evidence. *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 825-26, 872 P.2d 516 (1994).

Contrary to the City's argument, the Rose Environmental report was neither hearsay nor new evidence; rather it was part of the Board record,[49] which the superior court was entitled to consider. Similarly, when the IAJ admitted Dr. Goss's declaration into evidence, it became part of the Board record,[50] which the superior court was entitled to consider, despite the City's hearsay characterization. Because Gorre voluntarily withdrew Dr. Bollyky's letter during the superior court summary judgment hearing below, it is neither part of the record before us nor an issue on appeal.

The City also asserts that the IAJ ruled Simmons' medical testimony was irrelevant and disallowed it; and thus, the superior court erred in failing to strike Gorre's reference to Simmons' hearsay testimony in Gorre's superior court brief. The City mischaracterizes Gorre's use of Simmons' testimony: Gorre did not use Simmons' testimony to further his summary judgment arguments at the superior court level. Rather, Gorre merely explained to the superior court that

[49] The City had moved to exclude this report at the Board level, but the IAJ did not rule on it. Absent a ruling excluding this report, it remained part of the Board record. *See* RCW 51.52.115.

[50] An administrative court is not bound to follow the civil rules of evidence; on the contrary, relevant hearsay evidence is admissible in administrative hearings. *Nisqually Delta Ass'n v. City of Dupont*, 103 Wn.2d 720, 733, 696 P.2d 1222 (1985); *Pappas v. Emp't Sec. Dept.*, 135 Wn. App. 852, 857, 146 P.3d 1208 (2006); *Hahn v. Dep't of Ret. Sys.*, 137 Wn. App. 933, 942, 155 P.3d 177 (2007). *See also* RCW 34.05.452(1), which summarizes the relaxed evidentiary standards in administrative hearings and broad discretion for the presiding officer.

Simmons' testimony "was disallowed at the [Board of Industrial Insurance Appeals] BIIA hearing."[51] CP at 13.

CONCLUSION

We hold that the superior court did not err or abuse its discretion as the City asserts on cross appeal. Thus, we affirm both the superior court's finding that Gorre was not a smoker and the superior court's decision not to strike the evidence Gorre presented. But we reverse the superior court's findings of fact and conclusions of law (1) that Gorre did not have an occupational disease under RCW 51.08.140, (2) that Gorre did not contract any respiratory conditions arising naturally and proximately from his City employment, and (3) that the Board's decision and order are correct. We also reverse the corresponding Board findings and conclusions that the superior court affirmed: Finding of Fact 1.2; Conclusions of Law 2.2, 2.3, 2.4.

We reverse the superior court's affirmance of the Board's denial of Gorre's RCW 51.32.185 firefighter-occupational-disease worker's compensation claim; we also reverse the underlying Board decision denying Gorre's claim. We remand to the Board for reconsideration of Gorre's claim with instructions (1) to accord Gorre RCW 51.32.185's evidentiary presumption

[51] In other words, Gorre never offered Simmons' medical testimony at the superior court level. Consequently, Simmons' testimony was not before the superior court and, thus, not subject to being stricken.

of occupational disease and (2) to shift the burden of rebutting this presumption to the City to disprove this presumed occupational disease by a preponderance of the evidence that the disease did not arise naturally or proximately out of Gorre's employment.

Hunt, J.

We concur:

Worswick, C.J.

Penoyar, J.P.T.

APPENDIX B

RCW 51.32.185

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

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

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

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

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

(5) Beginning July 1, 2003, this section does not apply to a firefighter who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter from the provisions of this section.

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

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

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

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

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

Notes:

***Reviser's note:** RCW 41.26.030 was alphabetized pursuant to RCW1.08.015(2)(k), changing subsection (4)(a), (b), and (c) to subsection (16)(a), (b), and (c).

Legislative findings -- 1987 c 515: "The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for firefighters." [1987 c 515 § 1.]

APPENDIX C

and public policy factors included in the test for enforceability, and the court failed to address whether the covenant could be saved to some extent.

¶ 23 We reverse the order granting summary judgment, vacate the attorney fees award to Emerick, and remand for further proceedings. We also award Cardiac its statutory attorney fees.

¶ 24 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: HUNT and JOHANSON, JJ.

Michael A. RAUM, Appellant,

v.

CITY OF BELLEVUE, Respondent.

No. 67213–4–I.

Court of Appeals of Washington, Division 1.

Oct. 8, 2012.

Background: City sought review of decision of the Board of Industrial Insurance Appeals to award workers' compensation benefits to firefighter who experienced chest pressure while performing official firefighter duties. The Superior Court, King County, Bruce Hilyer, J., entered judgment on jury verdict in favor of city. Firefighter appealed.

Holdings: The Court of Appeals, Lau, J., held that:

(1) statute establishing an evidentiary presumption that applies to certain firefighter occupational disease claims does not create a new cause of action different from a standard occupational disease claim;

(2) firefighter failed to establish error in special verdict form;

(3) firefighter failed to establish error in trial court's evidentiary decisions; and

(4) evidence supported jury's finding that firefighter's heart problems arose from nonemployment-related factors.

Affirmed.

1. Workers' Compensation ⇐1914

A superior court reviews decisions under the Industrial Insurance Act de novo, relying on the certified board record. West's RCWA 51.52.115.

2. Workers' Compensation ⇐1884

Only issues of law or fact that were included in the notice of appeal to the Board of Industrial Insurance Appeals or in the proceedings before the Board may be raised in the superior court. West's RCWA 51.52.115.

3. Workers' Compensation ⇐1935

On review to the superior court, the decision of the Board of Industrial Insurance Appeals is prima facie correct, and the burden of proof is on the party challenging the decision, although the superior court may substitute its own findings and decision for the Board's if it finds, from a fair preponderance of credible evidence, that the Board's findings and decisions are incorrect.

4. Workers' Compensation ⇐1939.4(4)

The trier of fact, be it court or jury, is at liberty to disregard findings and decision of the Board of Industrial Insurance Appeals if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive. West's RCWA 51.52.115.

5. Workers' Compensation ⇐1939.1

On appeal from judgment of the trial court reviewing decision of the Board of Industrial Insurance Appeals, the Court of Appeals 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. West's RCWA 51.52.140.

6. Workers' Compensation ⇐548

To establish an "occupational disease," the causal connection between a workers' compensation 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. West's RCWA 51.08.140.

See publication Words and Phrases for other judicial constructions and definitions.

7. Workers' Compensation ⇐547

Causation required to establish an "occupational disease" may be established by lay testimony if the injury is apparent to one without medical testimony.

8. Workers' Compensation ⇐547

A disease is proximately caused by employment conditions, supporting a finding of "occupational disease," 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. West's RCWA 51.08.140.

9. Workers' Compensation ⇐1364

Generally a worker claiming entitlement to benefits for an occupational disease carries the burden of proving that the disabling condition arose naturally and proximately out of employment; however, if the statutory rebuttable evidentiary presumption applies, that burden shifts to the employer unless and until the employer rebuts the presumption. West's RCWA 51.08.140, 51.32.185.

10. Trial ⇐232(1), 242, 295(1)

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law.

11. Appeal and Error ⇐893(1)

Appellate court reviews the adequacy of jury instructions de novo as a question of law.

12. Appeal and Error ⇐1064.1(1)

An instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party.

13. Workers' Compensation ⇐1365

Statute establishing a rebuttable, evidentiary presumption that applies to certain firefighter occupational disease claims does not create a new cause of action different from a standard occupational disease claim. West's RCWA 51.08.140, 51.32.185.

14. Trial ⇐366

The rules for properly objecting to special verdict forms are, by analogy, governed by the rule governing jury instructions. CR 51(f).

15. Trial ⇐366

If a party is dissatisfied with a special verdict form, then that party has a duty to propose an appropriate alternative.

16. Appeal and Error ⇐273(10)

Appellate court may review a claimed special verdict form error when the party has properly excepted by stating distinctly the matter to which he objects and the grounds of his objection.

17. Trial ⇐365.1(1)

A special verdict form is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the law to be applied.

18. Workers' Compensation ⇐1365

Where opposing party presents countervailing evidence to rebut presumption that firefighter's condition was related to his firefighting duties and thus an occupational disease, firefighter seeking benefits for occupational disease must come forward with competent evidence that his condition arose naturally and proximately from the distinctive conditions of his employment as a firefighter. West's RCWA 51.08.140, 51.32.185.

19. Workers' Compensation ⇐1846

Firefighter seeking benefits for occupational disease invited any error in failure of special verdict form to provide for the possi-

bility that he had a preexisting condition that was "aggravated by" his employment; firefighter did not object to the special verdict form on such grounds, and his own proposed special verdict form did not contain the "aggravated by" language that he claimed was improperly omitted.

20. Trial ⇐365.1(3)

A special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction.

21. Appeal and Error ⇐930(2)

Appellate court presumes jurors follow the trial court's instructions.

22. Appeal and Error ⇐766

Court of Appeals could decline to review arguments for which appellant failed to provide meaningful legal analysis and citation to authority.

23. Appeal and Error ⇐970(2)
Trial ⇐43

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.

24. Workers' Compensation ⇐1389

Document that firefighter created estimating the number and types of calls and alarms he responded to and the number and types of experiences and exposures he had during his career as a fire fighter was hearsay in workers' compensation proceedings; document was offered to prove the truth of the matter asserted, namely that he had been exposed to various toxins and stress while employed as a firefighter. ER 801(c).

25. Workers' Compensation ⇐1385

Where workers' compensation claimant identified no hearsay exception at trial or on appeal, the Court of Appeals would assume none applied to permit admission of hearsay evidence.

26. Workers' Compensation ⇐1385

Firefighter's wife's testimony regarding firefighter's statements to her regarding chemicals he encountered and tragedies he witnessed while at work was hearsay in workers' compensation proceedings; testimony was offered to prove the truth of the matter asserted, namely that firefighter had been exposed to various toxins and stress through his work.

27. Workers' Compensation ⇐1530.3(3)

Evidence supported jury's finding that firefighter's heart problems arose from non-employment-related factors, thus supporting judgment in favor of city upon firefighter's occupational disease claim; city rebutted evidentiary presumption with concrete medical testimony that specific factors other than employment, including genetic predisposition, high blood pressure, and high cholesterol, caused firefighter's coronary artery disease, doctors testified that more probably than not, firefighter's cardiovascular disease was unrelated to his occupational exposures, and no testimony established a clear link between firefighting and coronary artery disease. West's RCWA 51.08.140, 51.32.185.

28. Workers' Compensation ⇐1939.4(2)

Even if the appellate court were convinced that a wrong verdict had been rendered in a workers' compensation action, it should not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered; more extensive appellate review of facts found in the superior court would abridge the statutory right to jury trial. West's RCWA 51.52.115.

29. Workers' Compensation ⇐1935, 1939.6

Appellate court's function on appeal in workers' compensation action is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court; appellate court is not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury. West's RCWA 51.52.115.

30. Workers' Compensation ⇐1939.4(4)

In appeals from decisions and orders of the Board of Industrial Insurance Appeals, the trier of fact, be it court or jury, is at liberty to disregard board findings and deci-

sion if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive.

31. Workers' Compensation ⇐1365

Statutory presumption that applies to certain firefighter occupational disease claims was not intended to create a legal conclusion that firefighters have a higher incidence of cardiovascular disease. West's RCWA 51.32.185.

32. Evidence ⇐570

The weight, if any, to be given a medical expert's opinion based solely on a medical records review is within the jury's province.

33. Workers' Compensation ⇐1420

Medical testimony proffered to establish the causal relationship between an industrial injury and an alleged condition or disability must be phrased in terms of medical probability, not possibility; testimony as to possibility means testimony confined to words of speculation and conjecture, and medical testimony that an incident could cause, might cause, or possibly could cause such a condition is not sufficient.

34. Workers' Compensation ⇐52

A court resolves doubts in favor of the worker when construing the Industrial Insurance Act. West's RCWA 51.04.010 et seq.

35. Statutes ⇐190

When the intent of the legislature is clear from a reading of a statute, there is no room for construction.

36. Constitutional Law ⇐2473

A court cannot, under the guise of statutory construction, substitute its view for that of the Legislature.

37. Statutes ⇐188

So long as statutory language is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.

38. Constitutional Law ⇐2488

Courts should resist the temptation to rewrite an unambiguous statute to suit their notions of what is good public policy, recognizing the principle that the drafting of a statute is a legislative, not a judicial, function.

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Cheryl Ann Zakrzewski, City of Bellevue, Bellevue, WA, for Respondent City of Bellevue.

Beverly Norwood Goetz, Ofc. of The Atty. Gen., Seattle, WA, for State of Washington.

LAU, J.

¶ 1 RCW 51.32.185 establishes a rebuttable evidentiary presumption that certain diseases suffered by firefighters are "occupational diseases" as defined by the Industrial Insurance Act (Act), chapter 51 RCW. The presumption extends to heart problems experienced within 24 hours of strenuous physical exertion due to firefighting activities. The presumption "may be rebutted by a preponderance of the evidence." RCW 51.32.185(1). City of Bellevue firefighter Michael Raum filed a worker's compensation claim after he experienced chest pressure while performing official firefighter duties. After the Board of Industrial Insurance Appeals (Board) awarded him benefits, the City appealed to superior court. A jury returned a verdict for the City. Raum appeals, arguing that (1) the jury instructions and special verdict form inadequately stated the law, (2) the trial court improperly excluded testimony already in the Board record, and (3) insufficient evidence supports the verdict. Because the instructions and special verdict form correctly state the law, the trial court properly excluded inadmissible hearsay testimony, and sufficient evidence supports the verdict, we affirm.

FACTS

¶ 2 The City of Bellevue hired Michael Raum as a professional firefighter in 1991. Throughout 19 years on the job, he was exposed to smoke, chemicals, fumes, and carbon monoxide. Over the course of his ca-

reer, he was evaluated several times for smoke inhalation at the scene of a fire. He was also exposed to secondhand cigarette smoke at the fire station, though he never smoked as a firefighter.[1]

¶ 3 Raum testified that he never experienced chest pain before 2008. That year, he experienced chest pressure on three occasions while at work.[2] He first experienced chest pressure in February 2008 while using an elliptical machine at high intensity during a fitness training session at the fire station. He lowered the machine's intensity and the pressure sensation subsided. The second time he felt chest pressure, he was using the same elliptical machine at the same location. The pressure ceased when he stopped exercising. The third episode occurred when Raum went on an emergency call involving a car accident. He jumped out of the fire truck and felt chest pressure as he ran to the accident scene. He testified that on this occasion, the pressure "was a little more intense than it had been before" but it subsided after about a minute. Report of Proceedings (RP) (Apr. 20, 2011) at 357.

¶ 4 Raum applied to the Department of Labor and Industries for benefits, alleging he sustained an industrial injury to his chest in February 2008. The Department denied Raum's claim on the basis that his condition was not an occupational injury or an occupational disease under the Act. The Department denied Raum's subsequent request for reconsideration. Raum appealed to the Board, arguing that the Department failed to apply RCW 51.32.185's [3] rebuttable evidentiary presumption.

¶ 5 Before the Board hearing, Raum moved for summary judgment, arguing he was entitled to RCW 51.32.185's evidentiary presumption and that the City failed to rebut the presumption. The Board denied Raum's motion, and the appeal proceeded to a hearing. Each party presented expert testimony regarding whether Raum's heart condition was employment related.

¶ 6 The industrial appeals judge (IAJ) issued a proposed decision and order reversing the Department's decision. The IAJ found:

> The conditions in which Lt. Raum performed his firefighting activities were distinctive conditions of employment that more probably caused his heart problems than conditions in everyday life or all employments in general, including a former history of tobacco use, hypertension, cholesterol, family history, and exposure from other employment or non-employment activities.

Certified Appeal Board Record (CABR) at 49. The IAJ concluded that Raum's heart problems constituted an occupational disease under RCW 51.08.140 [4] and it was more probable than not that he suffered heart problems from his firefighting activities. The City petitioned the Board for review, assigning error to multiple findings of fact and conclusions of law and all adverse evidentiary rulings before the Board. The Board denied review and adopted the proposed decision and order as its own.

¶ 7 The City appealed to King County Superior Court. Raum moved for summary judgment, arguing that the City presented insufficient evidence to overcome RCW 51.32.185's statutory presumption. The court denied his motion, and the matter proceeded to a jury trial. Pursuant to RCW 51.52.115, the entire Board record was read to the jury except for testimony the superior court ordered stricken.

1. Raum smoked on and off for a four-year period when he was in high school, but had not smoked in more than 25 years at the time of the Board hearing in this case.

2. The City does not dispute that the three episodes of chest pressure or chest discomfort Raum described occurred while he was working his assigned firefighter shifts. The City further "does not dispute that Raum experienced chest discomfort or pain that occurred within twenty-four hours of strenuous firefighting activity as such activity is defined by RCW 51.32.185(6)." Resp't's Br. at 17 n. 11.

3. As discussed below, this statute creates a rebuttable evidentiary presumption that certain diseases suffered by firefighters are occupational diseases under the Industrial Insurance Act. *See* RCW 51.32.185(1).

4. RCW 51.08.140 defines "occupational disease" as "such disease or infection as arises naturally and proximately out of employment...."

¶ 8 The medical evidence read to the jury at trial established the following:[5] The City presented cardiologist Eugene Yang's deposition testimony. Dr. Yang reviewed Raum's medical records from 2000 to 2009 but never examined Raum. Dr. Yang testified that reviewing records provides a significant amount of information to form an opinion regarding a patient's condition, "including blood pressure, cholesterol levels, blood glucose levels, the patient's body mass index, that can allow us to determine what kind of risk factors that individual has specifically for cardiovascular disease." RP (Apr. 19, 2011) at 73. He stated, "[I]t is not uncommon ... for [cardiologists] to place a great role on reviewing records in order for us to formulate a diagnosis and opinion regarding [a patient's] specific cardiovascular-related disease or conditions." RP (Apr. 19, 2011) at 73.

¶ 9 Dr. Yang testified that a July 2001 cardiovascular examination revealed that Raum had high blood pressure, a very high total cholesterol level, and a high LDL or "bad cholesterol" level. Raum's total cholesterol to HDL or "good cholesterol" ratio—a predictor of cardiovascular risk—was also high. Raum was prescribed Lipitor in October 2001 to treat his high cholesterol. His cholesterol levels initially improved, but Raum began taking the medication only intermittently and by August 2002 his levels increased again.[6]

¶ 10 Dr. Yang testified that in September 2003 another medical examination revealed that Raum had "extremely high" total cholesterol and LDL cholesterol levels, "markedly elevated" triglyceride[7] levels, high total cholesterol to HDL ratio, and hypertensive resting blood pressure. According to Dr. Yang, the examination indicated Raum was "at high cardiovascular risk" due to his blood tests and other factors such as his weight and blood glucose levels. Raum resumed taking cholesterol-lowering medications. In August 2004 Raum's cholesterol profile showed good LDL cholesterol levels but his triglyceride levels were more than double the acceptable level. His creatine phosphokinase enzyme (CPK) level—an indicator of heart muscle inflammation—was also high.

¶ 11 In July 2005, another examination revealed that Raum's body mass index was on the borderline between overweight and obese. His total cholesterol level and LDL cholesterol level were extremely high, and his triglycerides were still elevated. A stress test showed "potentially worrisome" changes that led Raum's physician to refer him to cardiologist Rubin Maidan. Dr. Yang testified that based on Dr. Maidan's records from August 2005, Raum reported experiencing multiple episodes of chest pain with exertion and at rest—including at least six occasions where a chest ache lasted up to 10 minutes—as well as shortness of breath with exertion. Dr. Maidan's records indicated that Raum's cholesterol levels were elevated, he would very likely need additional cholesterol-lowering medications in the future, and he might have early coronary artery disease given his family history.

¶ 12 Dr. Yang next reviewed records from early 2008.[8] At that time, Raum's total cholesterol and triglyceride levels were "extremely high," his LDL cholesterol level was "markedly elevated," and his fasting glucose level was elevated to the extent it was a potential marker of metabolic syndrome—"a known risk factor for cardiovascular disease." RP (Apr. 19, 2011) at 94. A March 2008

5. In his opening brief, Raum improperly cites to the deposition and hearing testimony provided to the Board. Because the superior court ruled on various objections, not all of the Board testimony was actually presented during the trial. The City moves to strike all sections of Raum's brief that improperly cite to the Board record because "it is impossible to ascertain if he is citing to testimony that was actually read to the jury or not." Resp't's Motion to Strike Portions of Appellant's Br. at 4. Because we discuss and analyze the testimony below as it was actually presented to the jury, we deny the City's motion.

6. Dr. Yang testified that taking cholesterol medications intermittently may elevate the risk of developing cholesterol buildup in the arteries.

7. Dr. Yang testified that triglycerides "have been associated as an independent risk factor for heart disease." RP (Apr. 19, 2011) at 87.

8. No witness testified about Raum's medical condition from mid–2005 through early 2008, and neither party submitted or reviewed medical records for that timeframe.

coronary angiogram showed that Raum had extensive coronary artery disease. Dr. Yang testified that Raum had calcification of his main artery, a condition that "occurs generally when people have advanced disease that occurs over many decades." RP (Apr. 19, 2011) at 97. Nine months later, another angiogram indicated Raum had very high grade blockage in a different artery.

¶ 13 Based on his review of Raum's medical records, Dr. Yang testified that Raum has very severe multivessel coronary artery disease, very severe hyperlipidemia or hypercholesterolemia, mild hypertension, metabolic syndrome, and abdominal obesity, all of which are risk factors for cardiovascular disease. When asked whether Raum experienced a heart problem within 72 hours of exposure to smoke, fumes, or toxic substances or within 24 hours of strenuous physical exertion due to firefighting activities under RCW 51.32.185, Dr. Yang stated he did not believe, based on the statute's definitions, that the evidence indicated Raum developed a heart problem. Dr. Yang testified that on a more probable than not basis, Raum's risk factors for cardiovascular disease—not his occupational exposures—caused his aggressive coronary artery disease over several decades. Dr. Yang testified that although symptoms of a chronic problem like coronary artery disease can become unmasked during physical exertion, "the actual problem or heart problem is not something that occurred within that 24–hour or 72–hour window." RP (Apr. 19, 2011) at 110. He clarified on cross-examination:

> [C]oronary artery disease is not a heart problem that develops within 24 to 72 hours. That is a very important distinction that needs to be clarified versus somebody who has a heart attack, which certainly in a setting of fire suppression could be a direct manifestation of the occupational exposure.

RP (Apr. 19, 2011) at 175. Finally, when asked to discuss medical studies addressing whether firefighting is associated with cardiovascular disease, Yang opined, "[W]e don't really have any strong evidence that there is a direct link or causation between firefighting as an occupation and either the development of obstructive coronary artery disease that Mr. Raum suffers from or even an increased risk of dying from cardiovascular disease." RP (Apr. 19, 2011) at 120–21.

¶ 14 The City also presented internal medicine physician Alvin Thompson's testimony. Dr. Thompson conducted an independent medical evaluation of Raum in October 2008. At that time, Raum was taking medications to lower his cholesterol, open his blood vessels, and prevent blood clotting. Dr. Thompson reviewed Raum's medical records—including those written by Drs. Maidan, Robert Thompson, Rachel Weiman, and Edward Kim—and performed a physical examination. Dr. Thompson concluded that Raum had coronary disease starting in about 2005. He testified that Raum's cholesterol levels, body mass index, and CPK levels were higher than normal and his blood pressure was at "the upper limits of normal." RP (Apr. 18, 2011) at 61–64, 71. He testified on a more probable than not basis that Raum had dyslipidemia (high blood fat). Dr. Thompson opined that this condition "had nothing to do with [Raum's] employment" because "family history would suggest a genetic basis." [9] RP (Apr. 18, 2011) at 78–79.

¶ 15 Dr. Thompson also diagnosed Raum with "arteriosclerotic cardiovascular disease with a history of angina, narrowing of two of his three main coronary arteries with stent placement medically unrelated to the subject claim on a more-probable-than-not basis" [10]

9. Raum's father died at age 37 "in coronary occlusion, having had rheumatic fever but having smoked a lot." RP (Apr. 18, 2011) at 70. Dr. Thompson saw no autopsy or death certificates for Raum's father, but testified that it was more likely Raum's father died of coronary disease than from rheumatic fever because his death was sudden. Raum noted on a patient information form that stroke was in his family history, that his father had high blood pressure or hypertension, his grandmother had congestive heart failure, and his grandmother and brother had diabetes. Raum later qualified these remarks by saying they represented his best guesses at the time he filled out the form.

10. Regarding angina (pain or pressure sensations resulting from inadequate blood flow through the heart), Dr. Thompson testified that this was a symptom of a condition, not a condition in itself.

and "[f]amily history of lethal coronary disease." RP (Apr. 18, 2011) at 80, 82. He agreed with Dr. Yang that Raum has metabolic syndrome. Dr. Thompson testified that given Raum's family history and atherosclerotic vascular disease and dyslipidemia, his level of cardiac disease would be the same in 2009 as it would have been in any other employment or if Raum had not worked at all. He stated that Raum would more probably than not have the same degree of dyslipidemia and cardiovascular disease even if he were not employed as a firefighter. He continued, "It is likely ... that a major component of [Raum's] coronary disease is genetic, and there is every reason to believe that his coronary disease may progress whether working in a sedentary occupation, as a firefighter, or with any other occupation." RP (Apr. 18, 2011) at 87.

¶ 16 Raum presented Dr. Maidan's testimony. Dr. Maidan was Raum's treating cardiologist from August 2005 to January 2009. He stated that Raum's health history showed several episodes of chest discomfort. Dr. Maidan noted in his August 2005 records that Raum's "family history was positive for heart attack, hypertension, and sudden death of his father, age 37, stroke in his grandfather, congestive heart failure in his grandmother, diabetes in his grandmother and his brother." RP (Apr. 19, 2011) at 203. He further noted:

> [Raum] has a family history of early heart disease. His father died suddenly at his ... seven-year-old [brother's] birthday party when he, himself, was five years old. His father was 37 and had a massive heart attack and may have never made it back home, having gone out to get more ice cream for the party.

RP (Apr. 19, 2011) at 205. Dr. Maidan administered a stress test to Raum in August 2005. His notes indicated Raum "may have early coronary artery disease prior to the level that can be detected by a stress test." RP (Apr. 19, 2011) at 209.

¶ 17 Dr. Maidan saw Raum again in March 2008 and noted severely elevated total cholesterol and LDL cholesterol levels and moderately elevated triglyceride levels. Dr. Maidan acknowledged that Raum's cholesterol levels gave him "a high-risk profile for developing cardiac disease." RP (Apr. 20, 2011) at 220. Another stress test suggested that Raum had developed clinically significant atherosclerosis since 2005. Dr. Maidan concluded on March 3, 2008: "[T]his patient has chest pressure and ST depression with exercise testing which suggests ischemia .... he has significant hyperlipidemia *on a genetic basis that is probably the cause.*" RP (Apr. 20, 2011) at 222 (emphasis added).

¶ 18 On March 6, 2008, Dr. Maidan performed a coronary catheterization and installed six stents in Raum's coronary arteries. Dr. Maidan found that Raum's left anterior descending artery had a 95 percent stenosis (narrowing) and was highly calcified. Dr. Maidan concluded Raum "was a young individual with very early severe coronary artery disease." RP (Apr. 20, 2011) at 224. He admitted he "cannot tell when in a person's life they first started developing early plaque in their [blood] vessels." RP (Apr. 20, 2011) at 229. He did not know whether Raum was exposed to smoke, fumes, toxic substances, or strenuous physical activity at work in the hours prior to his series of chest discomfort complaints. Dr. Maidan could not say which of the many risk factors caused Raum's heart problems.

¶ 19 Finally Dr. Maidan testified that firefighters "have a higher risk of cardiovascular disease and cardiovascular death than the general population." RP (Apr. 19, 2011) at 193–94. He also testified there was no way to segregate out any particular component of the exposures or stresses a firefighter encounters from any genetic risk factors with any kind of reasonable medical probability.

¶ 20 Raum also presented cardiologist Edward Kim's testimony. Dr. Kim first treated Raum in December 2008 for a heart attack that resulted from a clogged artery. He diagnosed Raum with coronary artery disease or "[a]therosclerosis specifically in the coronary arteries." RP (Apr. 20, 2011) at 252. Dr. Kim testified that high blood pressure generally causes this condition and stated that genetics is the main factor in high blood pressure, but other factors such as obesity, poor diet, excess salt, chronic pain,

or chronic stress may contribute. When asked whether factors such as fire alarms, lights, sirens, or wildfires cause high blood pressure, Dr. Kim either did not know or speculated that they might. He opined that Raum's high cholesterol and family history contributed to his atherosclerosis. He also stated that the chest pressure and discomfort Raum experienced were symptoms of an underlying disease, "not a condition in and of themselves." RP (Apr. 20, 2011) at 276. Although Dr. Kim knew nothing specific about Raum's occupational exposures to various toxins or stresses, he opined, "I would imagine that his exposures played a role in his atherosclerosis." RP (Apr. 20, 2011) at 261. But Dr. Kim described his awareness of cardiovascular risk factors that arise out of the firefighter occupation as "limited." RP (Apr. 20, 2011) at 283. He concluded that it was possible Raum's coronary artery disease would exist no matter what his occupation was or whether he worked at all.

¶ 21 The jury returned a verdict in the City's favor. Raum appeals.[11]

ANALYSIS

Standard of Review

[1–4] ¶ 22 A superior court reviews decisions under the Industrial Insurance Act de novo, relying on the certified board record. RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wash.App. 442, 445, 213 P.3d 44 (2009). "Only issues of law or fact that were included in the notice of appeal to the Board or in the proceedings before the Board may be raised in the superior court." *Elliott*, 151 Wash.App. at 446, 213 P.3d 44. On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision, although "[t]he superior court may substitute its own findings and decision for the Board's if it finds, 'from a fair preponderance of credible evidence,' that the Board's findings and decisions are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wash.App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wash.App. 439, 440, 777 P.2d 1084 (1989)). "[E]ither party shall be entitled to a trial by jury upon demand" to resolve factual disputes. RCW 51.52.115. "[T]he trier of fact, be it court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive." *Gaines v. Dep't of Labor & Indus.*, 1 Wash.App. 547, 550, 463 P.2d 269 (1969).

[5] ¶ 23 Our review is governed by RCW 51.52.140, which provides that an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." "We review whether substantial evidence supports the

11. After filing his opening brief, Raum moved to supplement the appellate record with the "Declaration of Ron Meyers." Appellant's Motion to Supplement Record at 1. In his declaration, Raum's attorney Ron Meyers gives an account of a conversation he had with juror "Debbie S." following the jury verdict. Appellant's Br. at Attachment. Meyers's declaration states that Debbie S. told him that she and other jurors believed that the jury instructions and special verdict form were confusing and left no alternative but to find for the City. The City moved to strike the declaration and all references to it, arguing that (1) Raum waived his right to challenge the verdict process, (2) Raum's motion fails to meet the criteria for RAP 9.11, (3) the declaration is inadmissible hearsay, and (4) the jury's understanding of the instruction inheres in the verdict.

We grant the City's motion under RAP 9.11, which provides in relevant part: "The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court." RAP 9.11(a). Raum fails to argue that he meets these six criteria for supplementing the appellate record, but asks us to waive the criteria to "serve the ends of justice." Appellant's Motion to Supplement Record at 3. Raum's argument is based on the contention that the jury instructions and the special verdict form were confusing and "incorrect as a matter of law." Appellant's Reply to Resp't's Motion in Opposition at 1. As discussed below, this argument lacks merit. We grant the City's motion to strike.

trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings." *Watson v. Dep't of Labor & Indus.*, 133 Wash.App. 903, 909, 138 P.3d 177 (2006).

Occupational Disease and RCW 51.32.185's Rebuttable Evidentiary Presumption

[6-8] ¶ 24 RCW 51.08.140 defines "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 [12] that shows that the condition is probably, not merely possibly, caused by the employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 477, 745 P.2d 1295 (1987). Our 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, nor 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 Wash.2d at 481, 745 P.2d 1295. 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 Wash.2d 472, 479, 202 P.2d 448 (1949).

¶ 25 RCW 51.32.185(1) contains a burden-shifting provision for firefighters with occupational disease claims:

> 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.

The statute also contains a rebuttal provision: "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." RCW 51.32.185(1).

[9] ¶ 26 Generally a worker claiming entitlement to benefits for an occupational disease carries the burden of proving that the disabling condition arose naturally and proximately out of employment. *Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 6, 977 P.2d 570 (1999). If RCW 51.32.185's rebuttable evidentiary presumption applies, that burden shifts to the employer unless and until the employer rebuts the presumption.

Jury Instruction No. 14

¶ 27 Raum claims that instruction 14 improperly negated the evidentiary presumption set forth in instruction 13. The City

12. Causation may be established by lay testimony if the injury is apparent to one without medical testimony (e.g., a layman sees his coworker lose a finger on the job). *See Jackson v. Dep't of Labor & Indus.*, 54 Wash.2d 643, 648, 343 P.2d 1033 (1959).

responds that (1) Raum waived this argument by failing to raise it below, (2) Raum waived his right to claim error because he offered instruction 14, and (3) instruction 14 is a correct statement of the law.

¶ 28 Although Raum proposed instruction 14, he took exception to it in light of instruction 13 and the special verdict form. Raum properly preserved his argument for appellate review. *Wickswat v. Safeco Ins. Co.*, 78 Wash.App. 958, 967, 904 P.2d 767 (1995) (an appellate court may review "a claimed instructional error when the party has properly excepted pursuant to CR 51(f)."

[10–12] ¶ 29 Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 107 Wash.2d 524, 529, 730 P.2d 1299 (1987). We review the adequacy of jury instructions de novo as a question of law. *Hall v. Sacred Heart Med. Ctr.*, 100 Wash.App. 53, 61, 995 P.2d 621 (2000). "[A]n instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." *Cox v. Spangler*, 141 Wash.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000).

¶ 30 Here, instruction 13 provided:

> 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.

This instruction mirrors the evidentiary presumption set forth in RCW 51.32.185(1).

¶ 31 Instruction 14 provided:

> 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.

This instruction is taken from RCW 51.08.140 and *Dennis*, 109 Wash.2d at 481, 745 P.2d 1295.

¶ 32 Raum acknowledges that instructions 13 and 14 are correct statements of law. But Raum claims the instructions are confusing when read *together* because they do not make clear that he "could have an RCW 51.32.185 claim and/or an RCW 51.08.140 claim. . . ." Appellant's Reply Br. at 14 (boldface omitted). His argument depends on the proposition that RCW 51.08.140 and RCW 51.32.185 establish two different claims for occupational disease.

[13] ¶ 33 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. 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.

¶ 34 The jury instructions quoted above accurately stated the law. They allowed Raum to argue that he was entitled to RCW 51.32.185's evidentiary presumption and that the City failed to rebut the presumption. They also allowed Raum, if he did not qualify for the presumption, to present evidence that his heart condition arose naturally and proximately from his employment. We reject Raum's claim of error because it is based on a mischaracterization of RCW 51.32.185's evidentiary presumption.

Special Verdict Form

¶ 35 Raum argues that the special verdict form submitted to the jury constitutes reversible error because (1) "it attempt[ed] to incorrectly combine the presumptive statute with the standard occupational disease statute" and (2) it improperly failed to list "aggravation" of a preexisting disease in question 2 as a means through which he was entitled to benefits. Appellant's Br. at 27, 30 (boldface omitted). The City responds that (1) Raum waived his challenge to the special verdict form when he failed to provide a legally sufficient alternative special verdict form and (2) the form correctly stated the law.

[14–16] ¶ 36 Regarding the City's waiver argument, the rules for properly objecting to special verdict forms are, by analogy, governed by CR 51(f),[13] which governs jury instructions. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash.2d 50, 63, 882 P.2d 703 (1994). If a party is dissatisfied with a special verdict form, then that party has a duty to propose an appropriate alternative. *Wickswat*, 78 Wash.App. at 966–67, 904 P.2d 767. The City claims that Raum waived his challenge to the special verdict form by failing to provide a legally sufficient alternative special verdict form. But an appellate court may still review a claimed special verdict form error when the party has properly excepted by " 'stat[ing] distinctly the matter to which he objects and the grounds of his objection.' " *Wickswat*, 78 Wash.App. at 967, 904 P.2d 767 (alteration in original) (internal quotation marks omitted) (quoting *Queen City*, 126 Wash.2d at 63, 882 P.2d 703). Here, the record reveals that Raum objected to the special verdict form on the ground that it improperly combined two distinct theories of recovery.[14] We thus review the claimed error. *Wickswat*, 78 Wash.App. at 967, 904 P.2d 767.

[17] ¶ 37 A special verdict form is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the law to be applied. *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995). Here the superior court submitted the following special verdict form to the jury:

> 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?

13. CR 51(f) provides: "Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made."

14. After repeatedly arguing that the court had erroneously combined RCW 51.32.185 and RCW 51.08.140 into one theory of recovery, Raum's attorney objected to the special verdict form, stating, "I have put my comments on the record with respect to the law." RP (Apr. 21, 2011) at 411.

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

The jury answered "no" to both questions.

¶ 38 Raum first argues that the special verdict form improperly created a "hybrid" of RCW 51.32.185 and RCW 51.08.140 and thus denied him the opportunity to recover on two separate theories. This argument depends on the same proposition Raum argued in challenging instruction 14, namely that RCW 51.32.185 created a "presumptive disease claim" somehow different than an "occupational disease claim" as defined in RCW 51.08.140. To the extent Raum bases his challenge to the special verdict form on this particular argument, it lacks merit as discussed above. Here, the special verdict form contained no clear misstatement of the law that could have prejudicially misled the jury. Instructions 13 and 14 correctly described occupational disease claims and the evidentiary presumption. The special verdict form's question 1 allowed the jury to consider whether the evidentiary presumption applied. Question 2 allowed the jury—in the event it found that Raum did not qualify for the presumption or the City rebutted the presumption—to consider whether Raum nevertheless presented sufficient evidence to establish an occupational disease under RCW 51.08.140.

[18] ¶ 39 Raum specifically challenges the "and which arose naturally and proximately from the distinctive conditions of his employment as a firefighter" language in the special verdict's question 1. He claims that in enacting RCW 51.32.185's evidentiary presumption, "[t]he legislature has done away with the 'naturally and proximately' requirement for firefighter presumptive disease claims." Appellant's Br. at 29. We disagree. RCW 51.32.185 does not establish a separate "presumptive disease claim." And RCW 51.32.185's presumption eliminates only the requirement that Raum present competent medical evidence *at the outset* to show that his heart condition is related to his firefighting duties and thus an occupational disease. If the City rebuts the presumption, Raum must come forward with competent evidence supporting his occupational disease claim.[15] The "naturally and proximately" language is part of RCW 51.08.140's definition of "occupational disease," which is referenced in RCW 51.32.185. Where, as here, the opposing party presents countervailing evidence to rebut the presumption, the above language is appropriately included in the special verdict form. Raum's challenge fails.

[19] ¶ 40 Raum also challenges the special verdict form on the ground that it improperly failed to provide for the possibility that he had a preexisting condition that was "aggravated by" his employment. Raum cites no authority for the proposition that legal standards must be included in special verdict forms. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments unsupported by reference to the record or citation to authority). And Raum did not object to the special verdict form on this ground. His own proposed special verdict form[16] did not contain the "aggravated by"

15. The superior court properly analyzed the effect of RCW 51.32.185's presumption:

> [T]he way I read this is, you've got a liability scheme. And then on top of the liability scheme you've got this extra little edge that your client gets. But the extra edge is just a presumption. It doesn't change the underlying liability. It just means that for starting out, all you have to show is X and Y and then Z is presumed. *But I don't think that it eliminates your requirement once there's countervailing evidence, which there is in this case, that you still have to prove the underlying liability.*

RP (Apr. 21, 2011) at 408 (emphasis added).

16. Raum's proposed special verdict form provided:

> QUESTION NO. 1: Was the Board of Industrial Insurance Appeals correct in deciding that on February 17, 2008 Michael Raum suffered from heart problems experienced within twenty-four hours of strenuous physical exertion due to firefighting activities within the meaning of RCW 51.32.185?
>
> ANSWER: _____ ("Yes" or "No")
>
> QUESTION NO. 2: Was the Board of Industrial Insurance Appeals correct in deciding that it was more probable than not that Mi-

language that he now claims was improperly omitted. Because Raum invited any claimed error, he cannot now complain about the trial court's failure to include the language at issue. *See Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wash.App. 572, 584, 187 P.3d 291 (2008) (party may not move for a new trial claiming a deficiency in a special verdict form it had expressly requested); *Sdorra v. Dickinson*, 80 Wash.App. 695, 702–03, 910 P.2d 1328 (1996) (because plaintiffs submitted the verdict form at issue, the plaintiffs invited the error and could not complain on a motion for new trial or on appeal that the verdict forms were inconsistent).

[20, 21] ¶ 41 Even on the merits, "a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction." *Capers v. Bon Marche*, 91 Wash.App. 138, 144, 955 P.2d 822 (1998). Here, instruction 14 provided, "A disease arises proximately out of employment if the conditions of a worker's employment proximately caused *or aggravated* the worker's disease." (Emphasis added.) Raum's counsel specifically referenced instruction 14's "aggravation" component during closing remarks. We presume jurors follow the court's instructions. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 136, 875 P.2d 621 (1994). Raum cites to nothing in the record indicating the jury failed to do so in this case. His challenge fails.

Evidentiary Rulings

[22] ¶ 42 Raum challenges three of the superior court's evidentiary rulings.[17] Raum claims that the court erred in excluding exhibit 1 [18] and certain testimony provided by his wife, Kristy.[19] But because Raum provides no meaningful legal analysis and cites no authority to support his arguments, we can decline to review them. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wash.App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument); *Cowiche*, 118 Wash.2d at 809, 828 P.2d 549 (declining to consider arguments unsupported by reference to the record or citation to authority).

[23–25] ¶ 43 Even if we address Raum's claims, they fail on the merits. "A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Sintra, Inc. v. City of Seattle*, 131 Wash.2d 640, 662–63, 935 P.2d 555 (1997). Here, the trial court excluded exhibit 1 and all references to it on hearsay and relevancy grounds.[20] " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. The trial court properly determined that exhibit 1 constitutes inadmissible hearsay because Raum offered it to prove the truth of the matter asserted—that he had been exposed to various toxins and stress while employed as a firefighter. Because Raum identified no hearsay exception at trial or on appeal, we assume none applies. *See State v. Duran–Davila*, 77 Wash.App. 701, 704, 892 P.2d 1125 (1995). The trial

chael Raum suffered heart problems as an occupational disease from work activity as a firefighter for the City of Bellevue, within the meaning of RCW 51.32.185 and RCW 51.08.140?
ANSWER: _____ ("Yes" or "No")
QUESTION NO. 3: Was the Board of Industrial Insurance Appeals correct in deciding that Michael Raum's heart problems constitute an occupational disease within the meaning of RCW 51.08.140?
ANSWER: _____ ("Yes" or "No")

17. Raum cites to nine sections of the Board record that he claims the superior court mistakenly excluded in the challenged evidentiary rulings.

18. Exhibit 1 is a document that Raum created estimating the number and types of calls and alarms he responded to and the number and types of experiences and exposures he had during his career as a fire fighter.

19. For clarity, we use Kristy's first name.

20. Neither party's brief addresses the trial court's exclusion of exhibit 1 on relevancy grounds. Because we find that hearsay was a sufficient basis for the trial court's ruling, we need not address this issue. This evidence was also cumulative of Raum's testimony.

court did not abuse its discretion by excluding exhibit I and all references to it.[21]

[26] ¶ 44 The trial court also excluded as hearsay certain testimony provided by Kristy. First, Kristy stated that Raum came home from work on one occasion and told her that his clothes had chemicals on them from "being on a call," and should be separated from their baby's clothes in the wash. CABR, Kristy Raum Transcript, at 25. Second, Kristy recounted occasions when Raum told her stories about tragedies he witnessed at work. Both responses were hearsay as they attributed out-of-court statements to Raum and were used to prove the truth of the matter asserted—that Raum was exposed to toxins and stress through his work. Because Raum fails to suggest any hearsay exception on appeal,[22] we assume none applies. *See Duran–Davila*, 77 Wash.App. at 704, 892 P.2d 1125. The trial court did not abuse its discretion when it excluded Kristy's testimony attributing statements to Raum.

Sufficiency of the Evidence [23]

[27] ¶ 45 Raum contends that insufficient evidence supports the jury's verdict. The State responds that medical testimony established that Raum had multiple, nonemployment-related risk factors for heart disease.

[28–30] ¶ 46 As discussed above, our " '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.' " *Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wash. App. 123, 128, 913 P.2d 402 (1996)). "[E]ven if the [appellate] court were convinced that a wrong verdict had been rendered, it should not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wash.2d 939, 943, 640 P.2d 1051 (1982). More extensive appellate review of facts found in the superior court abridges the right to jury trial provided by RCW 51.52.115:

> Our function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.

Harrison Mem'l Hosp. v. Gagnon, 110 Wash. App. 475, 485, 40 P.3d 1221 (2002) (footnote omitted). In appeals from Board decisions and orders, "the trier of fact, be it court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive." *Gaines*, 1 Wash.App. at 550, 463 P.2d 269.

¶ 47 As discussed above, 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

21. Even if we concluded the superior court abused its discretion in excluding exhibit 1, the exclusion did not prejudice Raum. Raum testified extensively about his personal experiences and exposures as a firefighter. And Raum presented no medical evidence relating the incidents documented in exhibit 1 to his coronary artery disease.

22. At trial, Raum argued that Kristy's testimony that Raum asked her to separate his work clothes from their baby's in the wash was admissible under the present sense impression exception to the hearsay rule. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). Our review of the testimony indicates that the exception does not apply here.

23. Raum bases his sufficiency of the evidence argument in part on the proposition that the Act creates both a "presumptive disease claim" and a "standard occupational disease claim." He again claims that the jury instructions and special verdict wrongly stated the law, "fail[ed] to explain that the presumptive standard is very different," and made it impossible for the jury to understand how to apply the law to the evidence. Appellant's Br. at 34 (boldface omitted). We address those arguments above. To the extent his sufficiency of the evidence argument relies on those premises, it lacks merit.

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. Here, the jury was properly instructed that this was a worker's compensation claim, that special consideration should be given to the testimony of an attending physician, that a condition may have one or more proximate causes, that the Board's findings and conclusions were prima facie correct, and that it was the City's burden to establish by a preponderance of the evidence that the Board's decision was incorrect.

[31] ¶ 48 Raum asserts that the City cannot rebut the presumption simply by criticizing the medical literature discussing the possibility of a connection between coronary artery disease and firefighting activity. He cites to several foreign cases involving different statutory schemes and presumptions. Those cases are not controlling here. And in 2007 when our legislature added a presumption for "heart problems ... experienced within twenty-four hours of strenuous physical exertion due to firefighting activities," RCW 51.32.185(1), our governor vetoed the portion of the proposed amendments that sought to include the statement that "[f]irefighting duties exacerbate and increase the incidence of cardiovascular disease in firefighters." ENGROSSED SUBSTITUTE H.B. 1833, 60th Leg. Reg. Sess., ch. 490 § 1 (Wash. 2007). According to the veto,

> [t]he legislature's statement of intent [regarding firefighting duties and cardiovascular disease] makes broad generalizations about the incidence of cardiovascular disease. In an effort to avoid the unintended interpretations of broad generalizations, Section 2 of the bill has been carefully crafted to define specific "firefighting activities" that are related to occupational diseases.

ENGROSSED SUBSTITUTE H.B. 1833, 60th Leg. Reg. Sess. (Wash. 2007) ch. 490 § 4(2), amending RCW 51.32.185; Note, governor's partial veto (located at Resp't's Br.App. D). Thus, as enacted and later amended, the presumption was not intended to create a legal conclusion that firefighters have a higher incidence of *cardiovascular disease*. And regardless of Raum's assertions regarding the medical literature, the City rebutted the presumption with concrete medical testimony that specific factors other than employment—including genetic predisposition, high blood pressure, and high cholesterol—caused Raum's coronary artery disease. This preponderance of evidence indicating that Raum's heart problem arose from conditions unrelated to his firefighter work shifted the burden to Raum to show that his heart disease arose naturally and proximately from employment.[24]

[32] ¶ 49 This record contains substantial evidence from which the jury could conclude that Raum's heart problems arose from nonemployment-related factors. As discussed above, four doctors testified about the nature and cause of Raum's coronary artery disease. The testimony established that Raum had multiple risk factors unrelated to his employment as a firefighter. Dr. Yang testified that more probably than not, Raum's cardiovascular disease was unrelated to his occupational exposures and that a variety of nonemployment-related factors contributed to his cardiovascular disease. Although Dr. Yang never physically examined Raum,[25] he is a

24. Raum cites several foreign cases, claiming that "[o]ther jurisdictions have entered strong, well-reasoned presumptive disease rulings in favor of public servants in similar cases." Appellant's Br. at 41 (boldface omitted). He essentially argues that those cases stand for the proposition that when courts apply presumption statutes like RCW 51.32.185, the employer has the burden to prove that the claimant's disease is nonwork-related. Appellant's Br. at 41–43; *Robertson v. N. Dakota Workers Comp. Bureau*, 616 N.W.2d 844, 853 (N.D.2000); *Montgomery County v. Pirrone*, 109 Md.App. 201, 213, 674 A.2d 98 (1996); *McCoy v. City of Shreveport Fire Dep't*, 649 So.2d 103 (La.App.1995); *Fairfax County Fire & Rescue Dep't v. Mitchell*, 14 Va.App. 1033, 1035, 421 S.E.2d 668 (1992). The same rule applies in Washington. *See* RCW 51.32.185(1). But here, the City rebutted the presumption and presented sufficient evidence for the jury to rule in its favor. Raum's cited cases are therefore unhelpful.

25. The weight, if any, to be given a medical expert's opinion based solely on a medical records review is within the jury's province.

qualified cardiologist and reviewed Raum's medical records before framing an opinion in terms of medical probability. His testimony was sufficient to persuade a fair-minded rational person to agree with his conclusion. The jury also heard Dr. Thompson's testimony—based on his examination of Raum and review of Raum's medical records—that neither Raum's dyslipidemia nor his cardiovascular disease was proximately caused by his employment. Dr. Thompson also testified on a more probable than not basis that Raum's cardiovascular disease was related to high cholesterol and family history, not his work as a firefighter.

[33] ¶ 50 Raum's two attending physicians also provided medical evidence from which the jury could conclude that Raum's heart problems were unrelated to his employment. Dr. Maidan testified that Raum was a young man with very early coronary artery disease caused by high cholesterol, high blood pressure, and family history. Despite offering opinions about firefighters in general, Dr. Maidan provided no testimony specifically linking Raum's cardiovascular disease to his occupation as a firefighter. Dr. Kim specifically testified that Raum's high cholesterol and family history contributed to his coronary artery disease. Dr. Kim was unable to testify on a more probable than not basis that Raum's heart problems were related to his exposures to stress or toxins.[26]

[34–38] ¶ 51 Given the above testimony, a preponderance of substantial evidence supports the jury's verdict that Raum's cardiovascular disease arose from risk factors unrelated to his employment as a firefighter. Raum presented no compelling evidence to support his claim to the contrary. He attempted to draw a connection based on references to medical studies and articles, but no testimony established a clear link between firefighting and coronary artery disease. Raum's claim turned on how the jury resolved the competing testimony and inferences. And we do not reweigh or rebalance competing testimony and inferences. *Gagnon*, 110 Wash.App. at 485, 40 P.3d 1221. Substantial evidence existed to rebut the evidentiary presumption and indicated that Raum's condition was unrelated to his employment as a firefighter.[27] Accordingly, "there was evidence which, if believed, would support the verdict rendered." *Retail Clerks*, 96 Wash.2d at 943, 640 P.2d 1051.[28]

26. Medical testimony proffered to establish the casual relationship between an industrial injury and an alleged condition or disability must be phrased in terms of medical probability, not possibility. Testimony as to possibility means testimony confined to words of speculation and conjecture. Medical testimony that an incident could cause, might cause, or possibly could cause such a condition is not sufficient. *See Vanderhoff v. Fitzgerald*, 72 Wash.2d 103, 107–08, 431 P.2d 969 (1967).

27. Raum cites several foreign cases for the proposition that "[c]ase law applying the presumptive disease statute require more than just speculation by the employer's experts to overcome its burden of proof." Appellant's Br. at 31 (boldface omitted). He essentially asks us to reweigh the competing testimony and inferences elicited at trial, which we cannot do.

28. Raum makes two arguments related to his sufficiency of the evidence argument. He first argues that the Act is remedial in nature and must be liberally construed with all doubts resolved in favor of the worker. It is true that we resolve doubts in favor of the worker when *construing* the Act. *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987). But we are not construing the Act when we review the sufficiency of the evidence to support the jury's verdict. And even if we were, " 'it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.' " *Elliott*, 151 Wash. App. at 450, 213 P.3d 44 (quoting *Johnson v. Dep't of Labor & Indus.*, 33 Wash.2d 399, 402, 205 P.2d 896 (1949)). *See also Lowry v. Dep't of Labor & Indus.*, 21 Wash.2d 538, 542, 151 P.2d 822 (1944) (declining to apply the liberal construction rule in a workers' compensation case where statutory language was unambiguous and noting that such "so-called construction would in fact be legislation."). Here the statutory language unambiguously provides that RCW 51.32.185's evidentiary presumption applies to *some* firefighter occupational disease claims. The presumption does not create a separate claim for relief. "[W]e cannot, under the guise of construction, substitute our view for that of the Legislature." *Allan v. Dep't of Labor & Indus.*, 66 Wash.App. 415, 421, 832 P.2d 489 (1992). The liberal construction doctrine is inapplicable.

Raum also argues that we should overturn the jury's verdict as a matter of public policy due to the Act's remedial purpose. But as discussed above, the statutory language here is unambigu-

Attorney Fees and Costs

¶ 52 Raum requests attorney fees and costs on appeal under RCW 51.32.185(7) and RCW 51.52.140. Under RCW 51.32.185(7)(b), a firefighter successfully appealing a determination regarding the evidentiary presumption shall have his reasonable attorney fees and costs paid by the opposing party. Because Raum has not successfully appealed the trial court's determination, he is not entitled to an award of fees and costs.

CONCLUSION

¶ 53 Because (1) Raum fails to show the jury instructions and special verdict form were erroneous, (2) his evidentiary challenges lack merit, and (3) substantial evidence supports the jury's verdict, we affirm.

WE CONCUR: COX and BECKER, JJ.

STATE of Washington, Respondent,

v.

Blayne Jeffrey COLEY, Appellant.

No. 30003–0–III.

Court of Appeals of Washington, Division 3.

Oct. 9, 2012.

Background: Defendant was convicted by jury in the Superior Court, Grant County, Evan E. Sperline, J., of two counts of second degree rape of a child, and he was sentenced to indeterminate sentence between 120 months and life. Defendant appealed.

Holding: The Court of Appeals, Sweeney, J., held that trial court's allocation of burden on defendant, who was already legally incompetent, to prove incompetency was structural error.

Reversed and remanded.

Brown, J., filed dissenting opinion.

1. **Constitutional Law ⇐4782**

Due Process Clause prohibits the criminal prosecution of a defendant who is not competent to stand trial. U.S.C.A. Const. Amend. 14.

2. **Mental Health ⇐18**

There is a presumption that an incompetent person remains incompetent until adjudicated otherwise.

3. **Criminal Law ⇐625.15**

Trial court's allocation of burden on defendant, who was already legally incompetent, to prove incompetency in follow-up competency hearing, after erroneously concluding that most recent order declared defendant competent, was error; most recent order declared defendant incompetent to stand trial, and stayed proceedings for 90 days, and operative presumption should have been that defendant was incompetent to stand trial. West's RCWA 10.77.084 (2011).

4. **Mental Health ⇐433(1)**

To require an incompetent defendant, someone who is presumably unable to understand the proceedings or assist in his own defense, to prove that he remains incompetent is unconstitutional. West's RCWA 10.77.084 (2011).

5. **Criminal Law ⇐1166(12)**

Trial court's allocation of burden on defendant, who was already legally incompe-

ous. "It is a well-settled rule that 'so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.' " *DeLong v. Parmelee*, 157 Wash.App. 119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller*, 72 Wash. 154, 158, 129 P. 1100 (1913)). Courts "should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle 'that the drafting of a statute is a legislative, not a judicial, function.' " *Sedlacek v. Hillis*, 145 Wash.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wash.2d 712, 725, 976 P.2d 1229 (1999)). Departure from the statute or the jury's verdict is improper here.

SUPREME COURT NO.

COURT OF APPEALS NO. 43621-3-II

EDWARD O. GORRE, Respondent, v. CITY OF TACOMA, Petitioner, and DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.	No. 43621-3-II CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2014, I filed and served the **Amended Petitioner City of Tacoma's Petition for Review** and this **Certificate of Service** upon the following parties, addressed as follows:

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DATED this 7th day of August, 2014, at Tacoma, Washington.

Brianna M. Larkin

Brianna M. Larkin