No. 43621-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

EDWARD O. GORRE

Appellant,

v.

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

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant career firefighter, Lieutenant Ed Gorre (hereinafter "Lt. Gorre"), suffers from respiratory diseases: eosinophilia\interstitial lung disease and coccidiodomycosis. These conditions are presumptively caused by occupational exposure and/or occupational aggravation of a preexisting condition. Either of the above conditions, caused or aggravated by his employment as a firefighter, entitles him to benefits under the Industrial Insurance Act.

In this firefighter presumptive disease case causation is established by the presumptions of respiratory disease and infectious disease set forth in RCW 51.32.185. The lower tribunals failed to properly apply the presumptions and establish that the burden of proof is on the Respondent, City of Tacoma (hereinafter "Employer") and prejudiced Lt. Gorre by forcing him to prove causation. Had the presumptive disease statute been applied correctly, it would be the Employer's responsibility to disprove causation before the BIIA, and, on appeal, the Employer's responsibility to rebut with a preponderance of objective medical evidence the strong statutory presumption of occupational respiratory disease and infectious disease in the statute that mandates additional protection to firefighters.

The Employer's, Board's and Courts' failures to apply the presumptive disease statute effectively rendered the presumptive disease

statute meaningless and constitutes reversible error.

II. ASSIGNMENTS OF ERROR

1. Whether the Board of Industrial Insurance Appeals at summary judgment and at hearing, and the Superior Court committed reversible error when they failed to apply the presumptions in RCW 51.32.185 when Lt. Gorre had different diagnoses for both respiratory disease and infectious disease for claims of eosinophilia\ interstitial lung disease and for coccidiodomycosis because these diagnoses were both presumptive diseases for firefighters? YES.

2. Whether the Board of Industrial Insurance Appeals at summary judgment and at hearing, and the Superior Court committed reversible error when each of the presumptions were not rebutted, (a) by a preponderance of relevant, credible and admissible medical testimony but were based upon speculation, conjecture and genetic predisposition; and (b) did not rule out occupation as a proximate cause of each of the respiratory and infectious conditions? YES.

III. STATEMENT OF THE CASE

A. Factual History.

Lt. Gorre has been a professional firefighter with the City of Tacoma since March 17, 1997. Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 28 (4) (certified board record on file with Division II Court of Appeals). Prior to his employment, he undertook and passed a demanding pre-employment test of physical strength and stamina, and a physical which included blood testing and x-rays. Edward Gorre, *Transcripts: In re: Edward O. Gorre* 09 13340 (2010) 107(13-19) (certified board record on filed with Division II Court of Appeals). In February or March of 2007, Lt. Gorre began to experience symptoms including fatigue, night sweats, chills, and diffuse

joint aches. He underwent a lung biopsy, upon which foreign material and nodules were found in his lungs. Employer's Motion to Compel and Motion to Continue Summary Judgment Proceedings, *Exhibit G: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals 214-218).

On April 20, 2007, Lt. Gorre reported an RCW 51.32.185 presumptive occupational disease to Employer after his physician had found evidence of respiratory/inhalation injury from the results of a lung biopsy. Self-Insurer Accident Report, *Exhibits: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals). On May 2, 2007, Lt. Gorre began treating with Dr. Christopher H. Goss, at the University of Washington Division of Pulmonary & Critical Care Medicine. There were initial concerns that Lt. Gorre's symptoms could possibly be the result of a reaction to mold, and he had recently remodeled his home. Although any such exposure was far more likely to have occurred during his occupation as a firefighter, he had a professional inspection done of his home which "did not reveal obvious sources of contaminants or conditions which would be responsible for occupant symptoms." Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 67-69 (certified board record on file with Division II Court of Appeals). Furthermore, Lt. Gorre had Rose Environmental implement the recommendations contained in the report.

Lt. Gorre's lung biopsy was analyzed at the University of Washington, and he was given a differential diagnosis of "granulomas with eosinophilic inflammation." It was noted that "The granulomas seem to be *located near respiratory bronchioles...*". Declaration of Garrison Ayars, M.D., *Exhibit D: In re: Edward O. Gorre* 09 13340 (2010) (certified board record on file with Division II Court of Appeals 780-781). There were several possible causes of the granulomas with eosiniphilic inflammation listed; however, each of the possible causes likely stemmed from his occupation as a firefighter, and it was clear that this was a respiratory disease. Lt. Gorre was treated with prednisone, an immune system suppressant, and his symptoms were alleviated for a short while. Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 57(8) (certified board record on file with Division II Court of Appeals). In March of 2008, he again began experiencing respiratory problems, and it was shown that he had a significant bronchodialator response. In April of 2008 a biopsy of a skin nodule indicated Coccidiomycosis, a disease contracted through inhalation and which affects the respiratory system. Lt. Gorre had not been in any endemic area, in the year prior to presenting with symptoms of the Coccidiomycosis, ruling out the contraction of Coccidiomycosis anywhere besides in Washington. Dr. Royce Johnson, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 22 (13-16) (certified board record on file with Division II Court of Appeals.

The most probable, and also the *presumptive*, exposure to Coccidiodomycosis was during the course of Lt. Gorre's occupation as a firefighter. *Id.* at 23(12-24).

Duties of a firefighter are varied and often extreme; ranging from pulling bars off windows and forcing doors, to cutting holes through roofs, to crawling through the burning building looking for potential survivors. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 111(13-26), 112(1-22) (certified board record on file with Division II Court of Appeals). While SCBA (self-contained breathing apparatus) is worn during the fire, it was not until 2007 that SCBA was worn during overhaul when smoke, fumes and toxic substances are still present. Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 31(17-25), 32(1-16) (certified board record on file with Division II Court of Appeals). In addition to exposure to smoke, fumes and toxic substances from fighting fires, the firefighter/paramedic's also go on other types of calls. Those calls include answering 911 calls at homes filled with garbage, cigarette smoke, unknown fumes, and other toxic substances. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 125-127(certified board record on file with Division II Court of Appeals). During such calls, Lt. Gorre and other firefighter/EMT's do not wear any kind of respiratory protection. Id. at 127(2-13).

Due to his position as a firefighter/paramedic, Lt. Gorre was often the first person on the scene to provide advanced life support care. Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 33 (3-25), 34 (1-8)(certified board record on file with Division II Court of Appeals). He was also responsible for search and rescue at fire scenes and accident scenes. *Id.* During these events, and at all other times except initial fire attack, Lt. Gorre was not wearing his SCBA. *Id.*

During the time period from 2006 to mid 2007, Lt. Gorre responded to several construction site calls. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 131(14-26), 132(1-9) (certified board record on file with Division II Court of Appeals). These calls brought Lt. Gorre to several locations where heavy equipment was being used to dig deeply into the earth, and to dig around foundations. *Id.* Lt. Gorre would respond to calls regarding incidents along the I-5 corridor, often several times a shift. *Id.* at 132 - 134. During these calls, since Lt. Gorre was a paramedic, his job was primarily patient care. This meant Lt. Gorre was responsible for extricating patients from vehicles, triage, care of injured persons at the scene and transporting patients. *Id.* at 29(25-26), 30(1-6). Firefighter/paramedics do not know if these injured persons have any infectious or respiratory diseases. *Id.* at 30(7-13). In addition to danger from injured persons, Lt. Gorre and other firefighter/paramedics were exposed to smoke, fumes and

toxic substances when responding to freeway calls. *Id.* at 30(14-26), 31(1-8), 85(17-26). Even when not out on a call fighting fires or attending to the sick and infirm, Lt. Gorre was still exposed to toxic substances and dangerous conditions. For example, when returning to the station, firefighters are always subjected to heavy diesel and benzene fumes from the fire trucks. *Id.* at 32(2-26), 33(1-6), 134(12-26), 135(1-10).

At one of the fire stations where Lt. Gorre often worked in 24 hour shifts, there was a serious mold issue. *Id.* at 135(14-26), 136(1-3). At that station, Lt. Gorre would become ill and suffer from sinus congestion. *Id.* Due to the recurring mold issue, and its effect on his respiratory system, Lt. Gorre transferred to a different station. *Id.*

Lt. Gorre, as a firefighter, experienced situations and environments that most people would find difficult to even imagine. It is important to review just a few of the hundreds of situations he experienced over his career in order to demonstrate the extensive exposures, as well as to highlight the difficulty in pointing to a particular exposure or situation, as the causes of a presumptive occupational disease condition, or conditions. *Id.* at 33(21-26), 34(1).

Lt. Gorre has had to break into a home, climb over six foot high piles of garbage, buckets of human waste, mold, and rotted food to reach a man who had burned himself up when he rolled onto a heater. *Id.* at 136(7-26),

137(1-16). Firefighters are often called to inspect old buildings, where homeless people will build fires, take illegal drugs, or sleep. *Id.* at 137(20-26), 138(1-21). Lt. Gorre, in one of many building inspections, went into an old chicken processing plant that was filled with bird feathers and droppings. *Id.* at 138(13-26), 139(1-3). In another inspection, Lt. Gorre went into a wood manufacturing plant where there was a haze filling the room from all the dust. *Id.* Lt. Gorre and other firefighters do not wear respiratory protection in these situations. *Id.* at 140(22-26), 141(1-7). Obviously, it is impossible to identify what the health risks are from entering a filthy home or an old processing plant; but a firefighter enters such locations because that is his job. *Id.* at 25(3-22). Lt. Gorre and other firefighter/paramedics transport patients in the back of their medic unit. *Id.* at 23(9-16). This is a very confined space and the paramedics are usually touching and performing procedures on the person being transported. *Id.* The paramedics frequently do not know what infectious or viral diseases these patients have. *Id.* Firefighters also respond to injury and disease calls to transient populations. *Id.* at 27(3-26), 28(1-5). On these calls, there is often dirt, human filth, drug use, and sometimes violence directed at the firefighter/paramedics. *Id.*

As part of the technical rescue team at Station 8, Lt. Gorre was also actively involved with trench rescue. *Id.* at 141 (17-26), 142 (1-23). As part of the required training for being a member of the technical rescue team, Lt.

Gorre was sent to a week of training on trench rescue. *Id.* This training included using an excavator to dig 12 feet deep into the earth, and putting a simulated "victim" in the hole. *Id.* Then the firefighters would shore up the hole and enter the hole to rescue the "victim". *Id.* Lt. Gorre would crawl down into the hole, dig the "victim" out and remove the dirt and set up a rigging system to evacuate the "victim". *Id.* Lt. Gorre did not wear any respiratory protection during this week long trench rescue training, even while several feet below the surface. *Id.* at 142(20-23).

Lt. Gorre has responded to calls for wild land fires, broken bones, and homeless people at the old Tacoma Airport. *Id.* at 143-144. Firefighters do not wear respiratory protection when responding to wild land fires. *Id.* Sometimes the dust from ATV riders at the old airport was so thick it looked like there were fires when there were not. *Id.* Firefighter/paramedics do not wear respiratory protection when responding to medical calls.

Lt. Gorre has also responded to calls at Point Defiance Park. *Id.* at 145 (2-4). One call involved a fire caused by a train traveling through the area. *Id.* Since there was no access to water, the firefighters had to dig a fire line and use the dirt along the track to put out the fire. *Id.* The firefighters wore their wild land gear which does not include respiratory protection. *Id.* at 144(21-26), 145(12-14).

Not even the Employer knows the number of times Lt. Gorre was exposed to dangerous smoke, fumes and toxic substances, including bacteria and viral exposures, or other harmful substances. *Id.* at 75-76. The Employer does not measure the types of smoke, fumes or toxic substances firefighters are exposed to on calls. The records it keeps are incomplete and fail to record the types and amounts of career exposures Lt. Gorre and other career firefighters experience. *Id.* at 16-17, 146-149.

1. Lt. Gorre's Treating Doctors

a. Dr. Royce Johnson.

Dr. Johnson is board certified in internal medicine since 1974 and infectious disease since 1976. Dr. Royce Johnson, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 9(14-18) (certified board record on file with Division II Court of Appeals). Dr. Johnson is the director of the Infectious Disease Consult Clinic at UCLA in Bakersfield, California, and the director of a separate coccidioidomycosis clinic. *Id.* at 11(11-24). The doctor has been a member of the Coccidioidomycosis Study Group ("CSG") since 1975. *Id.* at 14(2-15). CSG is a group "devoted entirely to the study of all aspects of coccidioidomycosis, valley fever, cocci" and all its manifestations. *Id.* The doctor has also written and lectured extensively on all aspects of coccidioidomycosis. *Id.* at 15 -18. Lt. Gorre was referred to Dr. Johnson by one of his attending physicians because of Dr. Johnson's expertise on all

aspects of coccidioidomycosis. Dr. Johnson found that Lt. Gorre was in good health until the end of 2006, when he developed flu-like symptoms for which he was evaluated in January of 2007. *Id.* at 19(4-21). At the time of his January 2007 evaluation, Lt. Gorre was found to have "an absolute eosinophilia" and underwent a lung biopsy which "showed eosinophilic granulomatous disease." *Id.* Following the results of the biopsy, and "major workup" following the biopsy, but without a specific diagnosis being made, Lt. Gorre was put on Prednisone therapy. *Id.* Lt. Gorre also received treatment for class II tuberculosis, a respiratory disease. *Id.* Dr. Johnson explained that in March of 2008, Lt. Gorre was at a social event and a dermatologist at the same event noticed a skin lesion on Lt. Gorre. *Id.* at 19-20. This lesion was biopsied and Lt. Gorre was diagnosed with coccidioidomycosis. *Id.* Dr. Johnson testified that the spores that cause coccidioidomycosis can waft around in the air and travel at least 75 miles. *Id.* at 20(14-20).

Dr. Johnson stated with certainty that since Lt. Gorre did not leave Washington in the six weeks prior to the onset of symptoms, then ***it is "much more likely than not" that the coccidioidomycosis infection was acquired in the state of Washington***. *Id.* at 22(13-16). Further, the doctor opined that it was more likely than not that Lt. Gorre's disease was a result of his work as a firefighter for the Tacoma Fire Department. *Id.* at 23(10-24).

Dr. Johnson addressed some of the records from the Employer's doctors. Specifically, he noted that most of them had "very little understanding of coccidioidomycosis, its incubation, its pathogenesis, its clinical presentation." *Id.* at 28(1-17). The doctor explained that coccidioidomycosis is "almost always eventuated from either symptomatic or asymptomatic pneumonic disease." *Id.* Dr. Johnson testified about a number of firefighters in California diagnosed with coccidioidomycosis, but explained that often this sort of thing is not reported or published. *Id.* at 37(15-25), 38(1-6). The doctor noted that in each of these firefighters cases it was determined to be a work-related exposure. *Id.*

Dr. Johnson noted that it would be very unlikely for someone to have coccidioidomycosis for several years and have no symptoms, then years later present with the disseminated disease. *Id.* at 43 (12-25), 44(1-5). In other words, according to Dr. Johnson, the odds of Lt. Gorre acquiring the disease when he was living in California, and the disease not manifesting itself until the date of injury, is "less than one in 10,000." Id. at 45(13-18).

The world renowned doctor disagreed with the Employer's supposition that Lt. Gorre just as likely contracted coccidioidomycosis while on a camping trip or remodeling his house, or working on his yard. *Id.* at 51(16-25), 52(1-4). The doctor explained that is was much more likely Lt. Gorre acquired coccidioidomycosis through work activities, especially along

I-5, than through any recreational activities or from working on his property. *Id.*

b. Dr. Christopher Goss.

Dr. Goss has been board certified as a critical care medicine physician since November of 2000. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 6(25), 7(1-4) (certified board record on file with Division II Court of Appeals). He is also board certified in pulmonary medicine. *Id.* at 7(23-25), 8(1-6). Additionally, he is also board certified in internal medicine. *Id.* at 8(13-21).

Lt. Gorre was referred to Dr. Goss by another attending physician, Dr. Paul Standstrom, a pulmonologist. Id. at 16(24-25), 17(1-6). The purpose of the referral was for Dr. Goss to provide an opinion on the etiology of Lt. Gorre's eosinophilic lung disease. *Id.* ***Dr. Goss noted that all eosinophilic lung diseases are respiratory diseases.*** *Id.* at 17(7-15). This classification of respiratory disease, places Lt. Gorre's condition squarely under the protection of RCW 51.32.185.

Dr. Goss noted an association with eosinophilic lung disease and exposure to dust. *Id.* at 22(15-25). He explained this has been well documented in situations including soldiers returning from the Iraq war, and firefighters after 9/11. The symptoms in these situations mirrored Lt. Gorre's

in that the disease was "notable for shortness of breath, systemic symptoms and response to steroids." *Id.* at 23(1-7).

Lt. Gorre responded quickly to the steroid Prednisone, resulting in an "almost complete resolution of his pulmonary infiltrates." *Id.* at 23(3-7).

According to Dr. Goss, Lt. Gorre noticed a bump on his forehead during the time the Prednisone was tapered off, but Lt. Gorre did not pursue treatment or a diagnosis for this bump. *Id.* at 23(12-25), 24(1-2). When Lt. Gorre did finally have the bump biopsied, many months after treatment by Dr. Goss, the biopsy showed spores of coccidioidomycosis. *Id.* The doctor explained that the presentation of spores outside the lung is suggestive of disseminated coccidioidomycosis. *Id.*

Dr. Goss determined Lt. Gorre's lung condition was related to his employment as a firefighter on a more probable than not basis. *Id.* at 24 (3-25), 25(1-6). Specifically, the doctor opined that Lt. Gorre had a work related lung disease that was treated with steroids, and the steroids caused dissemination of coccidioidomycosis. *Id.* The doctor supported this conclusion since, other than the isolated skin lesion, Lt. Gorre never had cocci in other parts of his body. *Id.* Since Lt. Gorre was fairly quickly weaned off steroids for his work-related eosinophilic lung disease, the steroids kept Lt. Gorre's coccidioidomycosis in check, preventing it from causing lesions on any other part of his body. *Id.*

2. Employer's Hired Experts

a. Dr. Garrison Ayars.

Dr. Ayars has never before testified in a case regarding coccidioidomycosis. Dr. Garrison Ayars, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09 13340 (2010), 115(21-16)(certified board record on file with Division II Court of Appeals). Dr. Ayars has never published anything dealing with coccidioidomycosis. *Id.* at 116(16-18). Dr. Ayars examined Lt. Gorre on only one occasion, September 3, 2008. *Id.* at 94(22-26) 95(1). This examination was performed on behalf of and paid for by the Employer.

Dr. Ayars apparently disagreed with Dr. Goss because Dr. Goss' diagnosis included two diseases. According to Dr. Ayars "it is much easier to give him one disease." *Id.* at 101(10-20). However, application of laws benefitting firefighters are never about coming up with the easiest diagnosis and "giving" it to the firefighter while disregarding another diagnosis.

Dr. Ayars alleged that an "inhalation exposure" would require significant dust exposure, or working around birds. *Id.* at 106(5-9). Dr. Ayars incorrectly opined that Lt. Gorre had not had any such exposures in spite of the significant history and testimony that demonstrated that Lt. Gorre was exposed to birds and bird droppings and dust on hundreds of occasions. The doctor admitted that chronic eosinophilic pneumonia, a respiratory disease, is idiopathic, meaning it has no known cause. *Id.* at 108(14-16).

Dr. Ayars was completely ignorant of the fact that Lt. Gorre was exposed to dirt and dust on hundreds of occasions while in the course of his work as a career firefighter. Dr. Ayars incorrectly testified that "unless they giving [sic] him the benefit of the doubt that maybe he was exposed to dirt up here, there is no way he could tie it into his work as a fireman or EMT." *Id.* at 109(16-18).

Dr. Ayars was also incorrect in his characterization of the testimony regarding Lt. Gorre's exposure along the I-5 corridor. For example, Dr. Ayars testified that there was nothing "significant occupational to driving up the freeways back and forth..." that could create an occupational risk, except for getting in a car accident. *Id.* at 110-(2-4). However, Lt. Gorre was not driving up and down the freeway, but rather responding to accidents and fires along the interstate highway. Lt. Gorre was outside his vehicle responding to calls on the freeway, often several times a day, and was routinely exposed for hours at a time to smoke, fume, toxic substances, dust, and unknown substances from all around the country on each and every call along Interstate-5.

Dr. Ayars did not address the issue of whether those exposures could lead to an occupational disease. The possibility of contracting an occupational disease from such exposures has not been disproved. In fact, attending physician and coccidioidomycosis expert, Dr. Johnson, testified that

the I-5 exposures were the most likely cause of the exposure to coccidioidomycosis spores.

Dr. Ayar's testified that, due to Lt. Gorre's ethnicity, he has an increased risk of susceptibility to complications from the organism that causes coccidioidomycosis, over the general population. *Id.* at 110(17-20). In other words, Lt. Gorre could have the same exposures as that of his coworkers, and be the only one who presents with symptoms or complications from coccidioidomycosis. His increased susceptibility based on his ethnicity may not be used by the Employer as a bar to benefits under the workers compensation system. Lt. Gorre's ethnicity simply establishes that it is more likely he will acquire an occupational disease.

During cross examination, Dr. Ayars admitted there was nothing in the record to indicate Lt. Gorre was not in his usual state of good health prior to February 2006. *Id.* at 117(9-21). While Dr. Ayars referenced Lt. Gorre's sick leave, he then had to admit he did not know why Lt. Gorre took sick leave. *Id.* at 117-118. The Employer's hired expert tried to deceive the trier of fact into believing irrelevant testimony somehow cleared the Employer of liability under RCW 51.32.185 or RCW 51.08.140.

b. Dr. Buckley A. Eckert.

The doctor testified that the Coxsackie virus is an infectious disease. Dr. Buckley A. Eckert, *Transcripts (June 14, 2010): In re: Edward O. Gorre*

09 13340 (2010), 174(11-17)(certified board record on file with Division II Court of Appeals). Dr. Eckert was not qualified to testify further regarding coccidioidomycosis and did not testify about eosinophilia\interstitial lung disease.

c. Dr. Emil Bardana, Jr.

Dr. Bardana, another Employer-hired expert, never even saw or treated Lt. Gorre. Dr. Bardana indicated that he "probably" saw cases of Valley Fever or coccidioidomycosis, but it was probably back in 1962 so he couldn't specifically recall it. Dr. Emil Bardana, Jr., *Transcripts (June 24, 2010): In re: Edward O. Gorre* 09 13340 (2010), 7(10-13)(certified board record on file with Division II Court of Appeals). *Id.* He testified that Valley Fever is an infectious disease. *Id.* at 11(7-10). Dr. Bardana practices in Oregon and referenced cases occurring in Oregon, which is outside the endemic area of the Sacramento Valley in California according to world renowned expert, Dr Johnson. Dr. Bardana noted that if the organism is present in the soil, and any activity exists that raises dust, this can disseminate the spores that cause coccidioidomycosis. *Id.* at 10(12-17).

Lt. Gorre has testified about responding, among other things, to calls on the interstate freeway and at the old airport where ATV riders were raising so much dust that it looked like the airport area was on fire.

Dr. Bardana also referenced Lt. Gorre's race as a Filipino as being a factor that increases his likelihood of developing coccidioidomycosis. *Id.* at 11(2-5). However, as noted above, increased likelihood of contracting a disease, when compared to his coworkers, does not bar Lt. Gorre from the benefit of the presumptive disease statute, and should not bar him from receiving benefits under the IIA.

Dr. Bardana admitted that when cases of coccidioidomycosis come into his clinic, most of them were referred to the infectious disease people for treatment. He does not treat them. *Id.* at 12(9-11). Dr. Bardana noted that firefighters can be exposed to dust, diesel, chemical and other harmful fumes, as well as smoke and toxic substances. *Id.* at 47(2-10). However, he incorrectly believed that firefighters would, in each of those situations, be protected by their SCBA. *Id.* The testimony of Lt. Gorre and other professional firefighters make clear that there are many times when they are exposed to dust, dirt, sawdust, smoke, fumes, exhaust, and other known and unknown toxic substances when they are not wearing their SCBA. Dr. Bardana's incorrect belief biased his testimony and led to incorrect opinions.

While Dr. Bardana felt it was rare, he did admit that exposures to smoke, fumes and toxic substances could increase eosinophilic counts in a firefighter. *Id.* at 50(20-26). He also admitted to the fact that smoke, fumes, and toxic substances can cause interstitial lung disease. *Id.* at 51(1-4).

Dr. Bardana was not qualified to testify regarding coccidioidomycosis. He admitted that he refers these cases out to other physicians who are so qualified. His testimony goes beyond the scope of his expertise.

d. Dr. Payam Fallah.

Dr. Fallah noted that the organism which causes coccidioidomycosis can withstand quite "adverse environmental factors" including freezing temperatures. Dr. Payam Fallah, *Transcripts (June 24, 2010): In re: Edward O. Gorre* 09 13340 (2010), 82(11-18)(certified board record on file with Division II Court of Appeals). Dr. Fallah testified that there is a "huge range of survivability" for the fungus. *Id.* at 82(1-2). In fact, according to Dr. Fallah, the spores could survive for months, even years. *Id.* at 82(19-26), 83(1-4).

e. Dr. Marcia Goldoft.

Dr. Goldoft did not have any training in coccidioidomycosis. Dr. Marcia Goldoft, *Transcripts (June 24, 2010): In re: Edward O. Gorre* 09 13340 (2010), 89(17-19)(certified board record on file with Division II Court of Appeals). Dr. Goldoft testified that she had no information regarding diagnosing coccidioidomycosis. *Id.* at 89(20-24). Dr. Goldoft is not qualified to testify on any aspect of Lt. Gorre's case.

f. Dr. Paul Bollyky.

Dr. Bollyky testified that "there are definitely instances of people acquiring the infection outside of those regions." Dr. Paul Bollyky, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 13 (certified board record on file with Division II Court of Appeals). Those regions were defined as being the areas generally considered endemic for coccidioidomycosis. *Id.* at 13-14. Dr. Bollyky admitted that it would be "purely speculative on my part to ascribe a greater or lesser likelihood in one scenario or another for coming down with this in Western Washington." *Id.* at 18(13-16). However, the doctor did find that a potentially significant source of coccidioidomycosis occurs when firefighters, particularly those who fight wild fires, work with dirt or soil and bulldozers to fight the fire. *Id.* at 18(5-12). Lt. Gorre testified to fighting wild fires and using dirt to fight the fire when there was no access to water.

Dr. Bollyky was asked if the organism that causes coccidioidomycosis had been found in the native soil of Western Washington. *Id.* at 18(17-21). The doctor stated his understanding was that it had not. *Id.* However, he followed that statement by stating that he did not know if anyone had ever looked for that organism in Washington soil. *Id.*

When asked to provide his opinion regarding coccidioidomycosis being windblown along the I-5 corridor or into Western Washington, Dr. Bollyky opined that it was possible. *Id.* at 20(7-14). Dr. Bollyky went on to

provide an example of how this could happen. *Id.* Specifically, Dr. Bollyky referred to farms that ship topsoil around the country. *Id.*

Dr. Bollyky testified that eosinophilic lung disease and interstitial lung disease respond to steroid treatment in most cases. *Id.* at 29(2-8). He also testified that ***steroids suppress the immune system, increasing the risk of infection***. *Id.* at 20(15-25). This testimony, the other medical testimony and the lay testimony establishes that Lt. Gorre had eosinophilia\ interstitial lung disease, took steroids for those conditions, and then acquired coccidioidomycosis during the time he was on steroids. Each is a respiratory or infectious disease covered by RCW 51.32.185. A compromised immune system as a result of taking steroids for a presumptive respiratory or infectious disease also makes it more likely to acquire other respiratory or infectious diseases.

With regards to whether Lt. Gorre had an active respiratory disease other than coccidioidomycosis, Dr. Bollyky repeatedly deferred to Dr. Goss. *Id.* at 21(1-16), 24(1-3), 27(18). However, Dr. Bollyky did note that Lt. Gorre still had scarring and other signs of disease other than coccidioidomycosis, but did not know what to attribute it to. *Id.* at 21(13-16). Finally, Dr. Bollyky testified that there are "many different etiologies for both eosinophilic lung disease and for interstitial findings" before again deferring to Dr. Goss. *Id.* at 33(11-13).

B. Procedural history.

On April 26, 2007, Lt. Gorre filed an Application for Benefits with the Department of Labor and Industries, for the presumptive occupational diseases. The Department rejected the claim for benefits on August 13, 2007, for the stated reason that Lt. Gorre did not provide it with a physician's report or medical proof. *Certified Board Record on file with Division II Court of Appeals*, 129. The Employer protested the order on September 6, 2007. On September 14, 2007, the Department held the August 13, 2007 order in abeyance. On February 11, 2008, the Department held the August 13, 2007 order for naught and rejected Lt. Gorre's claim for benefits. *Id.* at 131. Lt. Gorre protested the order on February 20, 2008. On March 26, 2008, the Department allowed Lt. Gorre's claim for an occupational disease of interstitial lung disease, nodular with eosiniophilia and granulomatous disease with possible sarcoid. *Id.* at 133. The Department held the order in abeyance one day later. On March 24, 2009, the Department canceled the March 26, 2008 order and rejected Lt. Gorre's claim for benefits. *Id.* at 135. Lt. Gorre filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the March 24, 2009 Department order on April 8, 2009. *Id.* at 137-140. On May 7, 2009, the Board agreed to hear the appeal. *Id.* at 145.

On January 12, 2010, Lt. Gorre brought a Motion for Summary Judgment which was denied. On March 8, 2010, the Lt. Gorre brought a

renewed motion for summary judgment. The motion was denied even though no evidence rebutted the statutory presumptions.

Hearings were held at the Board of Industrial Insurance Appeals on June 7, 14, 25 and July 26, 2010, and the testimony of other witnesses was perpetuated by deposition. Thereafter, an Industrial Appeals Judge issued a Proposed Decision and Order on October 1, 2010, from which both Lt. Gorre and Employer filed timely Cross Petitions for Review on October 14, 2010 and November 18, 2010, respectively. On December 8, 2010, the Board granted review to add Findings of Fact and Conclusion of Law to clarify why Lt. Gorre's respiratory conditions were not presumed to be an occupational disease. The Board's Decision and Order was issued on December 8, 2010. Lt. Gorre timely appealed this Decision and Order to the Superior Court. CP 1-2.

This matter was argued in open court on March 30, 2012 and on June 8, 2012, the Superior Court entered a Findings of Fact And Conclusions of Law and Judgment wherein they adopted and affirmed the Board's December 8, 2010 Decision and Order. CP 940-943. The Superior Court added Finding of Fact 1.3, in which it found that Lt. Gorre was not a smoker; Lt. Gorre had coccidioidomycosis; Lt. Gorre did not have separate diseases of eosinophilia or interstitial lung disease; Lt. Gorre's symptoms were manifestations of his coccidioidomycosis. *Id.*

Lt. Gorre timely appealed this decision to this Court, arguing that the burden of proof, which was the Employers, was erroneously placed on Lt. Gorre throughout this claim. CP 944-950.

IV. ARGUMENT

A. Standard of review.

1. Superior Court

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

2. Court of Appeals

For claims under the Industrial Insurance Act, "review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusion of law flow from the findings." *Young v. Dept. of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Ruse v. Dept. of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

B. The purpose of the Industrial Insurance Act is remedial in nature and shall be liberally construed in favor of the injured worker.

Construction of a statute is a question of law, which is reviewed *de novo* under the error of law standard. *State v. Keller*, 143 Wn.2d 267, 276 (2001); *Pasco v. Public Empl. Relations Comm'n,* 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *Inland Empire Distrib. Sys., Inc. V. Util. & Transp. Comm'n,* 112 Wn.2d 278, 282, 770 P.2d 624 (1989). The courts retain the ultimate authority to interpret a statute. *Franklin County Sheriff's Office v. Sellers,* 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed.2d 954 (1983).

The Court's objective is to determine the Legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600 (2005). When determining the Legislature's intent, the Court shall first look to the plain meaning of the statute. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10 (2002); *Lacey Nursing Ctr., Inc. v. Dept. of Revenue,* 128 Wn.2d 40, 53, 905 P.2d 338 (1995). To determine the plain meaning, this Court must look at the text and "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d at 600. If this reading of the statute leads to more than one interpretation, then the statute is ambiguous and this Court "may resort to statutory construction,

legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373 (2007).

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

The Washington Supreme Court has stated that the "guiding principle in construing the Industrial Insurance Act is remedial in nature and shall be liberally construed in order to achieve its purpose of "reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. "All doubts about the meaning of the [IIA] must be resolved in favor of workers." *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Boeing Co. v. Heidy,* 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

Lt. Gorre requests that this Court take notice of the legislature's intent in drafting and passing RCW 51.32.185. The legislative intent has

accompanied the statute since 1987 without challenge. See Appendix, ER 201; Legislative Intent, Session Laws1987 Chapter 515 § 1.

> **Legislative Intent For The Presumptive Occupational Disease Statute.**
> "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."
> Legislative Intent, Session Laws1987 Chapter 515 § 1.

In analyzing the presumptive occupational disease statute, it is clear the legislature made a finding in 1987 that career exposures to smoke, fumes and toxic substances cause firefighters to have a higher rate of respiratory disease than the general public. The legislature has mandated that due to those exposures that damage health – certain diseases including respiratory disease – are presumed to be occupational diseases for firefighters.

In order for a firefighter to gain the protections of the presumption of occupational disease and the shifting of the burden of proof onto the employer, the statute must be applied at the beginning of the firefighter's claim. Under the presumptive disease statute, when a firefighter applies for Title 51 benefits for occupational disease, certain diagnosed disease conditions: (1) are presumed to be occupational, and, (2) shift the burden of disproving the condition is an occupational condition onto the Employer.

Any respiratory disease is a presumptive occupational disease. See Appendix, RCW 51.32.185.

C. Lt. Gorre had clinically distinct diagnoses for both respiratory and infectious diseases for claims of eosinophilia\ interstitial lung disease and for coccidiodomycosis which are separate RCW 51.32.185 presumptive occupational diseases and separate RCW 51.08.140 occupational diseases.

Neither the text of RCW 51.32.185 nor its legislative history defines the meaning of the term "respiratory disease" for purposes of the statute. When a statute fails to define a relevant term, Courts will look both to the plain meaning of the word and to expert opinion to provide guidance. Webster's Dictionary defines "respiratory disease" as "a disease affecting the respiratory system."

There is no provision in the statutes which precludes Lt. Gorre from asserting alternate theories, or precluding him from asserting that he suffered from separate diagnosed conditions, or causally related diagnosed conditions. As has been shown through medical testimony of attending physicians, Lt. Gorre suffered from separate presumptive respiratory diseases, and therefore each respiratory condition was properly before each tribunal. In fact, the Board has previously held in numerous decisions that where a claim is either denied or allowed under one theory of compensability, the Board is free to consider alternate theories of compensability once the claim is on appeal. *See, e.g, In re: Kathy Lively,* BIIA Dec. 62 097 (1983).

1. Eosinophilic\Interstitial Lung Disease

Dr. Goss testified that Lt. Gorre had a clinically defined, separate diagnosis of Eosinophilic Lung Disease. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 6(25), 25(21-25)(certified board record on file with Division II Court of Appeals). The original report of injury was for an inhalation injury from the results of the lung biopsy in April of 2007. Self-Insurer Accident Report, *Exhibits: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals). This established that, unequivocally, Lt. Gorre's claim is for a lung condition. It is undisputed that Lt. Gorre's Eosinophilic Lung Disease is a respiratory condition. Under RCW 51.32.185, therefore, Lt. Gorre's Eosinophilic\Interstitial Lung Disease *must* be given the mandatory presumption that it is related to his occupation as a firefighter.

Dr. Bollyky testified that both eosinophilic lung disease and interstitial lung disease respond to steroid treatment. Dr. Paul Bollyky, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 29(2-8) (certified board record on file with Division II Court of Appeals). He also testified that ***steroids suppress the immune system, increasing the risk of infection***. *Id.* at 20(15-25). This testimony establishes that Claimant had eosinophilia\ interstitial lung disease and then experienced coccidioidomycosis. A compromised immune system as a result of taking steroids for a presumptive

respiratory or infectious disease also made Lt. Gorre more likely to acquire other respiratory or infectious diseases, including coccidioidomycosis.

Although clearly the Eosinophilic\Interstitial Lung Disease is a respiratory disease for purposes of RCW 51.32.185, it is also an RCW 51.32.180 occupational disease. Lt. Gorre was exposed to immeasurable dust, smoke, fumes and other toxic substances that are known to increase eosinophilic levels in the body and cause eosinophilic lung disease. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 22 (certified board record on file with Division II Court of Appeals). Each work day Lt. Gorre was exposed to one or more toxic substances such as diesel fumes, bacteria, mold, allergens, pigeon droppings, inorganic and organic toxins, chemicals, and other toxic or hazardous substance. Any of these toxic substances can, and do, raise the eosinophil levels in the respiratory system, which then leads to Eosinophilic Lung Disease.

The law does not require a Lt. Gorre to identify a specific exposure as the cause of the occupational disease. This issue has been the subject of litigation, and is not subject to redetermination. *Intalco Aluminum v. Dept. of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992). In *Intalco,* the Claimants were exposed to various chemicals at various times, which could have caused their conditions. *Id.* The Court allowed the testimony which stated that an unknown toxin or combination of toxins caused the conditions.

Id. In so doing, the Court stated that "In light of the Legislature's mandate to construe the Act liberally in favor of the worker seeking compensation, we decline to read into...[the] statute a requirement that the claimant identify the specific toxic agent responsible for his or her disease or disability." *Id.*, at 656 (Citing to *Lightle v. Dept. of Labor & Indus.*, 68 Wn.2d 507, 413 P.2d 814 (1966)).

2. <u>Coccidiodomycosis</u>

It has already been conceded by the Employer's experts that Coccidiodomycosis is a respiratory disease. The Lt. Gorre's experts, including renowned Coccidioidomycosis expert Dr. Royce Johnson, have also indicated that Coccidioidomycosis is a respiratory disease. Dr. Royce Johnson, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 28 (certified board record on file with Division II Court of Appeals). Indeed, the vast majority of cases are infected via inhalation. The dual nature of Coccidiodomycosis does not work as a bar to the presumption. Although the infectious disease presumption is not limited to those listed in the statute (as is the clear intention in the cancer limitation), even if it was, Lt. Gorre would still be entitled to the presumption because Coccidiodomycosis is also a respiratory disease. As an RCW 51.32.185 infectious disease, Coccidioidomycosis is entitled to the mandatory presumption. This presumption has never been legitimately rebutted by a preponderance of admissible evidence. The *only* testimony that has *ever* been presented

throughout this claim to rebut the presumption is that causation would be speculative, and that it is unable to be determined where Lt. Gorre contracted the presumptive occupational disease.

Clearly, speculation cannot overcome the strong mandatory presumption intended by the legislature. In fact, neither of the Employer's medical expert witnesses are qualified to give legal opinions, or any opinions, regarding the interpretation of RCW 51.32.185, and any such testimony should be stricken. That speculation to which the Employer's experts referred underlies the need for the presumption in RCW 51.32.185; to allow mere speculation to overcome the presumption would be to act against the legislative mandate.

Even if Lt. Gorre's Coccidioidomycosis condition is determined solely under RCW 51.32.185 as an occupational disease, it is more likely than not that the condition was contracted or aggravated during his workplace activities. Lt. Gorre was not in a Coccidioidomycosi endemic area for almost two years prior to the manifestation of his symptoms.

Dr. Royce Johnson has testified that if he was not in an endemic area in the six weeks prior to manifestation of the symptoms, it is far more likely than not that he contracted the disease in Washington. Dr. Royce Johnson, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 22 (13-16) (certified board record on file with Division II Court of Appeals). Dr. Johnson also

testified that based on the facts of this case, it is 1 in 10,000 that Lt. Gorre contracted Coccidioidomycosis during his work related activities in Washington State, as an employee firefighter for the City of Tacoma. *Id.* at 45(16-18). Dr. Johnson's overwhelming experience and knowledge regarding Coccidioidomycosis are compelling reasons to give a high degree of weight to his testimony.

Furthermore, the Employer's own expert, Dr. Ayars, demonstrated a fundamental ignorance of the relevant time line, work exposures and travel history of Lt Gorre. Dr. Garrison Ayars, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09 13340 (2010), 109 (certified board record on file with Division II Court of Appeals). The weight of the evidence submitted clearly indicates that, to at least a reasonable medical probability, Lt. Gorre's Coccidioidomycosis is work related on a more likely than not basis.

D. Neither of the presumptions were rebutted, (a) by a preponderance of relevant, credible and admissible medical testimony, and (b) did not rule out occupation as a proximate cause of each of the respiratory and infectious conditions.

The Superior Court and BIIA decisions are incorrect because the evidence establishes that the Lt. Gorre is entitled to presumptive occupational disease and occupational disease benefits. Further, the burden of proof should have been placed upon the employer from the time of application for benefits because the claimant was entitled to the burden shifting in the statute.

The evidence does not support a finding that the Employer met its burdens of proof.

In order to overcome the presumption established in RCW 51.32.185, the Employer must prove by a preponderance of admissible evidence that Lt. Gorre's occupational disease was acquired by some specific cause outside his career employment as a firefighter. The Employer must also prove that firefighting was not a proximate cause. The Employer is unable to meet its burdens. His career exposures to dust, smoke, fumes and toxic substances in the work place makes other potential sources unlikely.

1. The Employer failed to rebut the presumption by a preponderance of evidence.

A "preponderance of the evidence" is a judicial standard requiring that all of the evidence establish the proposition at issue is more probably true than not true. See, *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962); *Dependency of H.W.*, 92 Wn.App. 420, 961 P.2d 963 (1998). At no time has the Employer produced credible medical opinion testimony overcoming, by a preponderance of competent evidence, RCW 51.32.185's strong presumption of occupational disease in favor of the Employee firefighter. The presumption was created to impose a high burden on the Employer or the Department when attempting to defeat the presumption.

In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011, 56 P.3d

565 (2002), involving a much weaker claimant's case, and without the benefit of the statutory presumption favoring a firefighter, the Court ruled that the claimant's Hepatitis C was an occupational disease and that the evidence was sufficient to support an inference on a more-probable-than-not basis that the claimant acquired hepatitis while working at the hospital, even though the claimant had a history of drug use, had numerous body piercings, numerous tattoos, and had worked as emergency medical technician in the Navy prior to her employment at the hospital.

Rank speculation, conjecture or conclusory allegations do not overcome the presumption. The presumption cannot be rebutted absent a preponderance of credible medical testimony on specific causation. Conclusory, conjectural or speculative opinions are not admissible. ER 702; ER 703; *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001).

Lt. Gorre has a very healthy lifestyle. Except for his occupational respiratory and infectious diseases - he is in excellent physical condition. He was never a 'smoker', and has not smoked for two decades. He is not overweight. He has had no significant exposure to smoke, fumes, or other toxic substances outside of his service as a firefighter. The Employer, by simply presenting other potential speculative causes of respiratory or infectious disease, or denying the existence of respiratory or infectious disease, has not presented a preponderance of credible or admissible evidence

and has not established a cause of Lt. Gorre's respiratory or infectious diseases outside of firefighting.

2. The Employer failed to prove that Lt. Gorre's occupation was not a proximate cause of his respiratory diseases.

The term "proximate cause" means a cause which in a direct sequence produces the condition complained of and without which such condition would not have happened. There may be one or more proximate causes of a condition. For a worker to be entitled to benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. The law does not require that the work conditions be the sole proximate cause of such condition. WPI 155.06.01

For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must only be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition. *McDonald v. Dept. of Labor & Indus.*, 104 Wn. App. 617, 17 P.3d 1195 (2001). This standard is altered in RCW 51.32.185 cases. In such cases, the firefighter's employment is presumptively determined to be a proximate cause of his covered condition.

In Industrial Insurance cases, "[T]he 'multiple proximate cause' theory is but another way of stating the fundamental principle that, for

disability assessment purposes, a workman is to be taken as he is, with all preexisting frailties and bodily infirmities." *City of Bremerton v. Shreeve,* 55 Wn. App. 334, 340, 777 P.2d 568 (1989). This would include ethnic susceptibility.

Miller v. Dept. of Labor & Indus., 200 Wash. 674 (1939), is the seminal case on proximate causation involving industrial injuries. When an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not the pre-existing physical condition. *Miller*, at 682.

However, the presumptive disease statute *presumes* that the firefighter suffers from an occupational disease when he has been diagnosed with a respiratory or infectious disease. The legislature mandated into law a causal connection between the dangerous public service profession of firefighting, and various diseases including respiratory disease, certain cancers, infectious diseases and any heart problems experienced within 72 hours of exposures to smoke, fumes, or toxic substances, or within 24 hours of strenuous physical activity. This law means the firefighter does not have to prove causation; the causal connection has been made and is mandated by RCW 51.32.185. The firefighter only needs to present with a covered diagnosis that falls within the statute.

In this case, Lt. Gorre was diagnosed with eosinophilia\interstitial lung disease and coccidiodomycosis. These diagnosis were made by two attending healthcare providers and specialists in the fields of infectious and respiratory disease. These diagnoses should have been all that was required by Lt. Gorre.

The Employer then had the burden of proving that firefighting did not cause, or contribute to, his respiratory or infectious diseases. In other words, his employer had, and continues to have, the burden of showing that all causes of Lt. Gorre's respiratory and infectious diseases originated outside of his employment as a firefighter.

The Employer, by presenting other potential speculative causes of respiratory or infectious disease, or denying the existence of respiratory or infectious disease has failed to present any evidence excluding Lt. Gorre's occupational exposures as a proximate cause of his respiratory or infectious diseases. Rather, the testimony establishes that Lt. Gorre has a history of significant occupational exposures to smoke, fumes, hazardous and toxic substances of his long firefighting career. Edward Gorre, *Depositions: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals).

E. Strong case law in favor of workers in non-presumptive cases supports Lt. Gorre's entitlement to workers' compensation benefits.

In *Intalco Aluminum v. Dept. of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), the court sustained judgment in favor of defendants granted workers' compensation for occupational diseases arising from exposure to toxins at work. In *Intalco*, the injured workers did not have the benefit of the presumptive disease statute. However, they did have the benefit of the Industrial Insurance Act which is to be liberally construed, with all doubts resolved in favor of claimants. The court declined to read into the workers' compensation statute a requirement that the claimant identify the specific toxic agent responsible for his or her disease or disability. See *Lightle v. Dept. of Labor & Indus.*, 68 Wn.2d 507, 413 P.2d 814 (1966) (courts should refrain from narrowly construing provisions of the Act where such an interpretation results in the denial of benefits and statutory language does not suggest that the Legislature intended such a narrow interpretation).

Although not burden shifting, in workers' compensation cases, the court also must give special consideration to the opinions of attending physicians because the attending physicians are not merely hired experts giving a particular opinion consistent with one party's view of case. *Young v. Dept. of Labor and Industries*, 81 Wn. App. 123, 913 P.2d 402 (1996); *Chalmers v. Dept. of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Dept. of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633

(1964); *Spalding v. Dept. of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947).

Courts in other jurisdictions have declined to require the injured plaintiff in toxic tort products liability cases to prove the precise chemical that caused his or her injury. *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct.App.1989); *In re Robinson*, 78 Or.App. 581, 717 P.2d 1202 (1986). In *Earl*, the Court of Appeals of Idaho reversed a summary judgment in favor of the manufacturer, holding that the plaintiff presented sufficient evidence to allow a jury to conclude that his lungs were injured as a result of exposure to vapors emitted from a plastic film used in the meat-packing room where he worked. The plaintiff's attending physician believed that it was likely that a combination of chemicals caused the plaintiff's disease. *Earl,* 115 Idaho at 1092, 772 P.2d at 730. The manufacturer challenged the attending physician's opinion, arguing in part that the doctor failed to specify the particular component(s) of the plastic vapors which caused the plaintiff's disease. The court rejected this argument, stating:

> "We do not consider it fatal to the plaintiff's case that the etiology of his disease has not been traced to a discrete component or set of components within the heated plastic vapor. As explained by our Supreme Court in *Farmer v. International Harvester Co.*, supra, [97 Idaho 742, 772, 553 P.2d 1306, 1336,] the plaintiff need only show that the product is unsafe; he need not identify and prove the specific defects which render it unsafe. The same approach is reflected in the cases cited at footnote 2, where victims of

> "meatwrapper's asthma" have been allowed to recover despite scientific uncertainty as to the precise etiological link between their disease and specific chemical(s) in the heated plastic vapors."

Earl, 115 Idaho at 1095, 772 P.2d at 733. The court found the plaintiff's expert could rely on circumstantial evidence such as the plaintiff's suffering a worsening of symptoms while on the job and an improvement when he was not working.

In *Robinson*, a furniture store employee sought workers' compensation benefits, claiming that exposure to toxic chemicals in the furniture store where she worked caused her to suffer from headaches, fatigue and dizziness. The claimant testified that the store continually received new furniture which was uncrated weekly in the furniture showroom. The evidence also showed that new furniture goes through a "gassing out" process whereby it releases quantities of formaldehyde, phenol and hydrocarbons over a period of time. The claimant also testified that the showroom in which she began working was hot, poorly ventilated and had low ceilings. *Robinson*, 717 P.2d at 1203. The employer's insurer argued that the claimant could not show that her work conditions caused her symptoms because living in a mobile home and having new carpet installed had exposed her to formaldehyde. The Court of Appeals of Oregon found, however, that the claimant met her burden of proving that chemical exposure at work was a contributing cause of her disease. The court

further ruled that the claimant was not required to pinpoint the precise chemical that caused her sensitivity:

> "To recover, a claimant must prove that the conditions at work were the major contributing cause of the disability. Although the specific chemical cause of claimant's sensitivity is not conclusively established, she has shown by a preponderance of the evidence that the major contributing cause was her work environment at Struthers which exposed her to concentrations of chemicals much greater than she was ordinarily exposed to outside the course of employment."

(Citations omitted.) *Robinson*, 717 P.2d at 1206.

These cases show that there is already strong existing law in favor of all injured workers, even without the benefit of any legislative mandated presumption. It is because of the difficulty in pinpointing a precise cause of occupational disease in firefighters that the legislature created RCW 51.32.185. The statute created the causation between the certain diseases and the occupation of firefighting. The statute relieves the firefighter from the burden of identifying a particular substance or exposure in order to receive benefits. The firefighter presumption of occupational disease sits on top of the IIA and grants additional benefits in favor of firefighters.

F. Other Persuasive Authority

In *Jackson v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 965, 969, 35 Cal. Rptr. 3d 256 (3d Dist. 2005), the Court found that a physician's testimony that there was nothing specific to the deceased correctional

officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack was not sufficient to rebut the statutory presumption that the correctional officer's heart problems arose out of and in the course of his employment.

The Court in *Meche v. City of Crowley Fire Dept.*, (La.App. 3 Cir. 2/12/97), 688 So.2d 697, *writ denied,* (La. 4/25/97), 692 So.2d 1088, found that testimony of cardiologists that the firefighter's employment had not contributed to his condition, but that the condition had some other cause was not affirmative evidence that would sustain the Employer's burden of proving that the firefighter's employment could not have contributed to his condition.

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

Specifically in *Cunningham*, the court addressed a situation where a doctor attacked the premise of the presumption. The medical expert in the case stated that the claimant's heart disease was not related to employment, and pointed to the uncertainty in the medical community regarding the causation of heart disease. The doctor also referenced studies which showed an absence of a correlation between firefighting and heart problems. The doctor opined there was no medical evidence that the claimant's employment as a firefighter played any role in the development of his heart disease. The court in Cunningham determined that although the medical community might disagree as to the role of firefighting in the development of heart problems, the legislature had made a decision to presume a causal connection.

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

The growing case law of several states with public safety officer occupational disease presumptions is invaluable in analyzing the unsupported refusal of the Employer and the Department to apply the presumption to Washington firefighters as mandated by the legislature.

In *Fairfax County Fire & Rescue Dept. v. Mitchell*, 14 Va. App. 1033, 421 S.E.2d 668 (1992), the court upheld the application of Virginia Code § 65.1-47.1 which provides "a rebuttable presumption that, absent a preponderance of competent evidence to the contrary, a causal connection exists between an individual's employment as a salaried fire fighter and certain diseases. The court determined the presumption acted to "eliminate the need for a claimant to prove a causal connection between his disease and his employment." The burden was put on the employer to prove otherwise as a matter of law.

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

In *Montgomery County v. Pirrone*, 109 Md. App. 201, 674 A.2d 98 (1996), a retired firefighter was entitled to the statutory presumption that his

heart attack resulted from his employment for purposes of workers' compensation, even though the heart attack occurred after his retirement. The court found both the burden of production and the burden of persuasion remain fixed on the employer in determining the applicability of the statutory presumption of compensability. Neither ever shifts to the firefighter. The presumption constitutes affirmative evidence on the firefighter's behalf throughout the case, notwithstanding the production of contrary evidence by the employer. *Id.* The jury was properly instructed that it must only find that the firefighter's occupation was a factor in causing the heart disease, not the predominant factor.

In *McCoy v. City of Shreveport Fire Dept.*, (La.App. 2 Cir. 1/25/95) 649 So.2d 103, the court found medical evidence regarding a fireman's heart disease was legally insufficient to overcome or rebut the work-related causation presumption of Louisiana Revised Statute § 33.2581. The statute provides that the nature of a firefighter's work caused, contributed to, accelerated or aggravated heart disease or infirmity manifested after the first five years of employment. In order to rebut the statutory presumption, the defendant had to prove the negative - that the claimant's heart infirmity could not have resulted from his service as a fireman.

In spite of the legislative mandate requiring application of the firefighters' presumption, the regulations of the Department have not been

modified for decades and the statute is routinely ignored in cases where the legislative presumption is mandatory. The Department and employers continue to refuse to apply the firefighters' presumption statute in violation of the legislative directive.

G. Attorney fees and costs.

RCW 51.32.185(7) and RCW 51.52.140 provide fees and costs at the BIIA, the Superior Court and in the Appellate Courts when Board decisions are decided in favor of the firefighter. Lt. Gorre requests attorney fees and costs for all levels of appeal.

V. CONCLUSION

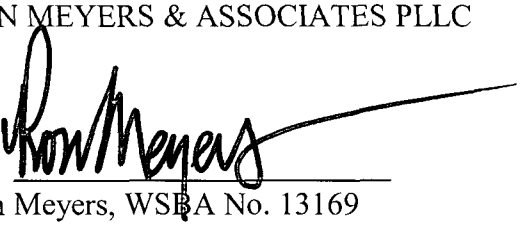
The burden of proof should have been placed upon the employer from the time of application for benefits because the claimant was entitled to the burden shifting in the statute.

Regardless, Lt. Gorre has established that he has presumptively occupational and occupational respiratory and infectious diseases of eosiniphilia\interstitial lung disease and coccidioidomycosis.

The previous rulings should be reversed as a matter of law.

DATED: November 2ND, 2012

RON MEYERS & ASSOCIATES PLLC

By: 

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APPENDIX

RULE ER 201
JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

[Adopted effective April 2, 1979.]

Comment 201

[Deleted effective September 1, 2006.]

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 RCW 1.08.015(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.]

RCW 51.08.140
"Occupational disease."

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

[1961 c 23 § 51.08.140. Prior: 1959 c 308 § 4; 1957 c 70 § 16; prior: 1951 c 236 § 1; 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

No. 43621-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

EDWARD O. GORRE

Appellant,

v.

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

Respondents.

DECLARATION OF SERVICE

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Tim Friedman
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ORIGINAL

DECLARATION OF SERVICE

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

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

ORIGINAL AND ONE COPY TO:

David Ponzoha, Court Administrator/Clerk
Washington State Court of Appeals
Division II
950 Broadway Ste 300
Tacoma, WA 98402-4454

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
[ ] Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

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Labor and Industries Division
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Seattle, WA 98104-3188

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
[ ] Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

DATED this 2nd day of November, 2012, at Lacey, Washington.

Connie L. Wall

Connie Wall, Paralegal