71101-6 71101-6

No. 71101-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WILFRED A. LARSON

Respondent,

v.

CITY OF BELLEVUE AND THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,

Appellants.

RESPONDENT'S BRIEF

Ron Meyers WSBA No. 13169
Matthew Johnson WSBA No. ~~37597~~ 27976
Tim Friedman WSBA No. 37983
Attorneys for Appellant
Wilfred A. Larson

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 APR 28 PM 1:37

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I. ASSIGNMENTS OF ERROR AND ISSUES

1. The superior court erred in allowing the jury to review a legal conclusion by the Board. **Issue:** Did the lower court err in allowing the jury to determine if the City rebutted the presumption, i.e. questions of fact?

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7. The superior court erred in awarding attorney fees and costs. **Issue:** Is Captain Larson entitled to attorney's fees and costs under Title 51 at the Board and Superior Court levels of appeal?

II. STATEMENT OF THE CASE

Captain Bill Larson is a career firefighter/EMT with the City. He has been employed by the City of Bellevue ("City") as a firefighter/EMT since 1979. His distinguished career includes a promotion to Lieutenant in 1989 and then to Captain in 1993. RP 263, 270. Captain Larson was diagnosed with malignant melanoma. CP 29. He filed a claim for benefits with the Department of Labor and Industries. His claim was ultimately allowed. CP 37. The City appealed to the Board of Industrial Insurance Appeals ("Board"). CP 40-42. The Board ruled in favor of the City. CP 26-35. Captain Larson appealed to the Superior Court. CP 1-2. The jury verdict was in favor of Captain Larson, having found that the City failed to present a preponderance of evidence to rebut the presumption that his malignant melanoma was occupational. CP 1775-76. Captain Larson filed a Notice of Presentation of Judgment with a motion for attorney's fees and costs. CP 1777. The Court's Order of Judgment awarded Captain Larson attorney's fees and costs. CP 1900, 1901, 1904. The City appealed. Additional facts related to individual issues are set forth below.

III. ARGUMENT

A. Standard of Review.

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) (citations omitted).

B. Whether a disease arises out of and is caused by conditions of employment are questions of fact.

This case involved a statutory presumption set forth in RCW 51.32.185, that Captain Larson's malignant melanoma is presumed to be "occupational." The term "occupational" means that Captain Larson's malignant melanoma arose naturally out of employment and that his employment was a proximate cause thereof. *RCW 51.08.140.* These are questions of fact. By virtue of RCW 51.32.185(1), and the definition of "occupational" in RCW 51.08.140, Captain Larson's malignant melanoma (a) was presumed to arise naturally out of his job and (b) was presumed to be proximately caused by his job (i.e. "Occupational"). These questions of fact were established by the presumption unless overcome by a preponderance of evidence. It is not the role of the judicial branch to weigh the City's evidence and decide whether the City proved by a preponderance that Captain Larson's cancer did not arise naturally and proximately out of his employment. Whether Captain Larson's cancer arose naturally out of and was caused by conditions of his employment are questions of fact."Proximate cause is

generally a question of fact." *White v. Twp. of Winthrop*, 128 Wash. App. 588, 595, 116 P.3d 1034 (2005). Whether a disease "arises naturally from conditions of employment" is factual as well.

RCW 51.32.185 (the statutory presumption) expressly states that the presumption can be rebutted by a preponderance of the evidence. *RCW 51.32.185(1)*. Triers of fact consider and weigh evidence and make decisions based on a preponderance of that evidence.

At the Board-level, the judge issued a finding of fact that Captain Larson's malignant melanoma did not arise naturally and proximately out of his employment. CP 35. The City argues this is the Board's "only" finding of fact related to causation, and thus the Board's decision that the presumption was rebutted must have been a legal conclusion. There is no basis given for that logic. In fact, at trial the City's counsel admitted that ". . . they ruled that, obviously, that the city had rebutted the presumption, and two, they didn't believe that - the board did not believe that Mr. Lasron had proven his disease was an occupational disease . ." RP 771.

It was presumed at the Board-level that Captain Larson's cancer arose naturally and proximately out of conditions of his employment (i.e. was "occupational"). The Board found in its "findings of fact" section of the Proposed Decision and Order that his cancer did not arise naturally and

proximately out of his employment (which necessarily means that the Board found that the City rebutted the presumption). CP 516

On appeal in the Superior Court, Captain Larson does have the ultimate burden to prove that the Board was wrong in deciding that the City rebutted the presumption. However, it is undisputed that Captain Larson was an eligible firefighter with one of the diseases enumerated in RCW 51.32.185, was entitled to the presumption, and that the City had to rebut that presumption. AB 42; CP 32, 33, 97. On appeal to the Superior Court, the presumption does not vanish. The City even inserted the presumption in Question 1 on its Proposed Revised Special Verdict form, and the City proposed a jury instruction on the presumption itself. CP 1749; CP 1742.

The City wants to re-structure an injured worker's constitutional rights to a trial-by-jury, in that the judge – and not the jury – would determine if the evidence presented by one party (the City) established on a more likely than not basis that the claimant's disease arose naturally out of his employment and was a proximate cause of his employment.

In review of the City's contention with Jury Instruction 9, paragraph 3, the City would fail to instruct the jury that it was the City's burden at the Board-level to rebut the presumption that Captain Larson's cancer arose naturally and proximately out of his employment. It would be confusing,

prejudicial, and simply nonsensical to not instruct the jury of this. The jury's job was to decide whether the Board was correct finding that the City rebutted the presumption of occupational-disease. CP 1775. In rendering a verdict, it is important for a jury to know who had the burden of proof as to the presumption. Burden of proof instructions are routinely given.

Paragraph 3 of the Court's Instruction 9 was informative, and it was necessary to give the jury the context it needed to decide if the Board's decision was correct or incorrect.

It is clear by the first two paragraphs of Instruction 9 that the Board's findings and decision is presumed correct and that the burden is on Captain Larson to establish by a preponderance of the evidence that the decision of the Board is incorrect. CP 1768. Also, in paragraph 3 of Instruction 9, the Court specifically inserted the words "at the hearing before the Board of Industrial Insurance Appeals" preceding the City's burden to rebut the presumption. The Court did this to make it clear that such was the burden <u>at the Board level</u>. RP 770. The City also claims that Instruction 10 and the Special Verdict form were somehow misleading and did not inform the jury of the law. Again, the City's position is completely reliant on their incorrect claim that whether a disease arose naturally out of and was caused by conditions of employment are somehow legal questions.

Moreover, no. 10 of the City's Revised Set of Proposed Jury Instructions (CP 1740) is identical to the Court's Instruction No. 10 (CP 1769), with respect to sections 1 and 2 (Larson's contentions with the Board's ruling). The City should be estopped from now arguing contrary to their own proposed Instruction 10. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d 13, (2007). Citations omitted. "The doctrine seeks " 'to preserve respect for judicial proceedings,' " and " 'to avoid inconsistency, duplicity, and ... waste of time.' " *Id.* Citations omitted

Three factors guide whether to apply the judicial estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party asserting an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 538-539.

Clearly, by submitting a proposed jury instruction at Superior Court, and then on appeal arguing that the Court's identical instruction was error,

the City's position fits all three categories above, and the City should be estopped from taking issue with Instruction 10. Notwithstanding the foregoing, the City cannot simply escape the fact that at the Board-level they had the burden to prove, with competent, admissible evidence, that Captain Larson's melanoma was not occupational. *RCW 51.32.185(1).*

It is undisputed that Captain Larson was a firefighter eligible for the statutory presumption of occupational-disease and that the City had the burden at the Board-level to rebut that presumption. Instruction 10 simply sets forth Captain Larson's contentions with the Board's decisions. CP 1769.

The City believes that the burden of proof at the Board-level "shifts back" to Captain Larson, if the City rebuts the presumption. Thus, the City should not be heard to contest that both sections 1 and 2 of Instruction 10 accurately represent the law and allow the parties to argue their case-theory.

The City contends the Court's Special Verdict form was error as to Question No. 1, claiming that it asked a question of law. First, the question posed to the jury in the City's Revised Proposed Special Verdict form is <u>substantively the same as</u> the Court's Special Verdict form. CP 1749; CP 1775, respectively. Again, the city should be estoppel from arguing contrary to their own proposed form. Second, even if not estopped, whether or not a disease arose out conditions of employment and was proximately caused by

employment are questions of fact.

C. The Jury Instructions and Verdict Form were proper.

The City's contention with Instruction 9 is their claim that it told the jury that to determine if the City rebutted the presumption, the City had to prove both that Larson's melanoma arose naturally out of and was proximately caused by his employment (i.e. what is presumed by RCW 51.32.185) AB 25. However, this was not the City's objection at Superior Court, where the City's contention was not the fact that it had to rebut both "proximate cause" and "arising naturally out of work," but rather on what it takes to rebut just the "proximate cause" prong of "occupational disease."

In the Superior Court, the City's counsel, in arguing about Instruction 9, said in pertinent part:

> ". . . what the burden is, as you can see from the statute that I passed to you, is simply to rebut the presumption by coming forth with evidence of other occupational – or other nonoccupational causes."
>
> "There is nothing in this statute that says the city has the burden to prove that his employment was not a proximate cause of his malignant melanoma. ..."
>
> "All we had to do was come forward with a preponderance of the evidence that other factors are the cause of his melanoma. That's all we had to do" – ". . . and there is nothing in the statute or in the Raum case . . . that we had the burden to disprove something, disprove that it was not, did not, his work did not play a role. That is not any place."

RP 771-772. Whether the City has to establish a non-firefighting cause and also establish that firefighting is not a cause has nothing to do with rebutting the "arising naturally out of" presumption, but rather squarely revolves around the "proximately caused by" presumption of RCW 51.23.185.

What the City is now contending is that Instruction 9 instructed the jury that to accomplish rebuttal of the statutory-presumption, the City had to rebut the "arise naturally out of" and "proximately caused by" prongs of the term "occupational disease." AB 24-25.

What it takes to rebut a presumption that a disease was proximately caused by employment (i.e. establishing a non-employment cause and eliminating employment as a case) is a different issue than whether the employer must rebut both the "arise naturally out of" and "proximate-cause" prongs of "occupational disease" to rebut the presumption.

Instruction 13 defines "arises naturally" and Instruction 11 defines "proximate cause." CP 1772; CP1770. They are distinct concepts, even distinctly set forth in the definition of occupational disease. RCW 51.08.140.

"The drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' " *State v. Roggenkamp*, 153 Wn. 2d 614, 624, 106 P.3d 196 (2005). "We may not delete language from an unambiguous statute:

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Id.* Internal citations omitted.

The City failed to make objection at the Superior Court that form the basis of their assignment of error on appeal. "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wash. 2d 412, 422, 705 P.2d 1182 (1985).

In *State v. Guloy,* Defendants objected to admission of a post-murder statement. *Id.* The basis of Defendants' objection at trial was that it was not proper impeachment nor was it within the scope of redirect. *Id.* The Washington Supreme Court held, "Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review." *Id.* Because the City did not make objection at trial on the grounds upon which it is now assigning error, the City has lost its opportunity for review of its assignment of error.

Regardless, Instruction 9 is a correct statement of the law. Instruction 9 is the burden of proof instruction, taken directly from WPI 155.03, with the exception of paragraph 3, which informs the jury of the City's burden of proof at the Board-level. CP 1768.

The presumption of RCW 51.32.185(1) is that Captain Larson's

cancer is occupational – meaning by definition that it arose naturally out of and was proximately caused by his employment. RCW 51.32.185 states that "This presumption of occupational disease may be rebutted by a preponderance of the evidence." [emphasis added]. Instruction 9, paragraph 3, specifically stated:

> "At the hearing before the Board of Industrial Insurance Appeals, the burden of proof is on the employer to rebut the presumption that 1) claimant's malignant melanoma arise naturally out of his conditions of employment as a firefighter and, 2) his employment is a proximate cause of his malignant melanoma."

CP 1768. The statute does not presume only that Captain Larson's melanoma arose naturally out of his employment, or only that it was caused by employment. The statute presumes both, and the City has to rebut what is presumed. In a recent Appellate Court opinion on another firefighter presumptive-disease case, the Court recognized this, when it said,

> "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. . . . 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 didsease and firefighting, the firefighter employee maintains the benefit of the occupational disease presumption."

Gorre v. City of Tacoma, Court of Appeals Division II (April 23, 2014) attached as appendix.[emphasis added]. Instruction 9 is a clear recitation of

the law.

Lastly, judicial estoppel applies to the City's contention that Instruction 9 incorrectly instructed the jury that to rebut the presumption, the City had to rebut both the "arise naturally" and "proximate cause" prongs "occupational disease." The City's Revised Proposed Special Verdict form specifically couched the rebuttal in the same terms as in paragraph 3 of Instruction 9, requiring both "naturally" and "proximately". CP 1749.

The City also contends that the Special Verdict form somehow perpetuated the error, claiming that the jury had to look back at instruction 9 to answer the first question. AB 26. The Special Verdict form asked the jury if the Board was correct in "deciding that the employer rebutted, by a preponderance of the evidence, the presumption that Plaintiff's malignant melanoma was an occupational disease?" CP 1775. Nowhere in the Special Verdict form are the words "arising naturally out of" or the word "and" or the word "proximately." Rather, the Special Verdict from used the phrase "occupational disease." The jury could look to Instruction 13 to find the definitions of "occupational disease" and "arising naturally out of employment," Instruction 11 for "proximate cause," paragraph 4 of Instruction 9 (for which no error was assigned) for "preponderance of evidence." CP 1772, 1770, 1768.

Instruction 9 is not an incorrect statement of the law. An occupational disease, by its statutory definition of RCW 51.08.140 means disease for which two facts apply: (1) it arose naturally out of employment and (2) it arose proximately out of employment. "The court is required, whenever possible, to give effect to every word in a statute. No word is deemed inoperative or superfluous unless it is the result of an obvious mistake or error." *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 479, 745 P.2d 1295 (1987).

The unique presumption at RCW 51.32.185(1) does not say that the employer may rebut "only a part of" the presumption. Rather, the statute states that "this presumption . . . " may be rebutted . . . . The Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318 (2003). "This presumption" to which RCW 51.32.185 refers, establishes two facts: that the subject disease arose naturally out of employment and that employment was a proximate cause of the subject disease. That, and nothing less than that, is what the City had the burden to rebut at the Board-hearing. The City cannot contort RCW 51.32.185 into a typical worker's compensation claim. It is not. It is unique, and the City had the burden to rebut what the law presumed as fact.

Lastly, referring to the Special Verdict form, the City states that "Question1 even refers to 'presumptions' which further highlights Larson's claim that the City had to rebut two different things." AB 26. The word "presumptions" is nowhere on the Special Verdict form. CP 1775-1776.

D. Substantial evidence supported the jury's verdict.

In the present case, the evidence overwhelmingly supported the jury's 11-to-1 verdict. ". . . even if were convinced that a wrong verdict had been rendered, this court would not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." *Burke v. Pepsi-Cola Bottling Co. of Yakima*, 64 Wash. 2d 244, 246, 391 P.2d 194 (1964).

A challenge to the sufficiency of the evidence admits the truth of the claimant's evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to the claimant. *Bott v. Rockwell Int'l,* 80 Wash. App. 326, 332, 908 P.2d 909 (1996). "The standard requires a conclusion by the trial court, and by us, that there is no evidence or inference derived therefrom by which this verdict can be sustained." *id.*

The City elicited testimony from Drs. Chien and Dick, dermatologists. The City also called Dr. Weiss, an epidemiologist. Unable to determine the cause of Captain Larson's malignant melanoma, the City's experts tried to

create causation by blaming a "risk factor" of UV ray exposure. However, the evidence established that the City's experts (1) cannot determine the cause of Captain Larson's malignant melanoma, (2) cannot determine the origin of Captain Larson's melanoma, (3) do not know if Captain Larson met the threshold in quantity or duration of UV rays to develop malignant melanoma, (4) do not know if chemicals can cause malignant melanoma, (5) admitted that melanoma can be found inside the body with no primary on the skin, (6) admitted that literature supports that maybe a majority of melanoma are not on sun exposed skin, (7) admitted that there can be more than one cause of melanoma, and (8) exhibited that they have a complete void of knowledge concerning the exposures that firefighters have to carcinogens.

Dr. Dick (the City's expert) testified that melanoma is diagnosed by biopsy, that to her knowledge there is no way by looking at the biopsy or at the melanoma itself to determine what the cause or origin of melanoma is, that there can be more than one cause of melanoma, and "at this point, I don't know if I can give a medical opinion because I don't know enough details of what he does at work." RP 722, 734, 731-32.

Dr. Chien (the City's expert) testified that the quantity or dose of UV exposure necessary to develop malignant melanoma is unknown, that medical science cannot pinpoint in time when a specific melanoma developed in a

patient, he does not know the exact time or circumstance under which any one individual who ever develops malignant melanoma actually became positive for that disease, and that it can never be determined what the exact cause of an individual's specific melanoma is.

RP 598, 604, 616, 648. Dr. Chien also testified that:

> A: "I can say that studies that have attempted to link melanoma incidents to chronic sun exposure have not made that link." "So if you look at whether or not asking about someone's chronic sun exposure can predict their risk for melanoma, the studies so far have said that it cannot. But it can for the other cancers, basal cell carcinoma." RP 621.

Dr. Weiss (the City's third expert) referring to the Registry Based Control Study of Cancer in California Firefighters, testified that "In this study they did find a suggestion of an increase in risk, 50 percent increase in risk of melanoma among firefighters." Rp 667. He further testified, when asked if the study took into account UV exposure, that this study "has no ability to do that" and that ". . . if there is a bias from that, it probably would not be terribly large. . . . I think that quantitatively it's not likely to be terribly important." RP 669-670. In responding to a question about an excerpt from a medical article that the incidence of melanoma is often higher on parts of the body least exposed to sunlight, Dr. Weiss conceded:

> A: "To me it just means that quantitatively there are many, **maybe even a majority of melanoma are not on sun exposed skin**. But to me that doesn't have any relevance in

> trying to judge the impact of other relevant factors." [emphasis added]. RP 694-695.

The City cannot determine that Captain Larson's melanoma is from UV rays if their own experts cannot determine the amount of UV rays necessary for Captain Larson to acquire melanoma or if their own experts do not know the cause or origin of his melanoma. The City's experts do not even know when Captain Larson's melanoma developed.

If the City cannot disprove firefighting as a cause, they have not rebutted the statutory presumption that firefighting <u>is a cause</u>. The WPI on proximate cause clearly provides that there may be more than one proximate cause of a condition and that the work conditions need not be the sole cause. See *WPI 155.06.01 Proximate Cause—Rejected Claim.*

Further, the City is hard-pressed to hang its hat on UV rays, when their own epidemiologist admits that literature supports the proposition that quantitatively there are many, if not a majority, of melanoma that are not on sun exposed skin. RP 694-695. Further, City expert Dr. Dick testified that not every incidence of malignant melanoma starts on the skin, there are cases where there is malignant melanoma inside of the body that was not present on the skin. RP 740-741.

The legislature has determined that there is a causal connection between firefighting and malignant melanoma and malignant melanoma

arises naturally out of firefighting. RCW 51.32.185. This presumption is not rebutted unless a trier-of-fact is persuaded by a preponderance of evidence.

Not only do the City's experts fall woefully short of establishing a non-firefighting cause or even extinguishing firefighting as a cause, but they actually gave testimony that highlights their lack of knowledge of the exposures to carcinogenic agents by firefighters. Dr. Dick testified that she does not know: (a) what exposures firefighters have to carcinogens, (b) their frequency of exposure to carcinogens, (c) their level of exposure to carcinogens, (d) the length of time they are exposed to carcinogens, or (e) the absorption rate of carcinogens to which they are exposed. RP 740. As to whether he would have developed melanoma but for firefighting, she said: "At this point, I don't know if I can give a medical opinion because I don't know enough details of what he does at work." RP 731-732. Dr. Dick also testified that she had not several of the medical articles/texts reviewed by Dr. Coleman, and that,

> "So if one were an expert on this, one would need to read those articles. **I am not an expert on environmental exposure in firefighters**. So if I were to read them, I would have an opinion, **but I certainly wouldn't be an expert**." [emphasis added.]

RP 735-736, 744-745. City expert Dr Chien testified that he does not know how frequently firefighters come in contact with polycyclic aromatic

hydrocarbons ("PAC"), and that he "does not know enough about the chemistry of fires to be able to comment" on whether PAC's are found as by-products of incomplete combustion in every fire. RP 624. He also testified to having no comprehensive knowledge one-way-or-the-other as to whether chemicals can cause malignant melanoma. RP 626.

The City, without knowing the cause or origin of Captain Larson's melanoma, tried to blame UV rays. The City's appellate brief notes that Captain Larson had a variety of UV exposures over the years.

However, Captain Larson has no history of sun burn or blistering sunburns. RP 292-293, 314-315, 318, 551. Captain Larson had never even become red to the point that he needed to apply aloe lotion. RP 292, 318. When he was growing up, Captain Larson would spend a couple weekends a month during the summer at a family cabin on Lake Kachess in the Cascade Mountains. His visits to Lake Kachess decreased in frequency to approximately once a month in the summer months. RP 285-286. He did not spend significant amounts of time in the sun. RP 289:13-15, 304, 306:15-18, 312-313. His tanning bed usage was extremely limited, starting out at two minutes, and never going more than ten minutes. RP 304. On his trips to Lake Chelan, Captain Larson's back was typically covered with a shirt. RP 304. If he was not wearing a shirt, he would generally be under an umbrella.

RP 289, 312. Captain Larson was not one that generally laid in the sun. RP 306. He testified "that wasn't my thing." RP 306. He would rather read his Louis L'amore books or stay in and watch the history channel. RP 312. Captain Larson even snorkled with his shirt on. RP 314-315. When he was a child, his parents always made sure he was covered in sun screen before going outside. RP 292-293.

The City contends that Captain Larson had a number of genetic characteristics which increased his risk of developing melanoma: greenish eyes, light colored hair, fair skin and freckles. To the contrary, Captain Larson and his wife testified to him having brownish-colored hair, not red or blonde. RP 241, 284, 323. Further, Captain Larson's heritage includes his mother's family, which has Italian heritage. RP 241. Captain Larson is hardly the nordic native that the City contends he is. With regard to freckles putting an individual at risk of melanoma, City expert Dr. Dick testified that the cause of dysplastic nevi (freckles) is unknown. RP 751. Therefore, the City cannot rule-out firefighting.

The City's own expert, Dr. Weiss, admitted that epidemiological studies may lead to inferences of possible causation if collectively strong enough to have a bearing on medical practice. RP 659. Dr. Kenneth Coleman, Captain Larson's Board Certified expert, testified to numerous

reliable medical articles addressing the increased rate of firefighters with melanoma compared to the general public, and also gave his own opinions consistent with those articles, and in doing so established that Captain Larson's exposures as a firefighter more likely than not were a cause of his malignant melanoma.

A complete mixture of toxic gases, fumes and particulates is produced when buildings and their contents burn. RP 414. The most commonly observed carcinogens in fire smoke are benzene and polyclic aromatic hydrocarbons, such as benzopyrene. RP 415. Firefighters are exposed to numerous combustion products, including but not limited to Polycyclic Aromatic Hydrocarbons - all of which are known or strongly suspected carcinogens. RP 419. Numerous toxins, including but not limited to PAC and even diesel fumes, are recognized or probable carcinogens that firefighters are known to be exposed to. RP 424.

Referring to Standardized Incidence Ratios of skin melanoma in Seattle/Tacoma firefighters being 1.2 compared to the general public, Dr. Coleman testified that "It means there's an increase in the incidence discovered in that group compared to the general population." RP 417.

Testifying about the peer-reviewed article entitled Registry-Based Case-Control Study of cancer in California Firefighters, Dr. Coleman was

asked, and answered,

> Q: "And what does 1.5 mean when talking about standardized incident rates or probabilities of occurrence of melanoma in firefighters vs the general population?"
> A: "They had an increased incidence of 1.5 times the general population in terms of melanoma." RP 418

In reference to a peer-reviewed article entitled Cancer Risk Among Firefighters: A Review and Meta-Analysis of 32 Studies," Dr. Coleman testified,

> A: "Well, that would mean two and a half- or correction –two and a quarter times increased incidence or 225, 225 percent increased occurrence of melanoma in that group."
> Q: "That group being firefighter?"
> A: "Correct." RP 427-428

In reference to an article entitled Brief Report, Organic Chemicals and Malignant Melanoma, Dr. Coleman opined that the increased rate of incidence of malignant melanoma in the people in that study who had exposure to chemicals supports Captain Larson's malignant melanoma being occupational based on his career as a professional firefighter. RP 428.

In reference to a peer-reviewed article published in Clinics in Dermatology, Dr. Coleman testified,

> A: "And I might point out that even this article in the early 1990s, it's - is reflective of the literature now for many years supporting the association between the exposure Captain Larson received and malignant melanoma." RP 502

In reference to a peer-reviewed article entitled Cancer Incidence In

Florida Professional Firefighters, 1981 to 1999, Dr. Coleman testified,

> A: "This article, as with the others, supports the fact that someone like Captain Larson, who has been a firefighter, due to his exposure to these carcinogenic agents, has an increased risk of developing melanoma as well as other cancers." RP 420.

Dr. Coleman testified, "And what the articles have shown here and what the research has shown is that they are exposed to these carcinogens or these cancer-causing agents through their work." RP 424.

Even the City's expert, Dr. Weiss, referring to the California-based Control Study as referenced above, admitted that the results of this study (50% increase in risk of melanoma among firefighters) are helpful, and add to the total of all of the studies. RP 667-668.

City expert Dr. Weiss testified that he does not doubt that exposure to PACs occurs in settings where incomplete combustion occurs. RP 696.

Captain Larson's expert Dr. Coleman testified to the rapidly growing literature that identifies many other malignant melanoma risk factors besides sunlight. RP 429, 500-501. Dr. Coleman was asked,

> Q: "What's the significance of 50 percent of the cases of melanoma aren't able to be explained as sun caused in particular is my question?"
> A: "Well, there's a growing body of literature and research that has acknowledged and discovered that a significant proportion of melanoma is not related to the sun or to ultraviolet radiation. So we have now again this growing awareness of melanoma being caused by other things than we

historically used to think . . ." RP 500-501.

Ultimately, Dr. Coleman testified,

> "And I believe it's relatively straight forward based upon his life and his exposure and his risk factors, his relatively minimal exposure to the other risk factors that make malignant melanoma a problem for people, that his occupational exposure as a firefighter **must be considered here, on a more probable than not basis, as one of the causes for his development of malignant melanoma**." [emphasis added].

RP 508. The City could also not overcome the overwhelming evidence that firefighters' bodies (not just their gear) are exposed to smoke, fumes and toxic substances. Captain Larson essentially spent his whole career working for the Ladder Company. The Ladder Company controls the atmosphere of the burning structure, works in and around the smoke more so than the Engine Company, goes on the roofs of structures to let gas and smoke vent out, and goes inside the burning and smoking structure to divert the gas and smoke, and is almost always the last to leave the scene. RP 250-251.

The second phase of fighting fires, as heard in this trial, is the salvage and overhaul phase. In this phase, soot is swept from walls, drywall and gypsum board is ripped down, and insulation and dust is flying in the air. RP 251. Particles are floating in the air. RP 249. Drywall is laying in the water. RP 368. Insulation, wiring, light fixtures are burned to the point where they are hanging down from the ceiling. RP 368. The remains of everything that

burned are present. RP 368.

Captain Larson testified that quite often he would remove his breathing apparatus and use a mere filter mask or sometimes nothing at all, to complete the overhaul phase. RP 249.0 Firefighter Randy Hart, who responded to numerous residential fires from 1997 to 2010 when working with Captain Larson testified that when exposed to insulation and dust in a dry post-fire scene, typically no self contained breathing apparatus ("SCBA") is worn, and that there would be times where you would have a "dust mask that you could put on." RP 370. He also testified that no SCBA is worn in brush fires or wildland grass fires. RP 371

Firefighter Hart testified that inadvertent exposure to smoke, fumes and toxic substances occurs when the firefighter is not wearing SCBA protection. RP 363.

After almost <u>every fire</u>, Captain Larson would have black sooty junk coming out of his nose, for days. RP 252. He smelled smoke coming out of his hair, for days, and experienced headaches and sore throats. RP 252. He could go for many hours before having the opportunity to shower after a fire, where exposed to smoke, fumes and toxic substances. RP 307.

Firefighter Halbert, who worked for 16 years with Captain Larson testified about how his white towel would be covered in black soot after

showering at the station. RP 390. He testified about how he would also have black soot inside of his nose after fires, and about how he would have upper respiratory black phlegm and black mucous. RP 390, 392.

In Captain Larson's second ten years with the City of Bellevue Fire Department, the fire department became more aggressive in ventilation operations, began sending Captain Larson's ladder truck company to fires in neighboring cities and his exposure to smoke, fumes and toxic substances increased. RP 252-253. As a Captain, he was still part of the crew, was still engaged in fire suppression, but would also serve at the Incident Commander and was always smelling diesel fumes from exhaust of the suburban command vehicle. RP 302.

Also, Dr. Coleman testified about the "Healthy Worker Affect" and how it lends itself toward support of Captain Larson's employment being a cause of his cancer.

> A: "The healthy worker effect simply means that you are looking at a group of people that have been selected out who are healthier than any control group that you might use to compare them to. For instance, firefighters have to go through rigorous selection process and training and would be generally viewed as having a better health or higher level of health than the general population."
> Q: "Would you expect then that firefighters would have lower incidences of cancer or the same incidence of cancer or a higher incidence of cancer if you didn't consider the healthy worker effect and then if you did? I just want to know what that means in lay terms."

> A: "Well, the literature, it's pretty clear, the general medical literature, that healthy people, for a variety of reasons, including their diets and including their exercise and including the things that they put in their body, that healthy people generally have lower rates of more than one type of cancer. So if you look at the healthy - that healthy group of people or the healthy worker effect, you would expect overall that they would have a lower incidence of a certain number of cancers than the average population. So if that group of healthy people ends up having an equal number of cancers to the general population, then there has to be a reason for why they got cancers when you'd expect them to get - be lower - have a lower cancer rate."
>
> . . .
>
> A: "If a person in a healthy worker group such as Captain Larson, Captain Larson or any firefighter, if they get a - if they get cancer at a rate equal to the general population or even - or higher than the general population, then you have to ask yourself - and that's what the studies do - okay, what kinds of things might be going on in that group's life or in that group's work life to cause them to have an increased risk - or an increased incidence of a particular type of cancer? And that's where you get to then looking at what goes on in a firefighter's life. They're exposed to things in the air, in their - in their food. You'd look at all kinds of factors. And what the articles have shown here and what the research has shown is that they are exposed to these carcinogens or these cancer-causing agents through their work."

RP 421-424. "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash. 2d 907, 915, 32 P.3d 250 (2001). Substantial evidence supports the jury's verdict.

E. The Court did not err in allowing Dr. Coleman's testimony.

1. Dr. Coleman is a qualified expert who assisted the jury.

At the Board hearing, Captain Larson presented the expert testimony of Dr. Kenneth Coleman. Dr. Coleman is a medical doctor licensed to practice medicine in Washington State. RP 401-401, 410. Dr. Coleman is Board Certified by the American Board of Family Practice. Rp 409. To list a few credentials, Dr. Coleman has been a licensed physician since 1974, and has been the director of multiple hospital emergency departments, has been a family practitioner, and has been the medical advisor to the American Cancer Society chapter in Republic. RP 401-412.

Dr. Coleman reviewed twelve medically-reliable journal articles or medical texts in relation to melanoma in firefighters and the carcinogens to which firefighters are exposed. RP 412.

Pursuant to ER 803(18), excerpts from some of these learned-treatises were called to Dr. Coleman's attention. Dr. Coleman testified to having reviewed this literature, to the literature being reliable authority in the field of medicine regarding melanoma, and to his having relied on this literature and their particular content. RP 412, 413.

Furthermore, independent of, and prior to, the present action, Dr. Coleman researched the causes, the treatment approaches and the various types of malignant melanoma. RP 517-518. Notably, Dr. Dick testified that melanoma is diagnosed with a biopsy. RP 722. Dr. Coleman testified that he

has an active medical practice and is an expert in the diagnosis of malignant melanoma in terms of skin diseases, doing biopsies, recognizing changes in skin lesions etc . . . RP 517. Dr. Coleman testified that as a physician, he has a good understanding of malignant melanoma, and that physicians are expected to be capable of studying and understanding diseases such as melanoma. RP 517.

Dr. Coleman gave testimony about the specific content of the relevant literature, which was of great assistance on the topics of increased incidence of melanoma in firefighters, the relationship between chemicals and cancer, firefighters' exposure to cancer-causing agents through work, and the growing literature that identifies many other risk factors for malignant melanoma other than sunlight. For example see pages 22-25 supra.

Dr. Coleman testified, "I didn't form my opinion, ma''m, based upon one article. I formed my opinions based upon a rather extensive review of literature." RP 534. The City's own expert, Dr. Weiss, admitted that epidemiological studies may lead to inferences of possible causation if collectively strong enough to have a bearing on medical practice. RP 659. The City is certainly entitled to differ in its opinions on the bearing of the literature, but differing opinions is not the threshold for exclusion of expert witnesses.

Ultimately, Dr. Coleman gave his unequivocal opinion that Captain Larson's occupation as a firefighter was more likely than not a cause of his malignant melanoma.

> "Yes, I did form an opinion. And I believe it's relatively straightforward based on his life and his exposure and the risk factors, his relatively minimal exposure to the other risk factors that make malignant melanoma a problem for people, that his occupational exposure as a firefighter must be considered here, on a more probable than not basis, as one of the causes for his development of malignant melanoma."

RP 508. See also RP 509. ("On a more probable than not basis, one of the causes for his malignant melanoma is his exposure as a firefighter.")

Dr. Coleman, based on his knowledge, skill, experience, training and education, is more than qualified to testify as medical expert in this case, and his testimony and opinions were undoubtedly of assistance to the trier of fact. An ER 702 challenge is subject to a standard of review, "whereby the appellate court accords deference to the discretion of the trial court." *State v. Kalakosky*, 121 Wn. 2d 525, 541, 852 P.2d 1064 (1993). "The standard of review is whether the trial court abused its discretion in admitting the testimony." *Kirk v. Washington State Univ.*, 109 Wn. 2d 448, 459, 746 P.2d 285 (1987).

The Court did not abuse its discretion in allowing testimony from a licensed medical physician, who has researched not only the causes but the

treatment approaches and the various types of malignant melanoma, who has an active practice involving the diagnosis of malignant melanoma in terms of skin diseases, doing biopsies, recognizing changes in skin lesions, and who has actually reviewed various medically-reliable peer-reviewed literature on the issues central to this claim.

In reference to the relatedness of cancers to the exposures from firefighting, Dr. Coleman testified that ". . . the studies that we've been talking about here, malignant melanoma shows up time after time." RP 526. In reference to an article pointing out that the smoke from most fire likely contains known or suspected carcinogens, Dr. Coleman testified, ". .. What is says here in this article is what is reiterated and been found by many investigators in other articles as well." RP 415-416. Dr. Coleman also testified on cross examination, referring to the 1994 study concerning Tacoma firefighters, Cancer Incidence Among Firefighters in Seattle and Tacoma, Washington: "Does this study support that firefighter exposure increases your risk for melanoma, and the answer is yes, based on this study, it supports it." RP 541. In reference to an article that stated

> "in addition to those professions previously described, other occupation and environmental exposure to multiple chemicals are associated with an increased risk of multiple myeloma, MM, morbidity and mortality. They include firefighters . . . Individuals who reside in areas with a high concentration fo chemical or petroleum industry also have an increased rate or

an increased mortality from MM, multiple melanoma . . . "

Dr. Coleman testified, "This article also supports the proposition that Captain Larson's malignant melanoma was occupationally related to his firefighting activity." RP 499-500.

As to the plethora of known or probable carcinogens to which firefighters are routinely exposed, the increased incidence of melanoma in firefighters, the application of the healthy worker effect, and a more likely than not cause of Captain Larson's melanoma, Dr. Coleman's testimony was very helpful in synthesizing and explaining this evidence as it relates to the likelihood that Captain Larson's exposures as a firefighter were a cause of his melanoma.

Dr. Coleman determined that the literature supports his conclusion that Captain Larson's job was a cause of his malignant melanoma. Dr. Coleman did not render his opinion in a vacuum. To the contrary, he testified:

> ". . . But now we take not only the healthy firefighter, but now we take the individuals involved and now we take whether or not they're - have had sunburn exposures, repeated sunburn exposures in their youth, whether or not they've had - whether or not they have red hair, and we take all the other factors when we look at the individual. Because you're talking to me about individuals now. We look at all those factors in Captain Larson and then we look at his exposure as a firefighter. That's how we can say we've got literature that supports the exposure of firefighters. If he doesn't have these

> other factors, he wasn't at high altitude anytime, **so we take all that - all that together and then we can say on a more probable than not basis, his exposure as firefighter was a cause of his melanoma.**"

RP 543,543.

> "If, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that the causal connection exists, we know of no principle which would forbid the drawing of that inference."

Sacred Heart Med. Ctr. v. Dep't of Labor & Indus., 92 Wash. 2d 631, 636-637, 600 P.2d 1015 (1979).

> "Here the medical testimony showed that there is generally a greater probability that a person in the petitioner's employment will contract hepatitis than there is that someone in another employment will do so. In other words, there is a greater risk of getting the disease when one is employed in a hospital." *Id.*

Moreover, to be of assistance and competent, Dr. Coleman's testimony need not prove the exact cancer-causing carcinogen that caused Captain Larson's melanoma.

> "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 workers' compensation statute a requirement that the claimant identify the specific toxic agent responsible for his or her disease or disability**."

Intalco Aluminum v. Dep't of Labor & Indus., 66 Wash. App. 644, 656, 833 P.2d 390 (1992). [emphasis added].

> "We agree with the Earl court that **the plaintiff should not**

> **be denied recovery simply because the precise etiological link between the plaintiff's disease and a specific toxin or toxins in the work place has not yet been made.**
>
> Further, we find the reasoning in Robinson persuasive. **Because the claimant is only required to demonstrate that conditions in the work place more probably than not caused his or her disease** or disability and because we are to construe the Act liberally in favor of the claimant, **we hold that the workers' compensation statute does not require the claimant to identify the precise chemical in the work place that caused his or her disease**."

Id at 658. [emphasis added].

2. The use of learned treatises was proper and the Court did not abuse its discretion.

The City contends that the "statements from the articles read by Larson do not fit that exception" (referring to the hearsay exception of ER 803(a)(18)) "as there was no testimony that these statements were relied upon by Dr. Coleman in providing his opinions." AB 35.

To the contrary, pursuant to ER 703 and ER 803(a)(18), Dr. Coleman testified (a) that the articles and texts that he reviewed are reliable in the field of medicine regarding malignant melanoma, (b) that the types of articles that he reviewed are the same types that medical experts would review and reasonably rely upon in looking at a cause of action of malignant melanoma in the general population and in firefighter, including the malignant melanoma of Captain Larson, and (c) that he relied on these articles and their

particular content regarding causation of malignant melanoma. RP 412-413.

ER 703 provides that

> "The facts and data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

While the medical articles themselves may not be received as exhibits, it is permitted that the excerpts brought-to-light during direct or cross examination are admissible and may be read into the record.

> "A witness permitted by the court to testify as an expert may rely on statements contained in treatises, periodicals, and pamphlets. These **statements are not excluded by the hearsay rule, and they may be read into evidence provided the expert has testified to their reliable authority**."

State v. Rangitsch, 40 Wash. App. 771, 779-80, 700 P.2d 382 (1985).[emphasis added]. Specific statements in the various learned treatises were called to the attention of Dr. Coleman, and substantive questions were asked of Dr. Coleman relating thereto. Whether counsel, opposed to Dr. Coleman, read the statements in the learned-treatise is not determinative of the admissibility of statements from learned treatises an opinions related thereto. In fact, ER 803(a)(18) begins with "To the extent **called to the attention** of an expert witness . . . statements contained in published treatises . . ." The City has admitted that passages from learned

treatises being read into the record to endorse or support Dr. Coleman's opinions is a proper use of ER 803(a)(18). See AB: 35-36. Apparently, the City believes that Dr. Coleman reading the passage is proper, whereas counsel reading the passage (i.e. calling it to the expert's attention) is not proper. That counsel, rather than Dr. Coleman, read the excerpts is not improper, and certainly not an abuse of discretion.

What is important, is that Dr. Coleman testified that these learned treatises are reliable authority in the field of medicine regarding malignant melanoma and that he relied on these learned-treatises and the particular content therein. RP 412-413. The City wants to inject requirements into ER803(a)(18) that simply don't exist, that is, a requirement that (a) the witness has to be the "reader" of the statement (b) the witness cannot be asked if the statement was read correctly, and (c) the witness has to then give an explanation for each statement as to how it supports his testimony. These provisions are nowhere in ER803(a)(18). ER 803(a)(18)—Learned Treatises—provides:

> To the extent **called to the attention** of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, **the statements may be read into evidence** but may not be

received as exhibits. [emphasis added]

It is neither leading nor "attorney testimony" to read the statement aloud and then and questions about it. ER 803(a)(18) makes it clear that the statements must be called to the witnesses's attention. ER803(a)(18) also specifically states that these "statements" may be "read into evidence."

Regardless, Dr. Coleman's testimony went above-and-beyond what was required under ER803(a)(18). For example, Dr. Coleman testified: "I do agree with that statement. What it says here in this article is what is reiterated and been found by many investigators in other articles as well." RP 415-416. Other examples of Dr. Coleman going above-and-beyond the requirements of ER803(a)(18) are found at RP 416, 418, 420-428, 502-503.

The standard of review for a trial court's ruling on admissibility of evidence is abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *Id.* That certainly did not occur here. Rather, the City is attempting to silence Dr. Coleman from making use of the damaging medical literature. ER803(a)(18) was properly applied and followed.

F. Exclusion of Dr. Hackett was proper.

The City presented expert testimony of three experts and wanted to

add a fourth. CP 1623:22-23. Captain Larson brought a Motion to Exclude the City's cumulative expert witnesses and testimony at the Board-level. CP 565. See also CP 577. Captain Larson offered expert testimony from one expert—Dr. Kenneth Coleman.

The Board allowed the City to offer testimony from three experts - (1) treating Board Certified dermatologist Sara Dick, M.D (RP 717); (2) Noel Weiss, M.D., Dr.P.H., an expert in epidemiological studies(RP 656); and (3) Andy Chien, M.D., Ph.D., another Board Certified Dermatologist who holds a medical degree and Ph.D. in molecular pharmacology and biological chemistry and specializes in research into malignant melanoma (RP 572-573).

In Superior Court, in the same motion where the City asked the Court to exclude Captain Larson's only expert witness, the City moved the Court to allow it to add **a fourth expert (a third dermatologist)**, Dr. John Hackett. CP 1622. Dr. Hackett's testimony —a fourth expert of the City and a third dermatologist—was cumulative and the Court properly ruled to allow only the testimony of Dr. Chien, Dr. Weiss, and Dr. Dick. RP 34.

The City cannot escape that it already had a dermatologist in Dr. Dick and a dermatologist in Dr. Chien. The City argues that dermatologist Hackett should be allowed to testify because he examined Captain Larson. However,

one of the two dermatologists already testifying for the City (Dr. Dick) was Captain Larson's treating provider. RP 718. As a treating provider, Dr. Dick not only examined Captain Larson, but she treated his malignant melanoma since 2009, and at the time of trial she continued to see him once a year for surveillance. RP 718, 720. Therefore, the City already had a dermatologist who specializes in malignant melanoma (Dr. Chien) and a dermatologist who examined and treated Captain Larson (Dr. Dick).

Nonetheless, the City contends that somehow a **third dermatologist** (Dr. Hackett) is not cumulative—implying that his job was to examine Captain Larson "thoroughly," that is, to ascertain risk factors and the role of those risk factors in development of Captain Larson's melanoma. AB: 37.

Per the City's own representation at Superior Court of the subject matter of Dr. Hackett's testimony, "In his perpetuation testimony, Dr. Hackett testified as to his examination of Larson, his findings, and his opinions as to the cause of Larson's malignant melanoma." CP 1624-1625. The cumulative nature of adding a third dermatologist witness for the City is self evident.

Dr. Dick is a Board Certified dermatologist who examined and treated Captain Larson for his malignant melanoma. RP 717, 718, 720. The City perpetuated Dr. Dick's testimony, and specifically discussed the (1) various risk factors of malignant melanoma(including but not limited to use of

tanning beds), (2) his skin complexity, hair-color, ethnicity, family history, UV exposure, (3) her surveillance of his skin, (4) her routine checks of his skin for cancer and (5) her treatment of Captain Larson. Moreover, Dr. Dick was also asked to give her opinion of the cause of Captain Larson's malignant melanoma—which she did. CP 721, 722, 724, 719, 734, 718, 730, 731-732.

Notably, in a different section of their appellate brief, the City emphasizes that Dr. Dick treated and examined Captain Larson. AB: 40.

Courts have the authority to limit the number of expert witnesses. *Vasquez v. Markin,* 46 Wn.App. 480, 731 P.2d 510 (1986); *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.,* 113 Wash.2d 123, 130, 776 P.2d 666 (1989), *Orion Corp. V. State,* 103 Wash.2d 441, 462, 693 P.2d 1369 (1985). Similarly, a trial judge may exercise discretion to exclude cumulative or repetitive witness testimony. *See, Miller v. Peterson,* 42 Wn.App. 822, 714 P.2d 695 (1986) (citing CR 16(a)(4)).

> The admissibility and scope of an expert's testimony is a matter within the court's discretion. [Citations omitted] Similarly, the admissibility of cumulative evidence lies within the trial court's discretion. [Citations omitted] *Christianson v. Munson,* 123 Wn.2d 234, 241 867 P.2d 626, (1994).

Trial judges serve as "gatekeepers" and limit the nature and scope of the evidence which may be presented at trial. *Resse v. Stroh*, 74 Wn. App. 550, 559, 874 P.2d 200, aff'd 128 Wn.2d 300, 907 P.2d 282 (1995). This is

particularly important when parties list multiple experts in the same field.

The City wanted Dr. Hackett so that it could add another "hired expert" to their arsenal. Notably, buried in a footnote on Page 4 of the City's motion to add Dr. Hackett, the City revealed its true intentions—to call as many retained experts as possible—even if it already has two dermatologists. The footnote provides: "The City did offer testimony of the [sic] Dr. Sarah Dick at the hearing, but Dr. Dick is Larson's treating dermatologist and not a witness retained by the City." CP 1625.

In *Bruce v. Byrne-Stevens & Assocs. Engineers, Inc.*, 113 Wn.2d 123, 129-30, 776 P.2d 666 (1989), the Supreme Court held the parties have no right to call experts to promote their own tactical goals. As the court recognized in *Bruce*, even experts retained by the parties testify on behalf of the court, and not the parties. *Id at 129-130.*

ER 702 establishes that the purpose of an expert is to assist the trier of fact. ER 401, roughly restated, defines evidence which is relevant as that having the tendency to make the existence of a fact more or less probable. ER 403 addresses the exclusion of relevant evidence from trial, and says that evidence may be excluded if its probative value is substantially outweighed by unfair prejudice, undue delay, waste of time, or needless presentation of cumulative evidence.

Stacking-the-deck with experts who will all express similar opinions on the same issues is prejudicial, cumulative and causes undue delay. Such testimony would have invited the trier of fact to decide the case based upon the sheer number of expert witnesses, the heavy volume of testimony from one side, and the repetition of the testimony. Certainly, the Superior Court did not abuse its discretion in excluding a third dermatologist.

Our Industrial Insurance Act is remedial in nature, and therefore, must be liberally construed with all doubts resolved in favor of the worker. *Dennis v. Department of Labor & Indus.,* 109 Wn.2d 467, 470 (1987). **Where reasonable minds can differ over what provisions in the Workers' Compensation Act mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker in every case**. *Gallo v. Department of Labor & Indus.,* 119 Wash. App. 49, 81 P.3d 869 (2003).

G. The Court did not err in not giving Instruction 15.

The Court did not err in not giving the City's proposed Instruction no. 15. At trial, Captain Larson pointed-out that this WPI was discretionary, and cited two cases in that regard. RP 806:3-15. The City admitted that this WPI "does say the instruction on attending physicians need not always be given. I agree with that." RP 807:8-15.

> "Whether to give a particular jury instruction is a matter within the trial court's discretion. A trial court's refusal to give a requested instruction, therefore, is reviewed only for abuse of discretion. A trial court abuses its discretion if its decision was manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons."

Boeing Co. v. Harker-Lott, 93 Wash. App. 181, 186, 968 P.2d 14 (1998). In that case, Harker-Lott requested the "special consideration for attending physician" instruction and the Court declined to give it. *Id at 185.* On appeal, the Court noted that the instruction was not necessary for the jury to understand Harker-Lott's theory of the case. *Id at 187* . The Court also noted that a general instruction already told the jury that the jury could ,

> "take into account the opportunity and ability of the witness to observe, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight."

Id. In the present case, that general instruction is essentially paragraph 5 of Instruction No. 1. CP: 1758. Additionally, Instruction 4 from WPI 2.10, provides additional guidance on this topic. CP 1763.

Similar to *Harker-Lott,* in this case other instructions (1 and 4) allowed the City to argue that special consideration be given to Dr. Dick because her goal was to treat Captain Larson over a period of time. The Court in *Harker-Lott* also stated that "the concept of giving special consideration to an attending physician was not so esoteric that the jury needed a special

instruction from the judge to understand it." *Boeing v. Harket-Lott* at 187.

An error on jury instructions requires reversal only if it is prejudicial. An error is prejudicial if it affects the outcome of the trial." *id.* It is incredibly unlikely that this instruction for Dr. Dick's testimony would have affected the outcome – given Dr. Dick's testimony. To that end, see page 16 and 19 supra for excerpts of Dr. Dick's testimony.

H. Attorney's Fees.

Captain Larson is entitled to the attorney's fees and costs incurred at the Board-level and Superior Court. RCW 51.32.185 provides in part:

> (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 <u>all reasonable costs of the appeal</u>, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.*** [emph added].

Further, RCW 51.52.130 also contemplates the Court fixing fee for the attorney's services before the department, the board and the Court, when a decision of the Board is reversed on appeal to the Superior Court.

Captain Larson's claim was accepted by the Department. He had no

reason to appeal to the Board, as he was already entitled to benefits. Had the City not appealed, there would be no fees and costs incurred by Captain Larson at the Board-level, the Superior Court level, or in the Appellate Court. The City's construction of the worker's compensation fee statutes uproot the policy and purpose of the Industrial Insurance Act.

> "The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the ***incurring of legal expense or the diminution of his award*** . . ." [bold italic emphasis added]

Harbor Plywood Corp. v. Department of Labor & Indus., 48 Wash.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Department of Labor & Indus.*, 26 Wash.2d 51, 57, 173 P.2d 164 (1946)).

The purpose of the Industrial Insurance Act is to make certain an employee's relief, and to provide for recovery regardless of fault or due care on the part of either the employee or employer. *Monloya v. Greenway Aluminum Co., Inc.*, 10 Wash. App. 630, 519 P.2d 22(1974). The longstanding public policy mandating "sure and certain relief for workers" set forth in RCW 51.04.010 favors the injured worker. *See e.g., Flanigan v. Department of Labor and Industries*, 123 Wash.2d 418, 869 P.2d 14 (1994).

<u>All doubts as to the meaning of the Industrial Insurance Act are to be resolved in favor of the injured worker</u>. *Taylor v. Nalley's Fine Foods*, 83

P.3d 1018 (2004). Since 1987, the same year the presumptive disease statute was enacted by the Legislature, our Supreme Court has mandated that all doubts are resolved in favor of the injured worker.

> "The guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."

Dennis v. Dep't of Labor and Indus., 109 Wn.2d 467, 470 (1987). It makes little sense to construe RCW 51.32.185 as precluding recovery of the worker's fees and costs incurred at the Board-level when it was the government who appealed from the Department's claim-allowance and it was the government who ultimately lost in Superior Court.

In the present case, the jury found, based on the record before the Board, that the Board was wrong and Captain Larson should have won at the Board-level. Had the Board got it right, the City acknowledges that Captain Larson would be entitled to fees and costs. AB 42. RCW 51.32.185 should not be construed such that the worker actually loses ground, despite ultimately prevailing in Superior Court. It was the worker whose claim was accepted by the Department and the worker who <u>ultimately</u> prevailed after the City started the initial appeal. The way the City construes the applicability of RCW 51.32.185(7) in this case provides protection only to the Employer and

not the worker.

In a case involving the presumption, RCW 51.32.185(7) provides that the court shall order that **all reasonable costs of the appeal**. To exclude the firefighter's costs and fees incurred at the Board-level when it was determined by a jury that his claim was allowable at the Board level contorts the fee provisions of RCW 51.32.185 and the underlying, yet overwhelming policy of protecting workers, opposed to employers.

V. CONCLUSION

Based on the foregoing, Captain Larson respectfully requests that this Court affirm the lower Court's rulings and uphold the jury's verdict.

DATED: April 24, 2014.

RON MEYERS & ASSOCIATES PLLC

By: _____

Tim Friedman, WSBA No. 37983
Ron Meyers, WSBA No. 13169
Matthew Johnson, WSBA No. 27976
Attorneys for Respondent

APPENDIX #1

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2014 APR 23 PM 3:29

STATE OF WASHINGTON

BY DEPUTY

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

[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.

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[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:

[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

[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.

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. RESPONDENT'S BRIEF
2. DECLARATION OF SERVICE

ORIGINAL TO:
Via Facsimile

Richard D. Johnson, Clerk of the Court
Washington State Court of Appeals, Division I
600 University St
One Union Square
Seattle, WA 98101-1176
(206) 389-2613

COPIES TO:

Attorneys for Department of Labor and Industries:
Beverly Norwood Goetz
Office of the Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188
[✓]Via Hand Delivery / courtesy of ABC Legal Messenger Service
[✓] Via Email: beverlyg@atg.wa.gov

Attorneys for Appellant City of Bellevue:
Cheryl A. Zakrzewski
City of Bellevue
PO Box 90012
Bellevue, WA 98009-9012
[✓] Via Facsimile: 425-452-7256
[✓]Via Hand Delivery / courtesy of ABC Legal Messenger Service

DATED this 24th day of April, 2014, at Lacey, Washington.

Mindy Leach, Paralegal

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2014 APR 28 PM 1:37

No. 71101-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WILFRED A. LARSON

Respondent,

v.

CITY OF BELLEVUE AND THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,

Appellants.

DECLARATION OF SERVICE OF RESPONDENT'S BRIEF

Ron Meyers WSBA No. 13169
Matthew Johnson WSBA No. 37597
Tim Friedman WSBA No. 37983
Attorneys for Appellant
Wilfred A. Larson

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