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NO. 67213-4-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL RAUM
Appellant

v.

CITY OF BELLEVUE,
Respondent

BRIEF OF RESPONDENT CITY OF BELLEVUE

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I. INTRODUCTION

This is a worker's compensation occupational disease case governed by the Industrial Insurance Act, Title 51 Revised Code of Washington (RCW). An occupational disease is defined as one which arises naturally and proximately out of the claimant's employment. Some firefighters with occupational disease claims enjoy the benefit of a statutory rebuttable evidentiary presumption found in RCW 51.32.185. If a claimant sustains a specific class of disease, that disease is presumed to be caused by the occupational exposure. The burden then shifts to the firefighter's employer to prove, by a preponderance of the evidence, that the disease was caused by other employment or from non-employment activities.

Appellant Michael Raum (Raum) was hired as a firefighter for the City of Bellevue (City) in 1991. Raum filed a worker's compensation incident report in February 2008 claiming that he had experienced heart problems as a result of his occupational exposures as a firefighter. The trial court correctly instructed the jury regarding the application of RCW 51.32.185. Raum waived any objections as to the trial court's jury instructions or special verdict form by failing to properly preserve his objections for appeal. Substantial evidence was presented at trial as to the cause of Raum's heart problem, and the jury correctly decided that

Raum's heart problem was not the result of his occupation as a firefighter.

II. COUNTERSTATEMENT OF ISSUES

1. Raum assigns error to Jury Instruction No. 14 which he proposed. Did Raum waive his right to now claim error to Jury Instruction No. 14 by offering the instruction at the time of trial?
2. Raum assigns error to the Special Verdict Form. Did Raum waive his right to claim error as to the Special Verdict Form when he failed to provide a legally sufficient alternate Special Verdict Form?
3. Raum claims the jury's verdict should be overturned as a matter of law and public policy. Should the jury's verdict be set aside when there was substantial medical testimony from which a jury could conclude that Raum's heart problems (coronary artery disease) arose as a result of his pre-existing hypertension, high cholesterol levels, obesity and genetic predisposition and not naturally and proximately from his employment as a firefighter?
4. Raum claims that the trial court improperly excluded certain lay testimony that had been allowed at the Board hearing. Should the trial court's decision to exclude this evidence be set aside as an abuse of its discretion?

III. COUNTERSTATEMENT OF THE CASE¹

A. Raum's Claim for Worker's Compensation Benefits

Raum was born on October 23, 1965. Raum was hired as firefighter by the City in 1991. Raum RP 308.² Over the years, Raum

¹ Raum improperly cites to the deposition and hearing testimony provided to the Board in his opening brief. Not all of the Board testimony was actually presented during the Superior Court trial, and Raum provides no citation to the testimony that was actually presented to the jury. Consequently, Raum's factual statement of the case should be stricken as set forth in the City's motion to strike.

² The City cites to the Report of Proceedings (RP) which reflects the actual testimony read to the jury. The trial court ruled on various objections made by the parties to the

worked in various capacities and claims he was exposed to a variety of chemicals and fumes.³

In August 2008, Raum filed an application for benefits with the Department of Labor and Industries (Department) alleging he had sustained a “heart condition” when he was training for an annual fitness evaluation in February 2008. BR 48⁴. The Department denied Raum’s claim for the reason that Raum’s condition was not the result of an industrial injury and was not an occupational disease as defined by the industrial insurance laws. BR 48. Raum appealed the Department’s decision to the Board of Industrial Insurance Appeals (Board). BR 48.

B. The Board and Superior Court Appeals

Prior to the Board hearing, Raum filed a motion for summary judgment alleging the City had not rebutted the presumption of RCW 51.32.185 and seeking an order granting him benefits. BR 90-104. The Board denied Raum’s motion. BR 102. Raum did not move to strike the

Board testimony, and consequently, not all of the Board testimony was read to the jury. The City also cites to the name of the actual witness with respect to each citation to the trial testimony as the court reporter numbered the pages of the Report of Proceedings for the first day of the trial beginning with page one and started the second day of the trial again with page one. The City would also note that Beverly Goetz did not appear at trial. The court reporter erroneously referred to Ms. Geotz. It was the City’s co-counsel, Monica Buck, who actually appeared at the trial.

³ Dr. Yang testified that any exposure to secondhand smoke by Raum while he worked as a firefighter was not distinctive to his work as a firefighter. Yang RP 181.

⁴ BR refers to the Board Record which was submitted to the Superior Court in its entirety by the Board of Industrial Insurance Appeals.

testimony of the City's medical experts before or during the Board proceedings.

The Board conducted an evidentiary hearing and issued a Proposed Decision and Order on June 10, 2010. BR 36-49. In its Proposed Decision and Order, the Board reversed the order of the Department and concluded that Raum's heart condition constituted an occupational disease within the meaning of RCW 51.08.140 and that Raum was entitled to benefits. BR 49. The City filed a Petition for Review asserting that the Industrial Appeals Judge had erred in finding that Raum had contracted heart problems as an occupational disease within the meaning of RCW 51.32.185 and RCW 51.08.140. BR 3-31. The City assigned error to all adverse evidentiary proceedings before the Board. BR 4. The Board denied review, adopting the proposed decision and order as the Board's final decision and order. BR 2. The City appealed the Board's decision to Superior Court. CP 1-4⁵.

Prior to trial, Raum filed a motion to strike the testimony of the City's expert witnesses. CP 5-16. The City responded arguing that Raum's motion to strike was both untimely and without merit. CP 368-379. Raum also filed a motion for summary judgment claiming that he

⁵ CP refers to the Clerk's Papers of the Superior Court.

should be entitled to worker's compensation benefits as a matter of law. CP 274-299. The Superior Court denied both of Raum's motions. CP 1085-1085, CP 1089-1090.

A trial was held before a jury of twelve in April 2011. Pursuant to RCW 51.52.115, the entire Board record was read to the jury, except for testimony which the court had ordered stricken. CP 1229-1335. On April 21, 2011, the jury returned a verdict in favor of the City. CP 1232. Raum did not file any post trial motions. Subsequently, this appeal was filed by Raum.

Following the filing of his appeal, Raum attempted to supplement the appellate record with the November 1, 2011 *Declaration of Ron Meyers*.⁶ Raum was represented at trial by attorney Ron Meyers. In his Declaration of November 1, 2011, attorney Ron Meyers recounted a conversation he had with a juror on April 21, 2011 immediately following the verdict. The City opposed Raum's attempt to supplement the record.

C. Medical Testimony as to Raum's Heart Problem

Medical testimony was presented by four witnesses. Dr. Edward

⁶ Raum first attempted to supplement the record by simply attaching the November 1, 2011 Declaration of Ron Meyers to his opening brief. Subsequently, Raum filed an actual motion to supplement the record. The City filed an opposition to Raum's motion to supplement. Commissioner Mary Neel declined to rule on the motion as it neither addressed nor met the strict criteria of RAP 9.11 and left it for the panel that considered the appeal on the merits. See Appendix A. The City moves to strike any reference in the Raum's opening brief to the content of the Declaration of Ron Meyers. See City's motion to strike.

Kim and Dr. Rubin Maidan are cardiologists who treated Raum at different points in time. Dr. Maidan first saw Raum in August 2005 while Dr. Kim first saw Raum in December 2008. Maidan RP 198, Kim RP 247. Dr. Alvin Thompson, performed an independent medical examination on Raum at the City's request on October 28, 2008. Thompson RP 58. Dr. Eugene Yang is board certified in internal medicine, cardiovascular disease, and nuclear cardiology who undertook a comprehensive review of Raum's medical records at the City's request. Yang RP 72-73.

The earliest medical record any witness testified about was from July 2001. Dr. Yang testified that Raum underwent a cardiovascular examination in July 2001 which revealed that Raum had a very high total cholesterol level and a high LDL or "bad cholesterol" level. In addition, his cholesterol to HDL ratio – a predictor of cardiovascular risk – was also high. Consequently, in July 2001, Raum was prescribed Lipitor, a medication to lower his cholesterol. In July 2001, Raum's blood pressure was also in the hypertensive range and his body mass index was 26.8, which was in the overweight range. Yang RP 77-80.

With the use of Lipitor, Raum's cholesterol levels improved in 2001 and early 2002. Yang RP 80. However, Raum only intermittently took his medication, and by August 2002, his cholesterol levels had gone

up substantially and were well above the recommended levels for an adult. Yang RP 80-81. Dr. Yang testified that taking medication intermittently allows higher levels of cholesterol to accumulate, thus elevating the risk of developing cholesterol build-up in the arteries. Yang RP 81.

In September 2003, Raum underwent a medical wellness profile as part of a medical evaluation. Yang RP 81-82. According to Dr. Yang, Raum was found to be at a high risk for cardiovascular disease⁷ based on his blood tests and other factors such as his weight and blood glucose levels. Yang RP 82-83. Raum's cholesterol level at that time was "extremely" high at 281; his triglycerides were "markedly elevated" at 273; and his LDL (bad) cholesterol was "extremely high" at 178. Yang RP 82. Raum went back on cholesterol lowering medications Yang RP 83. In 2003, Raum was also found to have an elevated creatine phosphokinase enzyme (CPK) which Dr. Thompson testified was indicative of heat muscle inflammation. Thompson RP 65.

In April 2004, Raum's CPK was again elevated. Yang RP 86. While medication lowered his cholesterol levels for a while, by August of 2004, Raum's cholesterol levels were again very high. In fact, Raum's triglyceride level was more than double the accepted level. Dr. Yang

⁷ Cardiovascular disease, coronary artery disease, and atherosclerotic cardiovascular disease are all terms used interchangeably by the medical witnesses to refer to a disease in which plaque builds up in the walls of the coronary arteries and obstructs the flow of blood to the heart.

testified that elevated triglycerides have been associated as an independent risk factor for heart disease. Yang RP 86-87. By August of 2004, Raum's CPK level was higher than it had ever been. Yang RP 86.

According to Dr. Yang, Raum's body mass index was on the border between overweight and obese at an annual exam in July of 2005. Yang RP 87. His cholesterol levels were again significantly elevated. Yang RP 87. The results of a stress test performed by his primary care physician "were potentially worrisome" and prompted the primary care physician to refer Raum to a cardiologist, Dr. Maidan, at Eastside Cardiology Associates. Yang RP 87.

When Dr. Maidan saw Raum in August of 2005, Raum reported that he had experienced chest discomfort on at least six (6) occasions that lasted for up to ten minutes, as well as shortness of breath on exertion. Yang RP 88. Raum reported that two of the episodes of chest discomfort had occurred at rest. Yang RP 88-89. Dr. Maidan noted Raum's family history as positive for heart attack, hypertension, and the sudden death in his father at age 37, a stroke in his grandfather, congestive heart failure in his grandmother, and diabetes in his grandmother and brother. Yang RP 88; Maidan RP 203. Dr. Maidan further noted in his August 29, 2005 record:

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

Maidan RP 205.⁸

Dr. Maidan performed a stress test on Raum in August 2005. Dr. Maidan testified that in 2005 he wrote in his notes that Raum "may have early coronary artery disease, given his family history prior to the level that can be detected by a stress test." Maidan RP 209. Dr. Edward Kim, another one of Raum's treating cardiologists, testified that that this stress test was performed due to "atypical chest discomfort in a patient who had other risk factors for heart problems." Kim RP 248. Dr. Kim testified that Raum's risk for a cardiovascular event in 2005 was very high. Kim RP 277-279.

Dr. Maidan suspected the presence of early coronary artery disease in 2005. He admitted that early coronary artery disease may not cause symptoms and that a stress test can only be used to detect the presence of severe disease. Maidan RP 209. Both Dr. Thompson and Dr. Yang testified that based on the totality of the records, Raum did have coronary artery disease as early as 2005. Thompson RP 61; Yang RP 110-111.

⁸ Dr. Thompson testified that it was not plausible that Raum's father died of heart problems related to rheumatic fever as Raum now alleges, since rheumatic fever causes a heart valve problem that results in gradual heart failure and not a sudden death as Raum's father experienced. Thompson RP 79-80.

No witness testified, nor were any medical records located, regarding Raum's medical treatment or the status of his health from the period of August 2005 through March 2008.

Raum testified that in February 2008, he experienced chest pain when using the elliptical treadmill while working at the City.⁹ Raum RP 350. Dr. Maidan saw Raum again in March of 2008 and noted severely elevated LDL or bad cholesterol and an elevated risk ratio. Maidan RP 219-220. A stress test suggested that Raum had developed clinically significant atherosclerosis over the past three years. Dr. Maidan concluded on March 3, 2008:

This patient has chest pressure and ST depression with exercise testing which suggests ischemia ... he has significant hyperlipidemia on a genetic basis that is probably the cause.

Maidan RP 222. Dr. Maidan acknowledged that Raum's cholesterol profile placed him at "high risk profile for developing cardiac disease." Maidan RP 220.

On March 6, 2008, Dr. Maidan performed a coronary catheterization and installed six (6) stents in Raum's coronary arteries. This surgery cleared out Raum's blocked vessels and arteries. Maidan RP 222-223. Dr. Maidan found that Raum's left anterior descending artery

⁹ The City does not contest Raum's assertion that he experienced two similar incidents of chest pain while working at the City. All three incidents were incorporated into the February 2008 worker's compensation incident report filed by Raum. However, a discussion of those other events is not necessary for a resolution of Raum's claim.

had 95% stenosis (narrowing) with calcifications. He also had 95% blockage of one of the branches coming off the main left anterior descending artery. Raum's right coronary artery was found to have 50% blockage in the mid part of the vessel. Maidan RP 223-224.

According to Dr. Maidan, the March 2008 angiogram findings indicated very advanced coronary artery disease at a very young age. Maidan RP 224 Dr. Yang testified that Raum had very advanced coronary artery disease because the amount of calcification found in his arteries was usually something that occurs over many decades. Yang RP 97.

In April 2008, Raum filed a claim for occupational disease alleging he had experienced a "heart condition" when he was training for an annual fitness evaluation in February 2008. He stated that he began experiencing chest discomfort (or angina) while exercising. Raum RP 348.

In December of 2008, Raum again experienced chest discomfort. However, it was not associated with any firefighting activities. In fact, Raum experienced the chest discomfort in the shower at home. Kim RP 266. As a result, Raum saw Dr. Edward Kim for the first time and underwent emergency surgery for a "heart attack". Kim RP 250. Dr. Kim found new blockages in other arteries. Raum's coronary artery disease had spread and now affected all three of his coronary arteries. Another stent was inserted in December 2008. Kim RP 250.

On October 28, 2008, Dr. Thompson performed an Independent Medical Examination on Raum. Thompson RP 58.

D. Medical Testimony as to the Cause of Raum's Heart Problem (Coronary Artery Disease).

Dr. Alvin Thompson (City retained expert) – Dr. Thompson is board certified in internal medicine and has taken care of cardiac patients over the course of his medical career. Thompson RP 52. He examined Raum and reviewed Raum's medical records. Thompson RP 57-58. Dr. Thompson diagnosed Raum with (1) dyslipidemia (abnormal blood fat), (2) arteriosclerotic cardiovascular disease with a history of angina and narrowing of his three main coronary arteries and (3) a family history of lethal coronary disease. Thompson RP 76-82.

Dr. Thompson testified, on a more probable than not basis, that Raum's dyslipidemia was genetic in basis and did not arise out of his employment as a firefighter. Thompson RP 78-79. He further testified, on a more probable than not basis, that Raum's arteriosclerotic cardiovascular disease was largely genetic in basis and unrelated to Raum's claim and would be at the same level had Raum never been employed as a firefighter. Thompson RP 85. According to Dr. Thompson, Raum's cardiac disease would have been the same no matter what Raum's employment or even if he had never worked. Thompson RP

85-86. Dr. Thompson testified there was every reason to believe that Raum's coronary artery disease would progress no matter what Raum's occupation. Thompson RP 87.

Dr. Eugene Yang (City retained expert) – Dr. Yang is a cardiologist at the University of Washington. He is board certified in internal medicine, cardiovascular disease, and nuclear cardiology. He has been licensed to practice medicine in Washington since 2006 and has seen approximately 2200 patients in his cardiac practice. Yang RP 59-62. Dr. Yang reviewed Raum's medical records from the time period of December 2000 through January 31, 2009.¹⁰ Yang RP 72. Dr. Yang testified that it is not uncommon for him, as a cardiologist, to review the medical reports of others and formulate a diagnosis and opinion regarding cardiovascular disease based on the records and data of other providers. Yang RP 72-73.

Dr. Yang testified that Raum suffers from very severe multi-vessel coronary artery disease, very severe hyperlipidemia or hypercholesterolemia, mild hypertension, metabolic syndrome, and abdominal obesity and that all these were risk factors for cardiovascular disease. Yang RP 102-103. Dr. Yang testified, on a more probable than

¹⁰ Raum asserts that Dr. Yang's testimony is suspect because he did not review any medical records from August 2005 through January 2008. However, Raum fails to mention that no witness testified about Raum's medical condition from mid 2005 through early 2008 because no records were available for that time period. It appears that Raum did not seek any medical attention during that time.

not basis, that Raum's risks factors for cardiovascular disease were the cause of his aggressive cardiovascular heart disease and that Raum's cardiovascular disease was not due to his occupational exposures. Yang RP 112. Dr. Yang testified that Raum would have had these same risk factors for coronary artery disease had he never worked as a firefighter. Yang RP 115-116. Finally, when asked to opine as to medical studies addressing the question as to whether there was a an association between the occupation of firefighting and the development of coronary artery disease, Dr. Yang indicated there was no evidence of a causal link. Yang RP 120.

Dr. Rubin Maidan (treating physician) - Dr. Maidan diagnosed Raum as "a very young individual with very early coronary artery disease." Maidan RP 224. He also testified that cholesterol, high blood pressure, and genetics all contribute to heart disease. Maidan RP 196-197. While Dr. Maidan testified at to his general belief that firefighters have a higher risk of cardiovascular disease than the general population, he offered no specific testimony that Raum's work as a firefighter caused or contributed to his cardiovascular disease. Maidan RP 194.

Dr. Edward Kim (treating physician) - Dr. Kim first saw Raum in 2008 when he presented at the hospital with an acute emergency (a heart attack) and in need of cardiac catheterization to address a critically

clogged artery. Kim RP 250. He diagnosed Raum with coronary artery disease and testified that the primary risk factor for coronary artery disease is high cholesterol. Dr. Kim also enumerated other factors, which include diet, weight, activity level, age, gender, and genetic factors. Kim RP 273-275. He testified that Raum suffered from hyperlipidemia (high cholesterol). Kim RP 275. He testified that Raum's high cholesterol and family history contributed to his coronary artery disease. Kim RP 275.

Dr. Kim also testified that one of the other primary causes of coronary artery disease is high blood pressure and that the main cause of high blood pressure is genetics. Kim RP 252. High blood pressure had been diagnosed by others. Kim RP 275. When asked whether a variety of circumstances, such as fire alarms, wildfires, lights, and sirens, could cause high blood pressure, Dr. Kim either did not know, or at best, could only speculate that they might. Kim RP 255.

When asked about various alleged toxins and stressful conditions, Dr. Kim could offer no medical opinion as to whether they could damage the arteries. Kim RP 278. Dr. Kim could not even offer a definitive medical opinion, on a more probable than not basis, as to the existence of any relationship between Raum's coronary artery disease and Raum's occupational exposures. He could only offer speculation that "imagined" that Raum's exposures might play a role. Kim RP 261. Dr. Kim

concluded that it was possible that Raum's coronary artery disease would exist no matter what his occupation or whether he worked at all. Kim RP 280.

E. Medical Testimony as to Nature of Raum's Chest Discomfort

Raum filed a claim for worker's compensation benefits in August 2008 after he experienced chest discomfort while exercising at work in February 2008. BR 48. Dr. Yang testified the chest pressure which Raum felt in 2008 was simply a symptom of his underlying coronary artery disease and not a separate heart problem. Yang RP 54-55. Coronary artery disease is a process that occurs over several decades and is not something that occurs within 24 or 72 hours. Yang RP 54. Dr. Yang testified that Raum's heart disease was not a "heart problem" that he experienced within 72 hours of exposure to smoke, fumes or toxic substances or within 24 hours of strenuous physical exertion due to firefighting activities. Yang RP 53-54.

Dr. Kim also testified that the chest discomfort or sensations that Raum experienced were symptoms of an underlying disease as opposed to a condition in and of themselves. Kim RP 276. Dr. Thompson testified that this chest discomfort was the result of insufficient blood flow through the heart, which to be severe requires about seventy percent narrowing of

the blood vessels, and is referred to as angina. Thompson RP 29. Angina is a symptom of arteriosclerotic coronary disease and not a condition in itself. Thompson RP 28.

IV. SUMMARY OF ARGUMENT

Raum is entitled to worker's compensation benefits from the City only if his disease or condition arose naturally or proximately from the distinctive conditions of his employment as a firefighter. RCW 51.08.140. Contrary to Raum's contention, RCW 51.32.185 does not create a new theory or standard under which firefighters are entitled to benefits. RCW 51.32.185 only creates a rebuttable evidentiary presumption that may be used by firefighters who have certain diseases or conditions. The City may rebut this evidentiary presumption by producing a preponderance of evidence showing that other factors caused the condition.

Raum filed a claim for worker's compensation benefits claiming he was entitled to the rebuttable evidentiary presumption provided in RCW 51.32.185 because he experienced a "heart problem" within twenty-four hours of strenuous physical exertion due to firefighting activities.¹¹ However, what Raum experienced was chest pain caused by his pre-existing and underlying coronary artery disease. Raum's chest pain was

¹¹ The City does not dispute that Raum experienced chest discomfort or pain that occurred within twenty-four hours of strenuous firefighting activity as such activity is defined by RCW 51.32.185(6).

not a separate heart problem or condition.

The jury was correctly instructed on the law with respect to Raum's claim for benefits. Regardless, Raum's challenge to the jury instructions and special verdict form must fail as Raum failed to properly preserve any challenge for appeal. Raum objects to Jury Instruction No. 14 which he proposed to the trial court, and Raum failed to provide the trial court with a legally sufficient alternate Special Verdict Form. Any attempt by Raum to now supplement the record to challenge the jury's understanding of the jury instructions or special verdict form is also improper and must fail.

The City produced competent and substantial medical testimony to rebut the presumption that Raum's heart problem (his coronary artery disease) was caused by his work as a firefighter. The jury weighed the testimony and correctly concluded that Raum's heart problem did not arise out of his work as a firefighter.

Raum's challenge to the admissibility to the testimony of the City's medical testimony fails on two grounds. First, any challenge to strike the testimony of the City's experts was waived when Raum failed to raise it at the Board, as required by RCW 51.52.104. Furthermore, the testimony of the City's experts was not speculative or conclusory. It was

based on well founded medical opinion, after examining Raum, reviewing his medical records and/or reviewing scientific literature.

Finally, the exclusion of certain lay testimony by the trial court was proper and should not serve as the basis of overturning the jury's verdict.

V. STANDARD OF REVIEW

In an industrial insurance case, it is the decision of the trial court that the appellate court reviews. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 179-81, 201 P.3d 355 (2009). The trial court reviews the Board decision de novo. RCW 51.52.115. The Court of Appeals in turns reviews the trial court decision. Rogers, 151 Wn. App. at 180.

VI. ARGUMENT

A. The Jury was Correctly Instructed on the Law.

1. Jury Instruction No. 14 is a Correct Statement of the Law and Was Proposed by Raum.

Raum appears to assert that Jury Instruction No.14 somehow negates Jury Instruction No 13 and therefore constitutes reversible error. However, Raum fails to point out that he proposed Jury Instruction No. 14 in the exact form presented by the trial court. CP 1178. Raum also fails to point out that he took no exception to any of the instructions given by the trial court

Raum did not take exception to Instruction No. 13. Raum did propose a version of Jury Instruction No. 13 that contained one extra sentence. CP 1177, 1252. However Raum, did not take exception of his proposed version of Instruction No. 13 not being given by the Superior Court. Jury Instruction No. 13 reads as follows:

A statute provides that heart problems experienced by a firefighter within twenty-four hours of strenuous physical exertion due to firefighting activities are presumed to be an occupational disease. This presumption of occupation disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, heredity factors, and exposure from other employment or non-employment activities.

Instruction No. 13 is an excerpt from RCW 51.32.185 and correctly sets forth the evidentiary presumption provided by RCW 51.32.185.

Jury Instruction No. 14 is taken from the language of RCW 51.08.140 and from Dennis v. Dept. of Labor & Indus., 109 Wn.2d 467, 745 P.2d 1295 (1987). It reads as follows:

An occupational disease is defined by law as:

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

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

A disease arises naturally out of employment if the disease is a natural incident or consequence of distinctive conditions of a

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

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

Raum took no exception to Jury Instruction No. 14 (his own instruction) RP 380-382. However, Raum now argues that Jury Instruction No. 14 should have contained additional language so the jury could have awarded benefits to Raum under two different theories – an occupational disease claim and a presumptive disease claim. This argument was not raised by Raum at the trial court level.

It is well settled that the basis for challenging a jury instruction not urged in the trial court cannot be urged for the first time on appeal. Roumel v. Fude, 62 Wn.2d 397, 399, 383 P.2d 283 (1963) A party cannot request an instruction and later complain that the requested instruction as given was improper. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). If a party assigns error to the failure of the trial court to submit a theory to the jury, the party had to submit an instruction on his theory. A party failing to request such an instruction cannot predicate error on its omission. McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963).

In this instance, Raum proposed Jury Instruction No. 14 as given by the trial court. Raum did not take exception to either Jury Instruction No. 13 nor No. 14, and he did not propose an alternate instruction to address his theory of the case. Raum invited the error he now asserts to exist. Invited error precludes judicial review. Boyer, 91 Wn.2d at 345.

Furthermore, as discussed in detail below, there is only one claim for occupational disease. The presumption set forth in RCW 51.32.185 creates only an evidentiary presumption and not a new theory or type of claim. Raum's contention that there is confusion created by these two instructions is incorrect. Since the City presented evidence to rebut the presumption of occupational disease, the burden remained with Raum to show that his coronary artery disease arose naturally and proximately out of his employment as a firefighter. The jury instructions correctly stated the law of the case.

2. The Special Verdict Form is a Correct Statement of the Law.

Raum argues that the Special Verdict Form constitutes reversible error for two reasons. First, Raum asserts that the Special Verdict Form improperly combined what he claims are his two different claims (one under RCW 51.08.140 and one under RCW 51.32.185). Secondly, Raum

claims that the Special Verdict Form constitutes reversible error because it fails to list “aggravation” under Question No. 2.

Again, Raum’s argument is based on an incorrect interpretation of RCW 51.32.185. The statute does not create a new standard that provides a “separate and distinct” way for Raum to be found eligible for worker’s compensation benefits. AP 28.¹² Raum is entitled to benefits only if it is determined that he suffers from an occupational disease (defined as one which arises naturally and proximately out of the employment). RCW 51.08.140. Since Raum is a firefighter, he is entitled to a rebuttable presumption that his coronary artery disease is an occupational disease and does not have to prove at the outset that his coronary artery disease arose naturally and proximately out of his employment. However, once the City put forth evidence to rebut that presumption, the presumption disappeared. The burden shifted back to Raum to prove that his coronary artery disease arose naturally and proximately from the distinctive conditions of his employment as a firefighter to qualify as an occupational disease. The Legislature did not eliminate the requirement that a claimant produce evidence that his heart problem arose naturally and proximately out of

¹² AP refers to Appellant’s Opening Brief.

employment. The legislature only eliminated that burden if the employer was unable to come forward with evidence to rebut the presumption.

Contrary to Raum's assertions, RCW 51.32.185 does not forever remove the requirement that Raum prove that his coronary artery disease is an occupational disease. The language in RCW 51.32.185 which allows the presumption to be rebutted by the employer would be rendered meaningless if, as Raum asserts, simply having a disease or condition set forth in the statute entitled him unconditionally to benefits.

The trial court gave the jury a proper verdict form based on Washington law. A special verdict form and jury instructions are sufficient if they properly inform the jury of the law, do not mislead the jury, and allow the parties to argue their theories of the case. Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The Special Verdict Form was a correct recitation of the law. The Special Verdict Form allowed Raum to argue to the jury that his heart problems or heart condition arose naturally and proximately from the distinctive conditions of his employment as a firefighter. The jury instructions and the Special Verdict Form also allowed Raum to argue that he was entitled to a presumption of occupational disease (a presumption that his heart disease arose naturally and proximately from the distinctive conditions of

his employment) and that the City had presented insufficient evidence to rebut that presumption.

Raum's contention that the trial court erred by giving the jury a legally deficient Special Verdict Form also fails because Raum did not propose a legally correct form of his own. Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 966, 904 P.2d 767 (1996). While there no specific rule for properly objecting to special verdict forms, it has been held that the rules governing instructional error apply by analogy. Queen City Farms v. Central Nat'l Ins., 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994). If a party is dissatisfied with a special verdict form, that party has a duty to propose an alternate form which is legally correct in every aspect. Hoglund v. Raymark Indus., Inc., 50 Wn. App. 360, 368-69, 749 P.2d 164 (1987) (citing Martin v. Huston, 11 Wn. App. 294, 299, 522 P.2d 192 (1974), review denied, 110 Wn.2d 1008 (1988)).

In this instance, Raum objected to the court's proposed Special Verdict Form but did not propose a legally correct alternative. Raum only proposed one alternate Special Verdict Form. CP 1179-1180. Raum's proposed form is not a correct statement of the law. Raum's proposed form contains three separate questions, each of which specifically refers to RCW 51.32.185 and/or RCW 51.08.140. However, the jury was never specifically informed as to the content of those two statutes. The jury

instructions provide the relevant content of those statutes but do not provide the numerical statutory reference. Raum's proposed form leaves the jury guessing as to the content of these two statutes.

Even if the jury knew the specific content of the two statutes, Raum's proposed form is still legally deficient. The first question simply asked the jury if the Board was correct in deciding that on February 17, 2008 Michael Raum suffered from heart problems experienced within twenty-four hours of strenuous physical exertion due to firefighting activities within the meaning of RCW 51.32.185. CP 1179-1180. In other words, Raum's first proposed question simply inquired whether Raum had met the criteria to be entitled to the presumption set forth in RCW 51.32.185.

If the jury had answered "NO" to this first question, Raum would not have been entitled to the presumption set forth in RCW 51.32.185, but there was no instruction not to answer Question No. 2 which specifically inquired further about findings related to RCW 51.32.185. Question No. 2 would have allowed Raum the benefit of the presumption even though the jury had concluded that Raum did not meet the criteria to be entitled to the presumption of RCW 51.32.185.

Raum's second and third proposed questions improperly gave the jury two separate chances to find that Raum suffered heart problems as an

occupational disease under two different standards:

QUESTION NO. 2: Was the Board of Industrial Insurance Appeals correct in deciding that it was more probable than not that Michael Raum suffered heart problems as an occupational disease from work activity as a firefighter for the City of Bellevue, within the meaning of RCW 51.32.185 and RCW 51.08.140?

ANSWER: _____ (“Yes” or “No”)

QUESTION NO. 3: Was the Board of Industrial Insurance Appeals correct in deciding that Michael Raum’s heart problems constitute an occupational disease within the meaning of RCW 51.08.140?

ANSWER: _____ (“Yes” or “No”)

CP 1179-1180. The very submittal of these two questions implies there are two different theories under which Raum could recover. RCW 51.32.185 is just an evidentiary statute. It only provides a rebuttal presumption. It does not create a new theory of recovery. Accordingly, it makes no sense to ask the jury whether Raum suffered from an occupational disease within the meaning of RCW 51.32.185.

Furthermore, RCW 51.32.185 does not define an occupational disease. Asking the jury if Raum suffered heart problems “as an occupational disease from work activity as a firefighter” within the meaning of RCW 51.32.185 does not inform the jury that they must find that the occupational disease arose naturally and proximately from the distinctive conditions of Raum’s employment as a firefighter. This would

have allowed Raum to argue that if the presumption of RCW 51.32.185 applied, there was no need to find that that his heart condition arose naturally and proximately from the unique conditions of his employment. In fact, that is exactly the erroneous argument that Raum wanted to make to the jury.

Raum incorrectly argues that the legislature did away with the “naturally and proximately” requirement for firefighter presumptive disease cases. AP 29. As discussed in detail later in this brief, RCW 51.32.185 did not create a new claim or basis for recovery. It only created a presumption. However, when the City presented evidence to rebut the presumption, the presumption of occupational disease disappeared and the jury was left to determine whether Raum’s heart condition met the requirements of an occupational disease as defined by RCW 51.08.140. When the presumption ceased to exist, Raum had to put forth evidence that his heart problems arose naturally and proximately from his duties as a firefighter.

Raum also challenges the Special Verdict Form because it does not specifically address the possibility that Raum had a pre-existing condition that was aggravated by his employment. Raum did not take exception to the Special Verdict Form on that ground. In fact, the Special Verdict Form which he submitted to the Superior Court did not contain the

“aggravated by” phrase which now claims is key to his argument. CP 1179-1180. Most importantly, however, is the fact that Jury Instruction No 14 clearly states in its last sentence that a disease arises proximately out of employment if the conditions of a worker’s employment “caused or aggravated the worker’s condition.” Raum was able to argue that his coronary artery disease was aggravated by his employment as a firefighter and thus arose proximately out of his employment from the jury instructions given by the trial court.

B. RCW 51.32.185 Provides Only an Evidentiary Presumption and not a Alternate Theory of Recovery.

Raum argues that Washington now provides two different theories or standards under which a firefighter may seek worker’s compensation benefits for occupational disease. Raum asserts that RCW 51.32.185 created an occupational disease claim somehow different from that defined in RCW 51.08.140.¹³ Raum asserts that he can pursue both an occupational disease claim under RCW 51.08.140 and a “presumptive occupational disease claim” under RCW 51.32.185. AP 25. Raum’s assertion is incorrect.

RCW 51.32.185 is not a separate standard or theory for recovery. RCW 51.32.185 only provides an evidentiary standard – a burden shifting

¹³ See Appendix B for the full text of RCW 51.32.185 and RCW 51.08.140.

provision for firefighters with occupational disease claims arising from certain specified disease processes. Under RCW 51.32.185, if a firefighter sustains a specific class of disease, that disease is presumed to be caused by a work exposure. The burden then shifts to the firefighter's employer to provide evidence that the disease or condition was caused by factors unrelated to the alleged work exposure. The statute provides:

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

When interpreting a statute, the court's goal is to effectuate the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is plain, the court shall give effect to that plain meaning as the expression of the legislature's intent. Id. Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. Id.

Here, the language of RCW 51.32.185 is plain. It only provides a rebuttable presumption of occupational disease. It does not provide an

alternate or additional theory of recovery as Raum argues. It is correct that some firefighters receive an additional benefit, not available to non-firefighters (a presumption of occupational disease). However, that benefit is subject to the plain terms of the statute and may be rebutted by a preponderance of evidence. The Legislature enacted this burden shifting evidentiary scheme for occupational disease claims filed by firefighters in 1987¹⁴. The ESSB 5801 Fact sheet makes clear that the purpose of this statute was only to create a rebuttable presumption and not a new statutory basis for recovery:

[The] [b]ill does nothing more than shift the burden of proof for duty related heart disease for LEOFF II law enforcement; and heart/lung diseases for firefighters to L&I or self-insured employers.

...

Every heart/lung disease claim is rebuttable under the bill. Should the claim not withstand scientific/medical rebut, there is no cost.

See Appendix C.

C. The Presumption in RCW 51.32.185 Does Not Relieve Raum of His Obligation to Prove that He Has an Occupational Disease.

In a typical worker's compensation claim, the ultimate burden for proof of an occupational disease is at all times with the worker. Olympic Brewing Co. v. Dept. of Labor & Indust., 34 Wn.2d 498, 505, 208 P.2d 1181

¹⁴ Law 1987, Ch. 515, § 1.

(1949), overruled on other grounds, Windust v. Dept. of Labor & Indust., 52 Wn.2d 33, 323 P.2d 241 (1958). However, RCW 51.32.185 provides a rebuttal evidentiary presumption of occupational disease for firefighters who suffer from certain conditions. RCW 51.32.185 provides examples of what evidence may rebut the presumption, but the list is not exhaustive. Raum incorrectly asserts that RCW 51.32.185 eliminates his need to ever prove medical causation and places the burden entirely on the City to demonstrate that Raum's exposures as a firefighter did not contribute to his disease. AP 20.

A presumption is not evidence and may disappear in the light of the actual evidence. Accordingly, a presumption ceases to exist and cannot be further considered by the court or jury. Bradley v. S.L. Savidge, Inc., 13 Wn.2d 28, 43, 123 P.2d 780 (1942). The presumption set forth in RCW 51.32.185 only eliminates the need for Raum to come forward with competent medical evidence at the outset to show that his heart condition is related to his firefighting activities and thus an occupational disease. However, once the City comes forward with evidence to rebut the presumption, the City is entitled to dismissal of Raum's claim for benefits unless Raum comes forward with competent medical testimony to support his claim of occupational disease. At that point, the jury must determine whether the City has provided a preponderance of evidence successfully

rebutting the presumption of occupational disease. To approach the application of RCW 51.32.185 differently, would render its rebuttal language meaningless.

The appellate court in Indian Trail Trunk Sewer v. City of Spokane, 35 Wn. App. 840, 670 P.2d 675 (1983), review denied, 100 Wn.2d 1037 (1984) specifically addressed the operation of a presumption. The court determined that the City of Spokane was entitled to a presumption that it acted legally and properly in making certain assessments. The burden of going forward with evidence rebutting the presumption rested with those landowners attacking the presumption. Since those landowners attacking the presumption presented expert testimony sufficient to rebut the City's presumption, the burden of proof shifted back to the City. Since the City then failed to carry its burden by introducing evidence to support its position, the landowners' evidence was uncontroverted and the landowners were entitled to prevail. The court stated: "To hold otherwise would make the presumption in favor of the City conclusive and render the hearing and statutory appeal process on the assessment roll useless." Id. at 843.

Similarly, in Neuson v. Macy's, 160 Wn. App. 786, 249 P.3d 1054 (2011), the appellate court examined whether Neuson had presented sufficient evidence to rebut a presumption of mailing. Neuson had been

terminated from employment with Macy's department store following her return to work after a worker's compensation injury. She sued Macy's for retaliation, disability discrimination, and wrongful termination. Id. at 1055. Macy's moved to compel arbitration based on an "Arbitration Election form" it had mailed Neuson when she was first employed and again when she transferred stores requiring her to opt out of arbitration. Macy's was entitled to a presumption of mailing by showing the company's customs on mailing and its compliance with those customs. Id. at 1056. As a result, a presumption of receipt by Neuson attached.

However, the presumption was not absolute. The court noted that the sole purpose of a presumption is to establish which party has the burden of going forward on with evidence on an issue. "Presumptions are the 'bats of the law, flitting in the twilight but disappearing in the sunshine of the actual facts.'" Id. at 1057 citing Mackowik v. Kansas City, St. J. & C.B.R., Co. 196 Mo. 550, 94 S.W. 256, 262 (1906). Neuson presented evidence that she did opt out of arbitration and did not receive the documents when she transferred stores. The court concluded that the Neuson had met her burden of presenting sufficient evidence to rebut the presumption. The court concluded that the question for the trier of fact then became whether Macy's had met its burden of showing it mailed and Neuson received the document. Id. at 1058.

The presumption set forth in RCW 51.32.185 is not conclusive and may be rebutted. In fact, RCW 51.32.185 specifically states that the presumption may be rebutted by a “preponderance of the evidence.” If the employer has presented sufficient evidence to rebut the presumption, the burden of proof returns to the worker to show that he is entitled to benefits. In other words, the worker must show that he suffers from an “occupational disease” as defined by RCW 51.08.140. Assuming that both parties have presented competent medical testimony, the jury must then weigh the evidence provided by both parties to determine whether the worker’s condition is an occupational disease, i.e., a “disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140. Raum’s assertion that since he is entitled to the presumption provided by RCW 51.32.185 he is never required to prove his conditions arises naturally and proximately out of his employment is totally inconsistent with the language and purpose of RCW 51.32.185.

Raum asserts that that the presumption cannot be rebutted simply by a criticism of the medical literature examining the possibility of a relationship between coronary artery disease and firefighting activity. To support his position, Raum cites to several cases from other jurisdictions which involve different statutory schemes and presumptions which are not present in the Washington statutes. Those cases are not determinative of

Washington law. Furthermore, the very fact that the Governor's veto of a portion of the proposed changes to RCW 51.32.185 makes it clear that the Governor did not want to draw a legal connection between heart problems and firefighting activity.

In 2002, the legislature amended RCW 51.32.185 by adding the provision for "heart problems that are experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances." 2002 Wash. Sess. Laws ch. 337, § 2, amending RCW 51.32.185.

In 2007, the legislature added a presumption for heart problems "experienced within twenty-four hours of strenuous physical exertion due to firefighting activities." However, the Governor vetoed the portion of the proposed 2007 amendments that sought to include the proposition that "firefighting duties exacerbate and increase the incidence of cardiovascular disease in firefighters." According to the veto, "the legislature's statement of intent in Section 1, however, makes broad generalizations about the incident of cardiovascular disease. In an effort to avoid the unintended interpretations of broad generalizations, Section 2 of the bill has been carefully crafted to define specific 'firefighting activities' that are related to occupational diseases" 2007 Wash. Sess. Laws ch. 490 §2, amending RCW 51.32.185. See Appendix D. The veto makes it clear that law does not incorporate any presumption based on an

assumption that firefighters are more likely to have cardiovascular disease than other classes of workers. The presumption was not designed to create a legal conclusion that firefighters have a higher incidence of cardiovascular disease.

Regardless of Raum's assertion regarding the medical literature, the City rebutted the presumption in this instance with concrete medical testimony that Raum's coronary artery disease was caused by specific factors, including his genetic family history, his high blood pressure, his high cholesterol levels and his obesity.

Raum's assertion that the application of the presumption provided in RCW 51.32.185 eliminates the need to show that his heart problem arose naturally and proximately out of his employment is not supported by any reading of the statute or case law. RCW 51.32.185 only provides an evidentiary presumption that may apply under certain circumstances. It does not provide Raum with a direct path to benefits. Similarly, RCW 51.32.185 does not require the City to prove that all the possible causes of Raum's heart problem originated outside his work as a firefighter. RCW only requires the City to come forward with a preponderance of evidence indicating that Raum's heart problem arises from conditions unrelated to his work as a firefighter. It is then Raum's burden to show that his work as a firefighter was at least a proximate cause of his heart disease.

D. The Jury Correctly Found in Favor of the City.

1. Raum Must Prove He is Entitled to Benefits.

Raum argues that under RCW 51.32.185, his obligation to provide evidence of occupational disease is totally negated and that the statute should be liberally construed to entitle him to benefits once he has shown that he experienced a heart problem with twenty-four hours of strenuous physical exertion due to firefighting activity. Raum is incorrect.

Worker's compensation claimants are held to a "strict proof of their right to receive the benefits of the Act." Berry v. Dept. of Labor & Indus., 45 Wn. App. 883, 884, 729 P.2d 63 (1986). "This strict standard of proof of entitlement to benefits is not limited or obviated by the rule of liberal construction of the Act." Jenkins v. Dept. of Labor & Indust., 85 Wn. App. 7, 13, 931 P.2d 907 (1996). Moreover, the doctrine of liberal construction of the Industrial Insurance Act is a rule of statutory construction and does not apply to the interpretation of fact. Ehman v. Dept. of Labor & Indust., 33 Wn. 2d 584, 206 P.2d 787 (1949).

2. There was Substantial Evidence from Which the Jury Could Conclude that Raum's Heart Problems Arose From Other Factors or Non-employment Activities.

The jury heard medical evidence as the nature and cause of Raum's coronary artery disease from four different physicians, including two of Raum's attending physicians. This medical testimony established

that Raum had multiple risk factors for his coronary artery disease that were in no way related to the distinctive conditions of his employment as a firefighter. It was the combination of these various risk factors that led to the development of Raum's coronary artery disease long before 2008. What Raum experienced in February 2008 was not a heart problem due to his work activities. Instead, he experienced symptoms of his underlying coronary artery disease.

The jury was properly instructed that this was a worker's compensation claim, that special consideration should be given to the testimony of an attending physician, that there may be one or more proximate causes of a condition, that the findings and decision of the Board were presumed correct, and that it was the City's burden to establish by a preponderance of the evidence that the Board's decision was incorrect. CP 1208-1228.

An appellate court may overturn a jury's verdict only if the verdict was not supported by substantial evidence. Burnside v. Simpson Paper Company, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The court may not substitute its judgment for that of the jury as long as there is evidence which, if believed, would support the verdict Id. at 108, 864 P.2d 937; Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn. 2d 939, 943, 640 P.2d 1051 (1982).

The City produced competent and substantial medical testimony through its own experts Dr. Alvin Thompson and Dr. Eugene Yang and through the testimony of Raum's own attending physicians which would support the jury's verdict. This expert medical testimony was not speculative or conjectural as Raum alleges. The fact that the City's witnesses were not Raum's attending physicians does not render their opinions worthless as Raum alleges.

Dr. Thompson testified based on his examination of Raum and review of Raum's medical records. Dr. Thompson diagnosed Raum as suffering from dyslipidemia (abnormal blood fat) and arteriosclerotic cardiovascular with a family history of coronary artery disease. He testified that neither Raum's dyslipidemia nor his arteriosclerotic cardiovascular disease were proximately caused by Raum's employment as a firefighter. He testified that Raum's cardiac disease would have been the same no matter what Raum's employment or even if he had never worked as a firefighter. Dr. Thompson provided unequivocal medical testimony, on a more probable than not basis, that Raum's coronary artery disease was related to his high cholesterol and family history (genetics) and not Raum's work as a firefighter.

Dr. Yang is a very well qualified cardiologist at the University of Washington. He is board certified in internal medicine, cardiovascular

disease, and nuclear cardiology. Dr. Yang testified that Raum suffers from a variety of risk factors for cardiovascular disease which all contributed to the development of his cardiovascular disease. Dr. Yang testified, on a more probable than not basis, that Raum's cardiovascular heart disease was not due to his occupational exposures. According to Dr. Yang, Raum would have had these same risk factors and cardiovascular heart disease had he never worked as a firefighter.

Raum's two attending physicians also provided medical evidence from which the jury could conclude that Raum's heart problems were unrelated to his occupation as a firefighter. Dr. Maidan testified that Raum was a very young man with early coronary artery disease caused by his high cholesterol, high blood pressure, and family history. Dr. Maidan provided a number of opinions about firefighters in general but no testimony linking Raum's cardiovascular disease to his occupation as a firefighter.

Dr. Kim testified that Raum suffers from coronary artery disease and that the primary risk factors of that disease are high blood pressure, high cholesterol, diet, weight, activity level, age, gender and genetics. He specifically testified that Raum's high cholesterol and family history contributed to his coronary artery disease. However, Dr. Kim was unable to offer a definitive medical opinion, on a more probable than not basis, as

to any relationship between Raum's heart problems and his exposures to stress or various alleged toxins. He never offered any opinion that, on a more probable than not basis, absent Raum's occupation he would never have experienced the heart problems which formed the basis of his claim. In other words, Dr. Kim did not provide testimony from which the jury could conclude that Raum's occupation as a firefighter was a proximate cause of his heart problems.

There was a preponderance of substantial evidence to support the jury's verdict that Raum's coronary artery disease arose from various risk factors unrelated to his employment as a firefighter. There was a preponderance of substantial evidence to support the jury's verdict that Raum's work as a firefighter was not a proximate cause of his heart disease.

Raum did not produce any compelling evidence to support his claim that his coronary artery disease arose naturally and proximately from his employment as a firefighter. Raum unsuccessfully tried to draw a connection based on suppositions and references to unsubstantiated studies and articles. However, none of the testimony established a clear link between firefighting activities and coronary artery disease. The evidence, did however, support a finding that Raum's cardiovascular

conditions was caused by his high cholesterol, genetic predisposition, hypertension and obesity.

E. The Superior Court Correctly Excluded Certain Lay Testimony as Hearsay and Lacking Foundation.

Raum asserts that the trial court improperly excluded testimony regarding Raum's exposures to toxins and stress.¹⁵ Raum asserts that this testimony would have allowed the jury to conclude that these factors were responsible for his occupational disease. Raum's assertions are incorrect for two reasons. First, the excluded testimony was inadmissible hearsay. Secondly, even if the evidence had been admitted, there was no medical evidence presented by Raum from which the jury could conclude that such exposures were a cause of Raum's coronary artery disease.

Raum first takes issue with testimony from his wife, Kristy Raum, that was stricken as inadmissible hearsay. In his brief, Raum argues that the Superior Court improperly exclude seven sections of testimony by Kristy Raum. In reviewing the actual Report of Proceedings and comparing it to the actual Board testimony, it is apparent that the trial court only excluded two sets of responses by Kristy Raum. The trial court properly excluded the first set of responses as hearsay since Kristy Raum

¹⁵ There is no dispute that the City properly objected to all of the excluded testimony during the Board proceeding and properly preserved for appeal all its adverse evidentiary objections at the Board level. BR 4.

was providing information about comments her husband made to her about not washing his clothes with the baby's clothes as his clothes had a chemical on them.¹⁶ The only other excluded testimony occurred in response to a question about what tragedies Raum may have discussed with his wife.¹⁷ Again, the Superior Court properly excluded the testimony based on hearsay.

Despite Raum's assertion, he testified extensively about his personal experiences and exposures as a firefighter. Raum testified about being awakened by an alarm bell and his fear of making a mistake. He testified about responding to different types of fires and being exposed to different types of chemicals, fumes and potentially toxic materials. What the trial court excluded was a document created by Raum summarizing the types of incidents he had responded to over time. The trial court properly excluded the exhibit as hearsay and lacking relevance or a foundation. RP 11. Even if the exhibit has been permitted, there was no medical evidence provided by Raum to relate these incidents to his coronary artery disease.

It is well established that decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be

¹⁶ The excluded testimony appears in the Board testimony of Kristy Raum which can be found in the Board Record of Kristy Raum's testimony at page 25, line 18 through page 26, line 1.

¹⁷ This excluded testimony appears in the Board testimony of Kristy Raum which can be found in the Board Record of Kristy Raum's testimony at page 29, line 18 and page 31, line 31, line 22 through page 33, line 3.

reversed on appeal absent a showing of abuse of discretion. Maehren v. City of Seattle, 92 Wash.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Huelett, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979). The trial court's decision to exclude this testimony was sound and should not be disturbed.

F. Raum Should Not be Allowed to Supplement the Record

Raum's attempt to supplement the record under RAP 9.11 with the November 1, 2011 *Declaration of Ron Meyers* is improper. Any references in Raum's opening brief to the contents of the *Declaration* should be stricken. The *Declaration* improperly attempts to establish evidence that was not part of the trial court record in an attempt to support Raum's claim that the jury instructions and special verdict form created confusion and error.

Although Raum filed a Motion to Attach Declaration and Supplement Record on November 8, 2011, and the City opposed the motion, the Court Commissioner declined to rule on the motion, leaving it for this Court to consider. The City has formally filed a motion to strike the portions of Raum's opening brief which refer to information contained in the Declaration of Ron Meyers and to strike the Declaration of Ron Meyers which was attached to Raum's opening brief. The City will not

restate its arguments here and relies on its previously filed opposition to Raum's motion to supplement and on the City's motion to strike.

G. Raum is not Entitled to Attorney Fees and Costs.

Per RCW 51.32.185(7)(b) a firefighter successfully appealing a Board determination that the rebuttable evidentiary presumption does not apply may have his reasonable cost and attorney fees paid by the opposing party. Because Raum has not successfully appealed to this court, he is not entitled to an award of fees and costs.

VII. CONCLUSION

The City asks that this Court affirm the verdict of the jury.

RESPECTFULLY SUBMITTED this 29th day of December, 2011.

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

By Lori M. Riordan WSBA # 16386
for Cheryl A. Zakrzewski, WSBA # 15906
Assistant City Attorney
For Respondent City of Bellevue

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in King County, Washington. I am over the age of 18 years and not a party to the within-entitled action. My business address is 450 110th Avenue NE, Bellevue, WA 98004. On December 29th, 2011, I served via ABC Legal Messenger a copy of the foregoing ***Brief of Respondent*** on the following:

Mr. Ron Meyers
Ron Meyers & Associates
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Lacey, WA 98104-3188
Attorney for Petitioner Raum

Beverly N. Goetz
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Attorney for Petitioner Department of Labor & Industries

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 29th day of December, 2011.


Reina McCauley
Legal Secretary

APPENDIX “A”

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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November 28, 2011

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CASE #: 67213-4-1
City of Bellevue, Respondent v. Michael A. Raum, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 28, 2011, regarding appellant's motion to attach declaration and supplement the record:

Appellant Michael Raum's motion to supplement the record neither addresses nor meets the strict criteria of RAP 9.11. Raum argues instead that this court should waive the requirements of the rule. The panel that considers the appeal on the merits will be in a better position to decide the motion to supplement the record.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

APPENDIX “B”

RCW 51.08.140
"Occupational disease."

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

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

RCW 51.32.185

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

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

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

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

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

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

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

(7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal,

APPENDIX “C”

ESSB 5801

FACTS

1. Bill pertains only to LEOFF II.
2. Bill is recommendation of the Joint Select Committee on Ind. Ins.
3. Distinction. LEOFF I medical/disability provisions are provided by the retirement act. LEOFF II medical/duty disability provisions are under L&I.
4. Bill does nothing more than shift the burden of proof for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for firefighters to L&I or self-insured employers.
5. Proof of duty related heart disease is now on employee. This is an impossible task. For such a challenge, if made, member must incur costs of an attorney and doctor - at a time that he/she is gravely ill and perhaps hospitalized.
6. In event of a fatal heart attack, surviving spouse/children must initiate the duty caused challenge under prohibitive costs. Failure means survivor absorbs medical and funeral expenses, and sustains loss of future income.
7. LEOFF II members receive duty related medical care from L&I or employer doctors. Accordingly, every heart/lung claim foregoes vigorous testing to validate realness.
8. LEOFF II members receive thorough physical examination prior to service acceptance. Weaknesses or tendencies thereof are noted on medical records and become a ready reference for rebut.
9. Every heart/lung disease claim is rebuttable under the bill. Should the claim not withstand scientific/medical rebut, there is no cost.
10. Logic follows that L&I with attorney and doctor resources, are ideally suited to initiate rebut rather than an ill member or survivor.
11. Bill carries special rebuttable consideration for smokers.
12. L&I administration of LEOFF II past 9½ years so efficient and abuse free that rates for firefighters were dropped by 36% and 28% for law enforcement on January 1, 1987. Percentage difference derives from police having greater employee numbers and thus working more hours with greater overall disability exposure.
13. LEOFF II employees share equally with employers of L&I medical care cost.
14. Thirty-five percent of LEOFF II (law enforcement) are employed by Seattle, Spokane and Tacoma as of one year ago. Figures should be even higher now.
15. Bill's cost. Had the bill been in effect past 9½ years, cost would be zero, for no heart/lung claims were filed.
16. Opponents claim this bill will be costly. Fact is they have no idea whatever what future costs will run.

17. Granted, there will be legitimate heart/lung claims in the future and thus the bill's purpose in shifting the presumptive burden from employee to L&I. However, that future cost should be slight based upon experience of 37 states with same or similar legislation.
18. There can be no cost until a heart/lung claim is rebutted and accepted by L&I or self-insured employer to be duty caused.
19. Heart and lung diseases fall under a distinct L&I category titled Occupational Disease. It's that definition Fire/Police employees must challenge in attempts to get a duty-related ruling when hit with heart /lung diseases. That definition follows:

RCW 51.08.140

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

Example of definition's application:

A police officer or firefighter on duty has a heart attack. Automatically, it's ruled non-duty related per application of the above stated definition, regardless of what employee had endured during shift.

If the attack is not fatal, employee is financially burdened to challenge the L&I definition and most likely on into court, if L&I medical care and monetary income is afforded. Failure to prove gets the employee nothing.

Should the on duty heart attack be fatal, survivor faces same costly challenge in seeking burial costs and some future income. Failure to prove duty-related causes gets survivor/children nothing.

APPENDIX “D”

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1833

Chapter 490, Laws of 2007
(partial veto)

60th Legislature
2007 Regular Session

FIREFIGHTERS--OCCUPATIONAL DISEASES

EFFECTIVE DATE: 07/22/07

Passed by the House April 18, 2007
Yeas 91 Nays 6

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 10, 2007
Yeas 46 Nays 2

BRAD OWEN

President of the Senate

Approved May 15, 2007, 2:27 p.m., with
the exception of section 1 which is
vetoed.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk
of the House of Representatives of
the State of Washington, do hereby
certify that the attached is
ENGROSSED SUBSTITUTE HOUSE BILL
1833 as passed by the House of
Representatives and the Senate on
the dates hereon set forth.

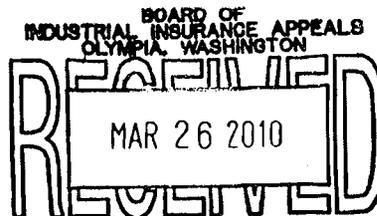
RICHARD NAFZIGER

Chief Clerk

FILED

May 16, 2007

Secretary of State
State of Washington



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ENGROSSED SUBSTITUTE HOUSE BILL 1833

AS AMENDED BY THE SENATE

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session

By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Pettigrew, Seaquist, Upthegrove, Morrell, Kessler, P. Sullivan, Williams, Kenney, Haler, Ericksen, Moeller, Sells, Dunn, Rolfes, Lantz, McCoy, Lovick, Jarrett, Strow, Hurst, Springer, Campbell, Goodman, Simpson, Pearson, Curtis, Rodne, Schual-Berke, McDermott, Ormaby and Chase)

READ FIRST TIME 2/28/07.

1 AN ACT Relating to occupational diseases affecting firefighters;
2 amending RCW 51.32.185, 51.52.120, and 51.52.130; and creating a new
3 section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 *NEW SECTION. Sec. 1. The legislature finds and declares:

6 (1) By reason of their employment, firefighters are required to
7 work in the midst of, and are subject to, smoke, fumes, infectious
8 diseases, and toxic and hazardous substances;

9 (2) Firefighters enter uncontrolled environments to save lives,
10 provide emergency medical services, and reduce property damage and are
11 frequently not aware of the potential toxic and carcinogenic
12 substances, and infectious diseases that they may be exposed to;

13 (3) Harmful effects caused by firefighters' exposure to hazardous
14 substances may develop very slowly, manifesting themselves years after
15 exposure;

16 (4) Firefighters frequently and at unpredictable intervals perform
17 job duties under strenuous physical conditions unique to their
18 employment when engaged in firefighting activities; and

INDUSTRIAL INSURANCE APPEALS
OLYMPIA, WASHINGTON

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1 (5) Firefighting duties exacerbate and increase the incidence of
2 cardiovascular disease in firefighters.

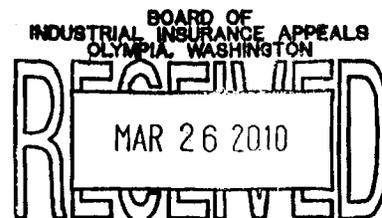
*Sec. 1 was vetoed. See message at end of chapter.

3 Sec. 2. RCW 51.32.185 and 2002 c 337 s 2 are each amended to read
4 as follows:

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

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

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



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

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

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

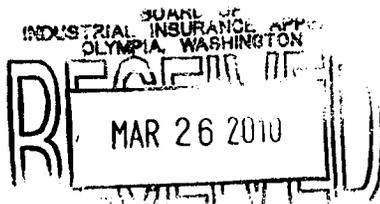
16 (7)(a) When a determination involving the presumption established
 17 in this section is appealed to the board of industrial insurance
 18 appeals and the final decision allows the claim for benefits, the board
 19 of industrial insurance appeals shall order that all reasonable costs
 20 of the appeal,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

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

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

30 Sec. 3. RCW 51.52.120 and 2003 c 53 s 285 are each amended to read
 31 as follows:

32 (1) It shall be unlawful for an attorney engaged in the
 33 representation of any worker or beneficiary to charge for services in
 34 the department any fee in excess of a reasonable fee, of not more than
 35 thirty percent of the increase in the award secured by the attorney's
 36 services. Such reasonable fee shall be fixed by the director or the
 37 director's designee for services performed by an attorney for such



1 worker or beneficiary, if written application therefor is made by the
2 ~~attorney, worker, or beneficiary within one year from the date the~~
3 final decision and order of the department is communicated to the party
4 making the application.

5 (2) If, on appeal to the board, the order, decision, or award of
6 the department is reversed or modified and additional relief is granted
7 to a worker or beneficiary, or in cases where a party other than the
8 worker or beneficiary is the appealing party and the worker's or
9 beneficiary's right to relief is sustained by the board, the board
10 shall fix a reasonable fee for the services of his or her attorney in
11 proceedings before the board if written application therefor is made by
12 the attorney, worker, or beneficiary within one year from the date the
13 final decision and order of the board is communicated to the party
14 making the application. In fixing the amount of such attorney's fee,
15 the board shall take into consideration the fee allowed, if any, by the
16 director, for services before the department, and the board may review
17 the fee fixed by the director. Any attorney's fee set by the
18 department or the board may be reviewed by the superior court upon
19 application of such attorney, worker, or beneficiary. The department
20 or self-insured employer, as the case may be, shall be served a copy of
21 the application and shall be entitled to appear and take part in the
22 proceedings. Where the board, pursuant to this section, fixes the
23 attorney's fee, it shall be unlawful for an attorney to charge or
24 receive any fee for services before the board in excess of that fee
25 fixed by the board.

26 (3) In an appeal to the board involving the presumption established
27 under RCW 51.32.185, the attorney's fee shall be payable as set forth
28 under RCW 51.32.185.

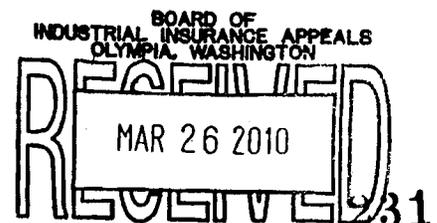
29 (4) Any person who violates this section is guilty of a
30 misdemeanor.

31 Sec. 4. RCW 51.52.130 and 1993 c 122 s 1 are each amended to read
32 as follows:

33 (1) If, on appeal to the superior or appellate court from the
34 decision and order of the board, said decision and order is reversed or
35 modified and additional relief is granted to a worker or beneficiary,
36 or in cases where a party other than the worker or beneficiary is the
37 appealing party and the worker's or beneficiary's right to relief is

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1 sustained, a reasonable fee for the services of the worker's or
~~2 beneficiary's attorney shall be fixed by the court. In fixing the fee~~
3 the court shall take into consideration the fee or fees, if any, fixed
4 by the director and the board for such attorney's services before the
5 department and the board. If the court finds that the fee fixed by the
6 director or by the board is inadequate for services performed before
7 the department or board, or if the director or the board has fixed no
8 fee for such services, then the court shall fix a fee for the
9 attorney's services before the department, or the board, as the case
10 may be, in addition to the fee fixed for the services in the court. If
11 in a worker or beneficiary appeal the decision and order of the board
12 is reversed or modified and if the accident fund or medical aid fund is
13 affected by the litigation, or if in an appeal by the department or
14 employer the worker or beneficiary's right to relief is sustained, or
15 in an appeal by a worker involving a state fund employer with twenty-
16 five employees or less, in which the department does not appear and
17 defend, and the board order in favor of the employer is sustained, the
18 attorney's fee fixed by the court, for services before the court only,
19 and the fees of medical and other witnesses and the costs shall be
20 payable out of the administrative fund of the department. In the case
21 of self-insured employers, the attorney fees fixed by the court, for
22 services before the court only, and the fees of medical and other
23 witnesses and the costs shall be payable directly by the self-insured
24 employer.

25 (2) In an appeal to the superior or appellate court involving the
26 presumption established under RCW 51.32.185, the attorney's fee shall
27 be payable as set forth under RCW 51.32.185.

Passed by the House April 18, 2007.

Passed by the Senate April 10, 2007.

Approved by the Governor May 15, 2007, with the exception of
certain items that were vetoed.

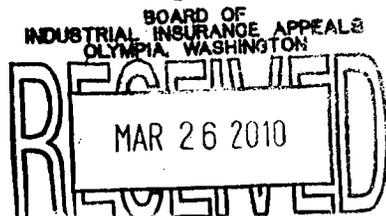
Filed in Office of Secretary of State May 16, 2007.

Note: Governor's explanation of partial veto is as follows:

"I am returning, without my approval as to Section 1, Engrossed
Substitute House Bill 1833 entitled:

"AN ACT Relating to occupational diseases affecting firefighters."

Engrossed Substitute House Bill 1833 creates a rebuttable presumption
that certain heart problems, cancer and infectious diseases are
occupational diseases for firefighters that are covered by industrial
insurance. I strongly support this law. The legislature's statement
of intent in Section 1, however, makes broad generalizations about
the incidence of cardiovascular disease. In an effort to avoid the
unintended interpretations of broad generalizations, Section 2 of the



bill has been carefully crafted to define specific "firefighting activities" that are related to occupational diseases.

For these reasons, I have vetoed Section 1 Engrossed Substitute House Bill 1833.

With the exception of Section 1, Engrossed Substitute House Bill 1833 is approved."

