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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 NOV -4 AM 10:43

No. 66974-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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PATRICK E. MCKEOWN,

Appellant,

v.

CITY OF MOUNTLAKE TERRACE AND WASHINGTON STATE  
LABOR & INDUSTRIES,

Respondents.

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## I. PREAMBLE

### **RCW 51.04.010 Declaration of police power — Jurisdiction of courts abolished.**

. . . The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and **sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault . . . .** [bold emphasis added]

### **RCW 51.12.010 Employments included — Declaration of policy.**

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

**This title shall be liberally construed** for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment. [bold emphasis added]

## II. ARGUMENT

### **A. Preemptive claim denial by the City and State Agency should not be accepted by this Court as justification for claim denial.**

The United States Supreme Court has held that the statute of limitations for an occupational condition caused by continuous exposure to harmful elements will be tolled until the “accumulated effects of the deleterious substance manifest themselves.” *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 252 (1949) (quoting *Assoc. Indem. Corp. v. State Indus. Accident Comm’n*, 124 Cal.App. 378, 12 P.2d 1075, 1076 (1932)). The *Urie* holding is also known as the discovery

rule. In *Funkhouser v. Wilson*, 89 Wash. App. 644, 666, 950 P.2d 501 (1998), *affirmed*, 138 Wn.2d 699 (1999), the court determined that the discovery rule applies to all statutes of limitations.

The *Urie* court held that the fact the injured worker may have had his disease without knowing it for more than three years before he sued for compensation did not bar his claim when the time which elapsed between his discovery of his condition and the filing of suit did not exceed three years, the period of limitations then prescribed. The court explained that if *Urie* was barred from prosecuting his action, “. . . it would be clear that the federal legislation afforded *Urie* only a delusive remedy. It would mean that, at some past moment in time, unknown and inherently unknowable even in retrospect, *Urie* was charged with knowledge of the slow and tragic disintegration of his lungs; under this view, *Urie*'s failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.” *Urie*, 337 U.S. at 169.

Similarly, in this case, charging firefighter McKeown with the knowledge of the slow, severe and progressive damage to his heart, damage which was unknown and inherently unknowable, constitutes denial of his right to compensation. If a firefighter with a presumptive “heart problem” is barred from prosecuting an action for career ending disease, it will be clear

that the mandatory presumptive disease legislation affords firefighters only a delusive remedy.

A number of the conditions covered in RCW 51.32.185, including “any heart problems” and cancers, are not known or knowable for an indeterminate period of time – sometimes for years. The heart problem begins at the cellular level and there is no early indication to the firefighter or to the doctor that anything is amiss.

Until a firefighter has a diagnosis that places him under the protection of the presumptive disease statute, and has knowledge of both the diagnosis and the statute, he does not know he is even entitled to the benefits of the statute. On February 3, 2008, Dr. Siecke notified firefighter McKeown that he had an occupational disease, and on February 5, 2008, Dr. Siecke signed the claim form, which was provided to the Department of Labor and Industries on February 12, 2008. As a firefighter with a presumptive “heart problem”, he was then, and is now, entitled to the benefit of the presumption of occupational disease and of the burden-shifting onto the City pursuant to RCW 51.32.185. Until he has the “heart problem” diagnosis, and that diagnosis is related to his career by a medical doctor, he lacks the knowledge to file, and cannot file, a presumptive disease claim. By the strict and draconian reading favored by the City and State Agency, every firefighter would face the impossible task of filing a claim for a yet unknown

occupational disease process upon leaving employment in order to protect rights to the presumption for heart disease, infectious disease, cancer or respiratory disease that does not manifest within 5 years of ending employment. Such a requirement would be absurd.

The City and the State Agency are correct – if you ignore the discovery rule and the statute requiring a doctor to relate the claim to firefighting – that if a firefighter has an RCW 51.32.185 diagnosed condition, he has 60 months from the last date of employment in which to file his claim. If the firefighter fails to file his presumptive occupational disease claim in that five year time frame, in spite of having obtained a proper diagnosis and the required statutory written notice from his doctor that such a condition and claim exists, he would lose his entitlement to the benefits of the presumption. His claim would then be treated as any other workers’ compensation claim under the Industrial Insurance Act. But the facts here are vastly different because the diagnosis connecting his heart problems to his occupation were not even made until 2008.

If the firefighter has no knowledge that such a claim exists, he is not able to file any sort of claim, much less a presumptive occupational “heart problem” claim. If he is not aware of his right to claim benefits of the statute, based upon written notice by a physician, it is inconsistent with reason or logic or common sense to claim he is subject to a statute of limitations prior

to those events occurring. Once the firefighter has the knowledge that he suffers from a presumptive disease process, then and only then, does the notice statute require that he file a claim within two years of that notice. The limits imposed by RCW 51.32.185 can only apply to those cases where the firefighter has knowledge of his claim. Any other interpretation punishes the firefighter for failing to self-diagnose an unknown occupational condition.

The “catch 22” circular argument advanced by the City and State Agency is in direct violation of the strong public policy in the Industrial Insurance Act, and clearly adverse to the legislative intent of RCW 51.32.185.

As set forth in Firefighter McKeown’s Opening Brief, page 48,

“Firefighter McKeown’s employer instructed him that he did not have a presumptive claim and could not file. The same employer, and the Department of Labor and Industries, then used a statute of limitations argument to claim firefighter McKeown is not entitled to his presumptive claim benefits because he did not timely file. The employer and the Department are using their own bad behavior to deny firefighter McKeown benefits. Firefighter McKeown filed a timely presumptive disease claim only one week after receiving written notice from a physician **as is required.**”

This bad behavior by the City in telling firefighter McKeown that he did not have a claim, is preemptive claim denial, or claim suppression, by the City.

**RCW 51.28.025. Duty of employer to report injury or disease--Contents of report--Claim suppression--Penalty**  
(1) Whenever an employer has notice or knowledge of an injury or occupational disease sustained by any worker in his

or her employment who has received treatment from a physician or a licensed advanced registered nurse practitioner, has been hospitalized, disabled from work or has died as the apparent result of such injury or occupational disease, **the employer shall immediately report the same to the department** on forms prescribed by it. The report shall include:

- (a) The name, address, and business of the employer;
- (b) The name, address, and occupation of the worker;
- (c) The date, time, cause, and nature of the injury or occupational disease;
- (d) Whether the injury or occupational disease arose in the course of the injured worker's employment;
- (e) All available information pertaining to the nature of the injury or occupational disease including but not limited to any visible signs, any complaints of the worker, any time lost from work, and the observable effect on the worker's bodily functions, so far as is known; and
- (f) Such other pertinent information as the department may prescribe by regulation.

Firefighter McKeown had asked the City whether he could file a presumptive occupational disease claim and was told by the City, in clear violation of the above statute, that he was not entitled to make such a claim.

*April 3, 2009 Deposition of Patrick McKeown; page 20-21 McKeown's Opening Brief.* Nor did the City report the claim as required by the statute.

The City told firefighter McKeown that he did not have a presumptive claim and could not file. Then, immediately upon learning from his doctor, in writing, that he did have a presumptive disease claim, he filed in spite of false information given to him by the City. The City, and the State Agency, are now claiming firefighter McKeown is barred from benefits because he did not file his claim in time. Basing a claim denial on a statute of limitations

argument when the City instructed the firefighter not to file a claim is bastardization of the law and should never be tolerated. The conduct is preemptive claim denial at best, or claim suppression at its worst.

It speaks volumes that the City failed to respond in any way to this issue.

Notice provisions of two-year statute of limitations on claims for occupational disease applies to *all claims* for occupational disease, whether filed by the worker or a beneficiary. *Dep't of Labor and Indus. v. Estate of MacMillan*, 117 Wn.2d 222, 814 P.2d 194 (1991). Although the City and the State Agency initially argued that the statute of limitations had run for what they had classified as a one year injury claim, this is very clearly not an injury claim. This is an RCW 51.32.185 presumptive occupational disease claim with the benefit of a legislatively mandated presumption and burden shifting, and an RCW 51.08.140 occupational disease claim.

Often, disease processes that occur on a cellular level are not discovered immediately – this is the reason for the extended time for filing occupational disease claims and the statutory written notice requirement in such cases. To interpret the Industrial Insurance Act and the presumptive occupational disease statute in a way that denies the firefighter a claim for an insidious occupational disease violates the strong public policies expressed in the Act and in RCW 51.32.185.

**B. Construction of a statute is a question of law.**

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

The Court's objective is to determine the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600 (2005). When determining the legislature's intent, the Court shall first look to the plain meaning of the statute. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10 (2002); *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). To determine the plain meaning, this Court must look at the text and "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d at 600. If this reading of the statute leads to more than one interpretation, then the statute is ambiguous and this Court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373 (2007).

The legislative intent is reproduced at the end of RCW 51.32.185 and can also be found at Session Laws 1987 chapter 515 § 1:

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

In analyzing the presumptive occupational disease statute, it is clear the legislature made a finding in 1987 that career exposures to smoke, fumes and toxic substances cause firefighters to have a higher rate of respiratory disease than the general public. The legislature has added heart problems, infectious diseases and certain cancers to the statute since it was enacted in 1987. The intent of the legislature to add additional protection for firefighter exposures to smoke, fumes, and all kinds of toxic substances can be clearly discerned regardless of the occupational disease, provided it is set forth in the statute.

**C. There can be multiple proximate causes of an occupational disease.**

The term “proximate cause” means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of and without which such condition would not have happened. There may be one or more proximate causes of a condition *WPI 15.01 and*

*comment.* For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition. *McDonald v. Dep't of Labor & Indus.*, 104 Wash. App. 617, 17 P.3d 1195 (2001). This standard is altered in RCW 51.32.185 cases. In such cases, the firefighter's employment is presumptively determined to be a proximate cause of his covered condition and the burden is shifted onto the City or State Agency to prove that a firefighting career was not a proximate cause of the presumptive occupational disease.

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

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

This standard is altered in RCW 51.32.185 cases. In such cases, the firefighter's employment is presumptively determined to be a proximate cause of the covered condition. The ruling of the Board must stand, unless, on review "[t]he superior court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence, that the Board's findings and decisions are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wash. App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wash. App. 439, 440, 777 P.2d 1084 (1989)).

**D. A condition need only be aggravated by employment.**

Although there is no evidence of a preexisting condition, a worker is entitled to benefits if the employment either causes a disabling disease, or aggravates a preexisting disease so as to result in a new disability. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 474, 745 P.2d 1295 (1987) ("compensation may be due where disability results from work-related aggravation of a preexisting non-work-related disease."). In an aggravation case, the employment does not cause the disease, but it causes the disability because the employment conditions accelerate the preexisting disease to result in the disability. Even if firefighter McKeown had a pre-existing genetic condition, he is still entitled to benefits if his employment "aggravated" those problems – regardless of initial causation.

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

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

Courts in other jurisdictions have declined to require the injured plaintiff in toxic tort products liability cases to prove the precise chemical that caused his or her injury. *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct.App.1989); *In re Robinson*, 78 Or.App. 581, 717 P.2d 1202 (1986). In *Earl*, the Court of Appeals of Idaho reversed a summary judgment in favor

of the manufacturer, holding that the plaintiff presented sufficient evidence to allow a jury to conclude that his lungs were injured as a result of exposure to vapors emitted from a plastic film used in the meat-packing room where he worked.

The plaintiff's attending physician believed that it was likely that a combination of chemicals caused the plaintiff's disease. *Earl*, 115 Idaho at 1092, 772 P.2d at 730. The manufacturer challenged the attending physician's opinion, arguing in part that the doctor failed to specify the particular component(s) of the plastic vapors which caused the plaintiff's disease. The court rejected this argument, stating:

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

*Earl*, 115 Idaho at 1095.

In *Robinson*, a furniture store employee sought workers' compensation benefits, claiming that exposure to toxic chemicals in the furniture store where she worked caused her to suffer from headaches, fatigue and dizziness.

The claimant testified that the store continually received new furniture which was uncrated weekly in the furniture showroom. The evidence also showed that new furniture goes through a “gassing out” process whereby it releases quantities of formaldehyde, phenol and hydrocarbons over a period of time. The claimant also testified that the showroom in which she began working was hot, poorly ventilated and had low ceilings. *Robinson*, 717 P.2d at 1203.

The employer's insurer argued that the claimant could not show that her work conditions caused her symptoms because living in a mobile home and having new carpet installed had exposed her to formaldehyde. The Court of Appeals of Oregon found, however, that the claimant met her burden of proving that chemical exposure at work was a contributing cause of her disease. The court further ruled that the claimant was not required to pinpoint the precise chemical that caused her sensitivity:

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

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

These cases show that there is already strong existing law in favor of all injured workers, even without the benefit of any presumption. It is because of the difficulty in pinpointing a cause that the legislature created

RCW 51.32.185. The statute created the causation between the disease and the occupation, and relieves the firefighter from the burden of identifying a particular substance or exposure, in order to receive workers' compensation benefits. The firefighter presumption sits on top of the strong law already in existence and grants additional benefits in favor of firefighters to which no other worker in the state of Washington is entitled.

**F. The worker's treating medical practitioners are to be given special consideration.**

The City and the State Agency spend a great deal of time attempting to present their expert's testimony as superior to that of firefighter McKeown's treating medical practitioners. However, **the court must give special consideration to the opinions of attending physicians because the attending physicians are not merely expert witnesses hired to give a particular opinion consistent with one party's view of case.** *Young v. Dept. of Labor and Indus.*, 81 Wash. App. 123, 913 P.2d 402 (1996); *Chalmers v. Dept. of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Dept. of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964); *Spalding v. Dept. of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947).

Significantly, the opinions of the worker's treating medical practitioners are to be given special consideration by the trier of fact in ***all***

industrial insurance cases. *Loushin v. ITT Rayonier*, 84 Wash. App. 113, 124-25, 924 P.2d 953 (1996).

### **III. CONCLUSION**

The City and the State Agency argue the plain language of the statute precludes firefighter McKeown from benefits for his severe, career-ending occupational “heart problems”. However, the plain language of the statute is that presumptive diseases “are occupational diseases under RCW 51.08.140”. A presumptive occupational disease is an occupational disease claim just as any other, but with the presumption of occupational causation and the benefit of burden shifting onto the Employer or State Agency to show the cause as something other than firefighting. As a presumptive occupational disease claim, just as any other occupational disease claim, the firefighter, just as any other worker, must have written notice from his physician that he has an occupational disease and a claim for that disease before the statute of limitations for occupational disease can even begin to run.

This claim is an occupational disease claim under RCW 51.08.140 according to the plain language of RCW 51.32.185. Firefighter McKeown is entitled to full benefits for his occupational disease and presumptive occupational disease “heart problems” under the Industrial Insurance Act and the additional protections of RCW 51.32.185.

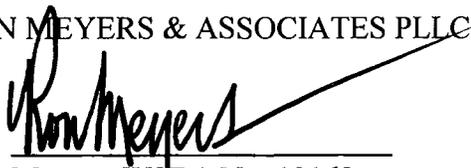
The Industrial Insurance Act’s mandated public policy of liberal

interpretation in favor of workers is met by correct application of the presumptive disease statute. Any effort attempting to shift responsibility away from the City and the State Agency contravenes both the Act and the public policy underlying the presumptive disease statute.

This case illustrates the need for the presumptive disease legislation that prevents injustice, and discriminatory or financially-motivated conduct by employers and government agencies attempting to escape financial responsibility for occupational diseases contracted by firefighters who unflinchingly risk their lives to protect the public. RCW 51.32.185 must be applied to prevent injustice, and discriminatory or financially-motivated conduct by employers or any government agency.

DATED: November 3, 2011

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DECLARATION OF SERVICE

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**ORIGINAL**

**DECLARATION OF SERVICE**

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

DOCUMENTS:       1.     APPELLANT’S REPLY BRIEF; and  
                      2.     DECLARATION OF SERVICE.

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Mountlake Terrace, WA 98043-6202

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

DATED this 3<sup>rd</sup> day of November, 2011, at Lacey, Washington.

  
\_\_\_\_\_  
Connie G. Wall, Paralegal



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November 3, 2011

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

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 NOV -4 AM 10:43

Re: *McKeown vs. City of Mountlake Terrace, et al.*  
Court of Appeals - Division I Cause No. 66974-5-I

Dear Court Clerk:

Please find enclosed originals and one set of copies of our Appellant's Reply Brief and Declaration of Service in the above-referenced matter.

Very Truly Yours,

RON MEYERS & ASSOCIATES PLLC  
By: Connie G. Wall  
Paralegal

Enclosures (4)

cc: Beverly Norwood Goetz and H. Regina Cullen w/encls.  
Gregory G. Schrag w/encls.