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No. 69125-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

SCOTT A. CRANE

Appellant,

v.

SNOHOMISH COUNTY FIRE DISTRICT NO. 1 and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondents.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR AND ISSUES. 3

 A. Whether the Superior Court committed reversible error when, without any basis supported by law, it injected requirements into the firefighter presumption of occupational-causation in RCW 51.32.185 that do not exist by ruling that the “nature” or “type” of FF Crane’s respiratory disease is relevant in the application of the presumption. YES. 3

 B. Whether the BIIA and Superior Court committed reversible error when it ruled that the Employer and Department rebutted the firefighter presumption of occupational-causation without a preponderance of relevant, credible and admissible medical testimony establishing a specific non-occupational cause of FF Crane’s respiratory disease and establishing that firefighting was not a cause of FF Cranes’ respiratory disease. YES. 4

 C. Whether, notwithstanding the presumptive-disease statute, the BIIA and Superior Court committed reversible error when they ruled that FF Crane’s respiratory disease was not an occupational-disease under RCW 51.08.140. YES. ... 4

III. STATEMENT OF THE CASE 4

 A. Statement of Facts 4

 B. Medical Testimony 8

 1. FF Crane’s Treating Doctors 8

 a. Testimony of Dr. Michael D. Eulberg 8

 b. Testimony of Dr. Michael S. Milder 11

| | | |
|-----|--|----|
| 2. | <u>Department’s Hired Expert</u> | 12 |
| C. | <u>Procedural History</u> | 14 |
| IV. | ARGUMENT | 16 |
| A. | <u>Standard of Review</u> | 16 |
| 1. | <u>Superior Court</u> | 16 |
| 2. | <u>Court of Appeals</u> | 17 |
| 3. | <u>Summary Judgment</u> | 17 |
| B. | <u>The Purpose of the Industrial Insurance Act is Remedial in Nature and Must be Liberally Construed in Favor of the Worker</u> | 18 |
| C. | <u>Statutes Governing FF Crane’s Claim</u> | 21 |
| D. | <u>The Superior Court Injected Requirements into the Presumptive-disease Statue That do not Exist in the Statute</u> | 22 |
| E. | <u>The Presumption of Occupational-causation was not Rebutted by a Preponderance of Relevant, Credible and Admissible Medical Testimony</u> | 24 |
| 1. | <u>The Employer/Department Failed to Establish by a Preponderance of Evidence that a Specific Cause Other than FF Crane’s Occupation Caused FF Crane’s Pulmonary Emboli, and in Failing to do so the Employer/Department did not Rebut the Presumption of Occupational-causation. The BIIA and Superior Court Erred by Doing Otherwise</u> | 25 |
| 2. | <u>The Employer/Department Failed to Prove that FF Crane’s Occupation was not a Proximate Cause of</u> | |

| | | |
|-----|---|-----|
| | <u>His Respiratory Disease Without Which the Presumption of Occupational-causation is not Rebutted. The BIIA and Superior Court Erred in Ruling Otherwise</u> | 29 |
| F. | <u>Notwithstanding the Presumptive-disease Statute, the BIIA and Superior Court Erred by Ruling that FF Crane’s Respiratory Disease was not an Occupational Disease Under RCW 51.08.140</u> | 32 |
| G. | <u>Strong Case Law in Favor of Workers in Non-presumptive Cases Support FF Crane’s Entitlement to Workers Compensation Benefits</u> | 33 |
| H. | <u>Other Persuasive Authority</u> | 37 |
| I. | <u>Attorney Fees and Costs</u> | 41 |
| V. | CONCLUSION | 42 |
| VI. | APPENDIX | |
| | Rule ER 201 | A-1 |
| | RCW 51.32.185 | A-2 |

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990) | 17 |
| <i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002) | 20 |
| <i>Chalmers v. Dept. of Labor & Indus.</i> , 72 Wn.2d 595, 434 P.2d 720 (1967) | 34 |
| <i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 288 (2007) | 19 |
| <i>City of Bremerton v. Shreeve</i> , 55 Wn. App. 334, 777 P.2d 568 (1989) | 28, 30 |
| <i>City of Frederick, et al. v. Shankle</i> , 136 Md. App. 339, 765 A.2d 1008 (2001) | 38 |
| <i>Cook v. City of Waynesboro</i> , 225 Va. 23, 300 S.E.2d 746, (1983) | 38 |
| <i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006) | 19 |
| <i>Cunningham v. City of Manchester Fire Dept.</i> , 129 N.H. 232, 525 A.2d 714, (1987) | 39 |
| <i>Dennis v. Dept. of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987) | 20 |
| <i>Dept. of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) | 19 |

| | |
|---|------------|
| <i>Dependency of H.W.</i> , 92 Wn. App. 420, 961 P.2d 963 (1998) | 25 |
| <i>Earl v. Cryovac</i> , 115 Idaho 1087, 772 P.2d 725 (Ct.App.1989) | 34, 35 |
| <i>Fairfax County Fire & Rescue Dept. v Mitchell</i> , 14 Va. App. 1033, 421 S.E.2d 668 (1992) | 39 |
| <i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed.2d 954 (1983) | 18 |
| <i>Grimes v. Lakeside Industries</i> , 78 Wn. App. 554, 897 P.2d 431 (1995) | 16 |
| <i>Groff v. Dept. of Labor & Indus.</i> , 65 Wn.2d 35, 395 P.2d 633 (1964) | 34 |
| <i>Harrison Memorial Hospital v. Gagnon</i> , 147 Wn.2d 1011, 56 P.3d 565 (2002) | 31, 32, 33 |
| <i>Inland Empire Distrib. Sys., Inc. v. Util. & Transp. Comm'n</i> , 112 Wn.2d 278, 770 P.2d 624 (1989) | 18 |
| <i>In re Robinson</i> , 78 Or.App. 581, 717 P.2d 1202 (1986) | 34, 35, 36 |
| <i>Intalco Aluminum v. Dept. of Labor & Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992) | 33 |
| <i>Jackson v. Workers' Compensation Appeals Bd.</i> , 133 Cal. App. 4th 965, 35 Cal. Rptr. 3d 256 (3d Dist. 2005) ... | 37 |
| <i>Lacey Nursing Ctr., Inc. v. Dept. of Revenue</i> , 128 Wn.2d 40, 905 P.2d 338 (1995) | 19 |

| | |
|---|----|
| <i>Lightle v. Dept. of Labor & Indus.</i> , 68 Wn.2d 507, 413 P.2d 814 (1966) | 33 |
| <i>McCoy v. City of Shreveport Fire Dept.</i> , (La.App. 2 Cir. 1/25/95) 649 So.2d 103 | 41 |
| <i>McDonald v. Dept. of Labor & Indus.</i> , 104 Wn. App. 617, 17 P.3d 1195 (2001) | 30 |
| <i>Meche v. City of Crowley Fire Dept.</i> , (La.App. 3 Cir. 2/12/97), 688 So.2d 697, writ denied, (La. 4/25/97), 692 So.2d 1088 | 37 |
| <i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001) | 29 |
| <i>Montgomery County v Pirrone</i> , 109 Md. App. 201, 674 A.2d 98 (1996) | 40 |
| <i>Moore v. Pac. NW Bell</i> , 34 Wn. App. 448, 662 P.2d 398 (1983) | 18 |
| <i>Pasco v. Public Empl. Relations Comm'n</i> , 119 Wn.2d 504, 833 P.2d 381 (1992) | 18 |
| <i>Presnell v. Safeway Stores, Inc.</i> , 60 Wn.2d 671, 374 P.2d 939 (1962) | 25 |
| <i>Ravsten v. Dept. of Labor & Indus.</i> , 108 Wn.2d 143, 736 P.2d 265 (1987) | 17 |
| <i>Robertson v. North Dakota Workers Comp. Bureau</i> , 2000 ND 167, 616 N.W.2d 844 (ND 2000) | 40 |
| <i>Ruse v. Dept. of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999) | 17 |
| <i>Spalding v. Dept. of Labor & Indus.</i> , 29 Wn.2d 115, 186 P.2d 76 (1947) | 34 |

| | |
|---|--|
| <i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005) | 19 |
| <i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001) | 18 |
| <i>Superior v. Dept. of Indus. Labor & Human Relations</i> , 84 Wis.2d 663, 267 N.W.2d 637, (1978) | 38 |
| <i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997) | 18 |
| <i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982) | 18 |
| <i>Worden v. County of Houston</i> , 356 N.W.2d 693, (Minn. 1984) | 38 |
| <i>Young v. Dept. of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996) | 17, 34 |
| Statutes | |
| RCW 51.04.010 | 19 |
| RCW 51.08.100 | 2, 14 |
| RCW 51.08.140 | 2, 4, 15, 21, 22, 24, 32, 33 |
| RCW 51.12.010 | 20, 22 |
| RCW 51.32.185 | 2, 3, 15, 16, 21, 22, 24, 25, 30, 32, 37, 39, 42 |
| RCW 51.52.115 | 16, 17 |
| RCW 51.52.140 | 42 |

I. INTRODUCTION

Firefighter Scott Crane (“FF Crane”) has been a full-time firefighter for the Snohomish Fire District No. 1 since July, 1990. CP 239(3-25); CP 279(25)-280(4). He had no conditions, disabilities or diagnoses that affected or hindered his ability to perform the strenuous physical activity necessary in his employment as a firefighter. CP 247(17)-248(2).

On December 12, 2007, FF Crane awoke with extreme chest pain and went to the emergency room, where a CT scan revealed bilateral pulmonary embolisms -- blood clots in the lungs. CP 248-249. FF Crane also developed a pulmonary infarction and hemothorax. CP 282(5-8). Dr. Eulberg testified that FF Crane’s bilateral pulmonary emboli with the ensuing complications of pulmonary infarction and hemothorax is a respiratory disease. CP 280(19-20); CP 281(10)-282(8). The Board of Industrial Insurance Appeals’ (“BIIA”) Decision and Order ruled that FF Crane’s condition was a respiratory disease. CP 121(5-9), 122(23). The Department of Labor and Industries (“Department”) and Snohomish County Fire District No. 1 (“Employer”) did not appeal the BIIA’s ruling that FF Crane’s condition was a respiratory disease.

FF Crane missed several months of work. He was released to full-time unrestricted work around June, 2008, when he was no longer on blood

thinners to treat the blood clots in his lungs. CP 252(16)-253(14).

FF Crane filed an application for benefits with the Department on November 9, 2009, requesting payment of his medical bills, time loss and disability resulting from his respiratory disease diagnosed on December 12, 2007. CP 121. His request for benefits was denied, and he timely appealed to the BIIA, which affirmed the Department's Order, and ruled that he did not sustain an industrial injury within the meaning of RCW 51.08.100, that the rebuttable presumption of occupational-causation set forth at RCW 51.21.185 applied to him but that the Department/Employer effectively rebutted the presumption, and that as of the date of the Department's Order, FF Crane did not have an occupational disease within the meaning of 51.08.140. CP 121-123.

FF Crane timely appealed the BIIA's decision to Snohomish County Superior Court. CP 151-157. At Superior Court, he moved for Summary Judgment on the following issues: (1) that he is entitled to the firefighter's mandatory presumption of causation for his occupational respiratory disease claim and the burden shifting benefits of RCW 51.32.185; (2) under RCW 51.32.185, the burden of proof must be placed on the Department/Employer for the duration of the claim -- from the time of filing through appeal; (3) neither the Department/Employer ever correctly applied the mandatory

presumption of occupational respiratory disease in this; (4) the Department/Employer failed to overcome the burden imposed upon them by the correct application of RCW 51.32.185, therefore, FF Crane is entitled to the benefit of RCW 51.32.185 for his respiratory disease claim as a matter of law; and (5) FF Crane is entitled to all attorney fees and costs since the initial denial of RCW 51.32.185 presumptive occupational respiratory disease benefits from the time of his retention of legal counsel pursuant to RCW 51.32.185(7). CP 31-50.

The Department/Employer brought a cross-Motion for Summary Judgment, asking the Superior Court to affirm the BIIA's decision. CP 128. The Superior Court affirmed the BIIA's ruling (a) after having improperly applied the statutory presumption of occupational-causation, and (b) without a preponderance of the evidence to rebut the statutory presumption. VP 21-29.

FF Crane respectfully requests that the Court review these decisions, and find in his favor on the following issues.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Whether the Superior Court committed reversible error when, without any basis supported by law, it injected requirements into the firefighter presumption of occupational-causation in RCW 51.32.185 that do not exist by ruling that the "nature" or "type" of FF Crane's respiratory disease is relevant in the application of the presumption. YES.

B. Whether the BIIA and Superior Court committed reversible error when it ruled that the Employer and Department rebutted the firefighter presumption of occupational-causation without a preponderance of relevant, credible and admissible medical testimony establishing a specific non-occupational cause of FF Crane's respiratory disease and establishing that firefighting was not a cause of FF Cranes' respiratory disease. YES.

C. Whether, notwithstanding the presumptive-disease statute, the BIIA and Superior Court committed reversible error when they ruled that FF Crane's respiratory disease was not an occupational-disease under RCW 51.08.140. YES.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

Prior to December 12, 2007, the onset of FF Crane's presumptive occupational respiratory disease, he enjoyed a number of family activities including tennis, camping, bike riding, and coaching his daughters in basketball and softball. CP 233(17)-234(5). He also enjoyed taking on large projects around the house such as building rock walls and fences, remodeling and landscaping. CP 234(6-13). He also had never complained or exhibited signs of any shortness of breath or chest pain to his wife of almost 20 years. CP 232(24)-233(1), 234(14-21).

FF Crane went to college and obtained a fire science degree. He volunteered and was subsequently hired as a firefighter for what became Snohomish Fire District No. 1, where he has been a firefighter since July 1990. CP 239(5-25). Prior to his employment, FF Crane was required to

pass a comprehensive physical and mental evaluation. In addition to the rigorous physical and mental evaluation, he also went through extensive and strenuous drills including lifting ladders over 50 pounds, carrying hoses weighing about 100 pounds, carrying a dummy weighing over 150 pounds, and other tests as required by the fire district. CP 245(18)-247(3). He passed all the tests, and had no conditions or diagnoses that affected or hindered his ability to perform the strenuous physical activity necessary in his employment as a firefighter. CP 247(17)-248(2).

Firefighter/paramedic Steve Varden described FF Crane as “an ox”, strong, and as someone who does not say “no” but just keeps going. CP 224(1-9). Mr. Varden responded to many fire calls with FF Crane, many emergency medical service calls with him, and participated in many drills with him. CP 223(22)-224(5). Mr. Varden had numerous opportunities to observe FF Crane at work and while performing mandatory training drills. CP 223(16)-224(5). In all those times working and drilling together, Mr. Varden never saw FF Crane exhibit any difficulty breathing or heard him complain of chest pain prior to December 12, 2007. CP 224(10-13), 225(9-14).

Firefighter Steve Lindsey worked with FF Crane at Snohomish Fire District No. 1. CP 227(4-10). While working together, Mr. Lindsey has

responded to emergency medical service calls with FF Crane, responded to fire suppression calls with him, participated in training drills with him, and performed mandatory exercise routines with him. CP. 227(4-21). When describing FF Crane, Mr. Lindsey testified “Scott would be the guy, the first guy to pick up the hose and carry it . . . if there is one hose and two guys need it to get up there, Scott packs the hose up. Scott was always the one that did, he took care of me. I . . . Scott takes care of me and allows me not to have to do as hard of work as he does.” CP 228(26)-229(5).

Firefighter Lindsey’s testimony was the same as firefighter Varden’s; prior to December 12, 2007, FF Crane was in “outstanding” shape, with no complaints or symptoms of chest pain or shortness of breath. CP 229(6-16).

As a full-time firefighter, FF Crane works approximately 10 shifts a month, 24 hours per shift, with somewhere between 80 and 120 calls a month. CP 241(12-18). These calls are typically 20 percent fire suppression calls, and 80 percent Emergency Medical Service calls. CP 241(19-24). Two hours of each shift are spent on a strenuous mandatory exercise program; a requirement of employment at Snohomish Fire District No. 1. CP 244(26)-245(9). These workouts must take place each shift, and are often fit in between emergency calls. CP 244(26)-245(9).

FF Crane described the gear that all firefighters carry or wear when

responding to a fire suppression call. CP 241(25)-242(12). This gear includes the self-contained breathing apparatus (SCBA) which weighs approximately 45 pounds, bunker gear of approximately 10 pounds, and tools of approximately 25 pounds. CP 241(25)-242(12).

FF Crane also described the different types of smoke, fumes and toxic substances that firefighters are repeatedly exposed to including exhaust, car battery acids, carbon monoxide, cyanide gas, burning plastics and other toxins. CP 243(24)-244(17).

On December 12, 2007, FF woke up with extreme chest pain and went to the emergency room. CP 248(3-23). When blood work results were negative, the doctor ordered a CT scan. This revealed bilateral pulmonary embolisms -- blood clots in the lungs. CP 249(1-4), 249(14-19); CP 279(25)-280(12). Prior to December 12, 2007, FF Crane never experienced any difficulty or symptoms associated with blood clots in his lungs. CP 249(25)-250(1).

After his diagnosis of blood clots in his lungs, FF Crane was hospitalized for two days. However, at home he continued to take medications and remained on oxygen. CP 250(13-21). He was only home for one day when his breathing worsened and he felt like he was drowning. CP 251(6-15). His wife took him back to the hospital, and testing revealed a

complication of one of the pulmonary emboli resulting in a collapsed lung. CP 251(15-26); CP 281(19-25). FF Crane testified he “was basically drowning” in his own blood. CP 251(26). This time, FF Crane was forced to remain hospitalized for two weeks, finally returning home the day after Christmas. CP 252(2-4). He remained home until mid-February, at which time his treating Pulmonologist determined he could return to light duty work. FF Cranes’ Pulmonologist would not release him to full time unrestricted duty for six months, until FF Crane was no longer on blood thinners for the blood clots in his lungs. However, once he was no longer taking the blood thinners, he was released by his Pulmonologist to return to full time, unrestricted firefighter work. He has remained a full time firefighter without restriction ever since. CP 252(17)-253(14).

B. MEDICAL TESTIMONY.

1. FF Crane’s Treating Doctors.

a. Testimony of Dr. Michael D. Eulberg

Dr. Eulberg is a Board Certified Pulmonologist and a Board Certified Internist. CP 275 (16-25), 276 (1-14). Dr. Eulberg is the Director of Respiratory Therapy and is also the Director of Critical Care at Evergreen Hospital Medical Center. CP 277 (15-25), 278 (1-10). Dr. Eulberg has spent over two decades in clinical practice diagnosing and treating patients with

respiratory disease. CP 276 (14-25), 277(1-5).

Dr. Eulberg first examined FF Crane on December 18, 2007, in the hospital. CP 279 (22-25), 280(1-4). The doctor explained that FF Crane's initial diagnosis of bilateral pulmonary embolisms means "blood clots that are in the lungs that will affect the performance of the lungs and the heart." CP 280 (5-20). The doctor further testified that bilateral pulmonary embolisms are a "respiratory disease". CP 280 (19-20).

Pulmonologist Eulberg noted that everyone who has a pulmonary embolism will not develop a pulmonary infarction. CP 281 (1-9). However, FF Crane's respiratory condition did progress to the point of developing a pulmonary infarction. CP 281 (4-9). Dr. Eulberg testified that a pulmonary infarction is when the blood clots in the lungs compromise blood flow to the surrounding lung tissue, causing part of the lung tissue to die. CP 280 (21-25), 281(1-3). Dr. Eulberg testified that a pulmonary infarction is a part of the respiratory disease process involving the embolism. CP 281(14-16). According to Dr. Eulberg, FF Crane also developed a hemothorax which is the result of lung tissue dying from the infarction. A hemothorax causes bloody fluid to fill the space between the lung and the rib cage. CP 281 (17-25), 282 (1-2).

Dr. Eulberg testified that the factors that predispose people to blood

clots are “some trauma to a vein where the intima, or the inside lining, of a vein is disrupted for some reason and/or lack of activity.” CP 287 (5-13). He testified that those are the two main factors that the medical field focuses on. CP 287 (5-13). Dr. Eulberg then dismissed the presence of both of those factors in FF Crane’s case. CP 287 (14-17). Specifically, Dr. Eulberg testified that (a) he was not able to find a precipitating cause of FF Crane’s pulmonary emboli, CP 286 (19-25), CP 287 (1-13); (b) he does not see the requisite level of inactivity in a firefighter to cause it, CP 287 (14-21); (c) FF Crane was a non-smoker, CP 296 (3); (d) he was in excellent health with respect to his physical fitness, CP 296 (4-9); (e) he was not obese, CP 296 (4-9); (f) he had no lifestyle factors that would have caused pulmonary embolism, CP 296 (10-13); (g) he had no hereditary factors that would have caused pulmonary embolism other than a Protein S deficiency as reported by FF Crane, CP 296 (14-21); and (h) FF Crane experienced nothing outside of his employment that could have been a factor in causing his pulmonary emboli, CP 297 (1-8). FF Crane’s Protein S deficiency was ruled-out by Board Certified Hematologist Dr. Milder as is discussed immediately below. CP 311 (2-6). The Department’s doctor concurred with Dr. Milder. CP 358 (6-16).

When asked about the origin of the blood clots that caused FF

Crane's respiratory disease of pulmonary embolisms, pulmonary infarction, and hemothorax, Dr. Eulberg testified that there was nothing in his medical records that could determine the origin of the blood clots. CP 284 (12-15). In addition, there was no way to precisely determine when the blood clots formed. CP 285 (2-4). In sum, Dr. Eulberg could not and did not point to any non-occupational cause of FF Crane's respiratory disease.

b. Testimony of Dr. Michael S. Milder

Dr. Milder is Board Certified in Nuclear Medicine, Internal Medicine and Oncology. CP 304 (25), 305 (1-19). Dr. Milder was consulted on FF Crane's case because FF Crane had blood clots in his lungs and tests had indicated an abnormal level of Protein S. CP 308 (1-7). Dr. Milder testified that Protein S is one of a series of proteins in the blood that inhibit clotting. The significance of a Protein S deficiency is that such a deficiency results in a susceptibility to the formation of blood clots. CP 308 (8-16).

According to Dr. Milder, FF Crane tested with a "slightly decreased Protein S level" of 47 percent, when he was tested at the same time he was hospitalized with the blood clots in his lungs. CP 308 (17-25). However, Dr. Milder testified that such a mild finding was nonspecific and not diagnostic of congenital Protein S deficiency. CP 310 (19-22). FF Crane was tested again after he completed his course of the blood thinner coumadin. CP 310

(9-25), 311 (1-6). However, Dr. Milder testified that coumadin inhibits production of Protein S so a low level at that time is to be expected. *Id.* In order to be thorough, FF Crane was again tested for Protein S levels after his coumadin treatment was concluded in June 2008. *Id.* At that time, his Protein S levels were normal at 86 percent. *Id.* Dr. Milder testified that it was his professional opinion, based upon reasonable medical probability, that FF Crane does not have a genetic Protein S deficiency. CP 311 (1-6). The Department's doctor, Dr. Stumpp, concurred. CP 358(13-16). The presumption that FF Crane's respiratory disease was caused by his occupation was not rebutted.

2. Department's Hired Expert

Dr. Stumpp is certified only in Occupational Medicine. He is not Board Certified in Pulmonology or Hematology. CP 350 (21-25), 351(1). He only examined FF Crane on one occasion, two and one half years from the date when FF Crane experienced bilateral pulmonary embolisms, pulmonary infarction and hemothorax. CP 331 (19-25), 332 (1). This one examination, by an expert witness without relevant credentials, was requested and paid for by the Department of Labor and Industries. *Id.*

Dr. Stumpp testified that the known causes of pulmonary emboli are: "being bedbound with an illness", "infections like sepsis", "genetic clotting

abnormalities”, “lower extremity injuries”, and “abdominal injuries”. CP 340 (1-15). However, Dr. Stumpp conceded that none of these “known causes” applied to FF Crane. Specifically, Dr. Stumpp testified that (a) FF Crane was a regular exerciser, exercising three times a week, CP 335 (1-4); (b) FF Crane did not have any pulmonary infections, CP 333 (21-25), 334 (1-9); (c) FF Crane did not have any injuries, *Id.* (d) FF Crane did not drink coffee, CP 335 (1-4); (e) FF Crane never smoked, CP 365 (13-16); (f) FF Crane did not drink alcohol, CP 335 (1-4); (g) FF Crane did not use illicit drugs, *Id.*; (h) FF Crane was in good physical health, CP 365 (20-23); (i) FF Crane had no hereditary factors that would have caused his pulmonary embolism, CP 366 (2-4); (j) FF Crane had no lifestyle factors that would have caused his pulmonary embolism, CP 365 (24-25), 366 (1); and (k) FF Crane had no exposure to anything outside of his employment that could have been a factor in causing his pulmonary embolism. CP 366 (5-9).

Dr. Stump testified that he could not determine where the blood clots that caused FF Crane’s pulmonary embolism originated. CP 374 (25), 375 (1-6). When Dr. Stumpp was asked to identify the “evidence to rebut the presumption” of occupation-causation in FF Crane’s case, rather than point to a specific non-occupational cause, Dr. Stumpp’s answer was merely that there is “no known association [of pulmonary embolism] with occupation of

any sort.” CP 347 (4-14). The presumption that FF Crane’s respiratory disease was caused by his occupation was not rebutted.

C. PROCEDURAL HISTORY.

FF Crane filed an application for benefits with the Department on November 9, 2009, requesting payment of his medical bills, time loss and medical disability resulting from his respiratory disease diagnosed on December 12, 2007. CP 121. FF Crane’s request for benefits was denied by Department Order dated December 21, 2009, determining that FF Crane’s condition was not the result of an industrial injury, not the result of the injury alleged, and not the result of the exposure alleged, and not an occupational disease. CP 121. FF Crane timely filed a Notice of Appeal on January 28, 2010 with the BIIA. CP 122. On February 4, 2010, the Department reconsidered its December 21, 2009 Order and after further review the Department issued an Order on June 30, 2010 affirming its December 21, 2009 Order. *Id.* FF Crane timely filed a Notice of Appeal to the BIIA on August 27, 2010. *Id.* After hearing FF Crane’s appeal, the BIIA issued a Proposed Decision and Order on May 12, 2011, affirming the Department’s June 30, 2010 Order and ruling that FF Crane did not sustain an industrial injury within the meaning of RCW 51.08.100, that the presumption of occupational disease set forth in RCW 51.21.185 does not apply to FF

Crane's pulmonary embolism, pulmonary infarction and hemothorax conditions, and that as of the date of the Department's Order, FF Crane did not have an occupational disease within the meaning of 51.08.140. CP 122 - 123. FF Crane timely filed a Petition for Review on May 31, 2011. CP 125 - 132.

The BIIA issued a Decision and Order on August 16, 2011 affirming the Department's June 30, 2010, despite also ruling that the presumption of occupational disease set forth in RCW 51.21.185 did apply to FF Crane's pulmonary embolism, pulmonary infarction and hemothorax conditions. CP 118 - 124. FF Crane timely appealed the BIIA's Decision and Order to Superior Court on August 24, 2011. CP 380-381. At Superior Court, FF Crane moved for Summary Judgment on the following issues: (1) that he is entitled to the firefighter's mandatory presumption of causation for his occupational respiratory disease claim and the burden shifting benefits of RCW 51.32.185; (2) under RCW 51.32.185, the burden of proof must be placed on the Department/Employer for the duration of the claim -- from the time of filing through appeal; (3) the Department/Employer never correctly applied the mandatory presumption of occupational respiratory disease in favor of FF Crane; (4) the Department/Employer failed to overcome the burden imposed upon them by the correct application of RCW 51.32.185,

therefore, FF Crane is entitled to the benefit of RCW 51.32.185 for his respiratory disease claim as a matter of law; and (5) FF Crane is entitled to all attorney fees and costs since the initial denial of RCW 51.32.185 presumptive occupational respiratory disease benefits from the time of his retention of legal counsel pursuant to RCW 51.32.185(7). CP 31-50.

The Department/Employer brought a cross-Motion for Summary Judgment, asking the Superior Court to affirm the BIIA's decision. CP 12-30. The Superior Court affirmed the BIIA's ruling without any evidence to rebut the occupational-causation presumption and after it created limitations on the presumption that do not exist in the statute. CP 3-5.

FF Crane timely appealed the Superior Court's decision to this Court, on the basis of the aforementioned errors at the BIIA and Superior Court.

IV. ARGUMENT

A. STANDARD OF REVIEW.

1. Superior Court

In an appeal of a BIIA decision, the superior court holds a de novo hearing but does not hear any evidence of testimony other than that included in the BIIA records. RCW 51.52.115. *See also, Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). The findings and decisions of the Board are prima facie correct and the burden of proof is on

the party challenging them. RCW 51.52.115. *See also, Ravsten v. Dept. of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (quoting *Weatherspoon v. Dept. of Labor & Indus.*, 55 Wn. App. 439, 440, 777 P.2d 1084 (1989)).

2. Court of Appeals

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

3. Summary Judgment

Summary judgment at Superior Court is appropriate *only* if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56 (c). "In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of*

Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When reviewing an order of summary judgment, the Appellate Court engages in the same inquiry as the trial court. The appellate courts consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The purpose of summary judgment is to avoid a useless trial. *Moore v. Pac. NW Bell*, 34 Wn. App. 448, 662 P.2d 398 (1983). Summary judgment should only be granted where reasonable minds can reach but one conclusion. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

B. THE PURPOSE OF THE INDUSTRIAL INSURANCE ACT IS REMEDIAL IN NATURE AND SHALL BE LIBERALLY CONSTRUED IN FAVOR OF THE INJURED WORKER.

Construction of a statute is a question of law, which is reviewed *de novo* under the error of law standard. *State v. Keller*, 143 Wn.2d 267, 276 19 P.3d 1030 (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, 115 P.3d 281 (2005). When determining the Legislature’s intent, the Court shall first look to the plain meaning of the statute. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Lacey Nursing Ctr., Inc. v. Dept. of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). To determine the plain meaning, this Court must look at the text and “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs*, 154 Wn.2d at 600. If this reading of the statute leads to more than one interpretation, then the statute is ambiguous and this Court “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 288 (2007).

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

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

FF Crane requests that this Court take notice of the legislature’s intent in drafting and passing RCW 51.32.185. *See Appendix, ER 201*. The legislative intent of RCW 51.32.185 has accompanied the statute since 1987 without challenge. *Legislative Intent, Session Laws 1987 Chapter 515 § 1*.

Legislative Intent For The Presumptive Occupational Disease Statute.

“The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for firefighters.” *Legislative Intent, Session Laws 1987 Chapter 515 § 1*.

In analyzing the presumptive occupational disease statute, it is clear the legislature made a finding in 1987 that career exposures to smoke, fumes and toxic substances cause firefighters to have a higher rate of respiratory disease

than the general public. The legislature has mandated that due to those exposures that damage health – certain diseases including respiratory disease – are presumed to be occupational diseases for firefighters.

In order for a firefighter to gain the protections of the presumption of occupational disease and the shifting of the burden of proof onto the Employer, the statute must be applied at the beginning of the firefighter's claim. Under the presumptive disease statute, when a firefighter applies for Title 51 benefits for occupational disease, certain diagnosed disease conditions are presumed to be occupational, and the law shifts the burden onto the Department/Employer to disprove the condition as an occupational condition.

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

C. STATUTES GOVERNING FF CRANE'S CLAIM.

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.

RCW 51.32.185 Occupational diseases — Presumption of occupational disease for firefighters — Limitations — Exception — Rules.

(1) 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 exposure from other employment or nonemployment activities.

...

(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.

D. THE SUPERIOR COURT INJECTED REQUIREMENTS INTO THE PRESUMPTIVE-DISEASE STATUTE THAT DO NOT EXIST IN THE STATUTE.

In its Decision & Order, the BIIA stated that, "Given Dr. Eulberg's explanation of a pulmonary embolism as a disease and its potential consequences upon the respiratory functioning of the lungs, the definitions in *Webster's* and *Borland's*, and the liberal construction mandate of RCW 51.12.010 we hold that Mr. Crane's undisputed diagnosis of pulmonary embolism qualifies as a respiratory disease within the meaning of RCW 51.32.185(1)." CP 121 (5-9), 122 (23). The Department did not appeal that decision. At the Superior Court, it was undisputed that FF Crane's condition was a respiratory condition.

Nonetheless, Superior Court Judge David Kurtz wrongfully exhibited his personal skepticism that pulmonary embolisms could be a respiratory

disease when, according to him, “this is not the type of breathing problem that I think folks generally associate with being a respiratory disease.” VP 24(22-25), 25(1-2).

Judge Kurtz created law that did not exist in the presumptive disease statute, when he ruled that the “type” or “nature” of the respiratory disease is relevant in applying the presumptive-disease statute. Judge Kurt stated,

“And, also, I think it is fair to say, *because this does have some relevance*, to look at the particular nature of the respiratory disease or problem involved. . . . But arguably, to call this condition, the pulmonary embolism, a respiratory disease or problem is a bit of a misnomer and perhaps does not characterize it in the usual sense of what we think of in terms of a respiratory problem. This is not a breathing issue like bronchitis or something like that.” VP 23(13-24). [*Emphasis added.*]

“The *type* of respiratory disease that we are talking about *does have some significance in applying the presumption* in this particular fact situation, because, again, this is not the type of breathing problem that I think folks generally associate with being a respiratory issue.” VP 24(22-25); 25(1-2). [*Emphasis added.*]

When asked for a clarification of his ruling, Judge Kurtz stated,

“Well, I’m assuming that we are talking about a respiratory disease. My comments I think about the *nature* of the respiratory disease in this particular fact context *are relevant* for some of the reasons I’ve just articulated, that this is not like some other types of respiratory disease. And that *in applying the presumption, that may be a relevant consideration. . . .*” VP 28(14-22). [*Emphasis added.*]

RCW 51.32.185 is the presumptive-disease statute. It is unambiguous. “In the case of firefighters . . . there shall exist a prima facie presumption that: (a) respiratory disease; . . . are occupational diseases under RCW 51.08.140. . . .” The legislature, without qualification or exception, deemed any respiratory disease to be causally-related to firefighting. The presumptive disease statute does not state that the presumption of occupational-causation is only applied to certain “types” of respiratory diseases. The statute does not state that the “nature” of a firefighter’s respiratory disease is a factor in applying the presumption.

Judge Kurtz committed reversible error when he injected non-existent law into his application of the presumptive-disease statute.

E. THE PRESUMPTION OF OCCUPATIONAL-CAUSATION WAS NOT REBUTTED BY A PREPONDERANCE OF RELEVANT, CREDIBLE AND ADMISSIBLE MEDICAL TESTIMONY.

The Superior Court and BIIA decisions are incorrect because the evidence establishes that the Department and Employer failed to rebut the presumption of occupational-causation. Further, the burden of proof should have been placed upon the Department/Employer from the time of application for benefits because FF Crane was entitled to the burden-shifting mechanism in the statute. The evidence does not support a finding that the Department/Employer met their burdens of proof.

RCW 51.32.185 creates a presumption that employment as a firefighter caused FF Crane's respiratory disease. This is a presumption of proximate cause, which recognizes the inherent exposures to dangers and toxins experienced by firefighters, opposed to the general public. In order to overcome the presumption established in RCW 51.32.185, the Department/Employer must prove by a preponderance of admissible evidence that (1) FF Crane's occupational disease was acquired by some specific cause outside his career employment as a firefighter, and (2) that employment as a firefighter was not a cause.

1. **The Department/Employer failed to establish by a preponderance of evidence that a specific cause other than FF Crane's occupation caused FF Crane's pulmonary emboli, and in so failing the Department/Employer did not rebut the presumption of occupational-causation. The BIIA and Superior Court erred by ruling otherwise.**

A "preponderance of the evidence" is a judicial standard requiring that all of the evidence establish the proposition at issue is more probably true than not true. *See Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962); *Dependency of H.W.*, 92 Wn. App. 420, 961 P.2d 963 (1998). At no time has the Department/Employer produced credible medical opinion testimony that anything other than firefighting caused FF Crane's pulmonary emboli.

Dr. Stumpp conceded that the known causes of pulmonary emboli

(inactivity, genetic abnormalities, traumatic injuries) did not apply to FF Crane. Dr. Stumpp conceded that FF Crane was a regular exerciser, did not have any pulmonary infections, did not have any injuries, did not drink coffee, never smoked, did not drink alcohol, did not use illicit drugs, was in good physical health, had no hereditary factors that would have caused his pulmonary embolism, had no lifestyle factors that would have caused his pulmonary embolism, and had no exposure to anything outside of his employment that could have been a factor in causing his pulmonary embolism.

Simply put, the Department's own medical expert could not and did not opine that anything outside of FF Crane's employment caused his pulmonary emboli. Dr. Stumpp even testified that he could not determine where the blood clots that caused FF Crane's pulmonary embolism originated.

Similarly, Dr. Eulberg testified that there was no objective evidence indicating where the blood clots originated. Dr. Eulberg also testified that FF Crane was a non-smoker, was in excellent health with respect to his physical fitness, was not obese, had no lifestyle factors that would have caused pulmonary embolism, had no hereditary factors that would have caused pulmonary embolism other than a Protein S deficiency as reported by FF Crane (which was ruled-out by Dr. Milder's opinion, to which Dr. Stumpp concurred), and FF Crane experienced nothing outside of his employment that

could have been a factor in causing his pulmonary emboli.

Both Dr. Eulberg and Dr. Stumpp were given the opportunity at their perpetuation depositions to testify whether there was anything outside of FF Crane's employment that caused FF Crane's pulmonary emboli. Unable to point to a distinct non-occupational cause, Dr. Stumpp merely testified "there is no known association [of pulmonary embolism] with occupation of any sort." CP 347 (12-14). Dr. Eulberg similarly stated that ". . . I wasn't aware of any comparable data that talked about firefighters having a higher incidence or risk of developing pulmonary emboli" CP 293 (15-19) and "I had no awareness of pulmonary embolism being an occupational illness." CP 292 (2-3).

There is no medical opinion in the record that something other than FF Crane's employment caused FF Crane's pulmonary emboli. Rather, the medical opinion of both the Department and FF Crane's experts not only reflect an inability to determine a cause, but also acknowledge a complete lack of the potentially-rebutting factors such as genetic predisposition, smoking, lifestyle factors, and physical fitness.

Even if FF Crane had a predisposition to respiratory disease it is irrelevant because of the ". . . fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all preexisting

frailties and bodily infirmities.” *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, 777 P.2d 568 (1989).

Without proving that something other than firefighting caused FF Crane’s respiratory disease, the Department/Employer has not rebutted the presumption that firefighting caused FF Crane’s respiratory disease. The core of the intent behind the presumptive-disease statute is the understanding that the law is not going to task the firefighter with the duty of finding exactly what independent exposure to smoke, or fumes, or toxins, or chemicals, caused the respiratory disease. Rather, due to the inherent exposures to these dangers experienced by firefighters, opposed to what the general public experiences, the law presumes that firefighting causes respiratory disease.

By only challenging the premise of the statute, i.e. rejecting the legislature’s decision to make this causal connection, the Department/Employer has not rebutted the presumption. The Department’s/Employer’s position is one that is best suited to be taken up with the legislature. A presumed causal connection between respiratory disease and firefighting is the law, and the Department’s/Employer’s position is merely that of disagreeing with the legislature’s rationale. Stated otherwise, to rebut the presumption the Department/Employer needs to come forward with evidence of what caused FF Crane’s respiratory disease. The

Department/Employer failed to do so. The presumption was not rebutted, and the BIIA and Judge Kurtz erred by ruling otherwise.

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

2. **The Department/Employer failed to prove that FF Crane's occupation was not a proximate cause of his respiratory disease, without which the presumption of occupational-causation is not rebutted. The BIIA and Superior Court erred in ruling otherwise.**

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

WPI 155.06.01

For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must only be a proximate cause of the alleged condition for

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

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

Even if a non-occupational cause was present in the record, FF Crane is still entitled to benefits because there can be more than one proximate cause of a condition. Both Dr. Stumpp and Dr. Eulberg testified to the known causes of pulmonary emboli. Both Dr. Stumpp and Dr. Eulberg's testimony established that those known causes do not apply to FF Crane. It is undisputed that the medical experts in this case do not know what caused FF Crane's respiratory disease. Therefore, if the known causes of respiratory disease do not apply to FF Crane, and the experts don't know the actual cause, the evidence cannot support extinguishing occupation as a proximate cause. This is especially true given the occupation at issue in this case.

As a firefighter since 1990, FF Crane has been exposed to exhaust fumes, car batteries that have been punctured, gases from air-bag deployment, car fires, smoke, fumes, carbon monoxide, and by-products of modern materials which can include cyanide gases and other types of gases given off by plastics and modern material. CP 244 (2-17).

In passing the presumptive-disease statute, the legislature specifically found, “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.” *See Legislative Intent, Session Laws 1987 Chapter 515 § 1.*

In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011, 56 P.3d 565 (2002), the Court ruled that the claimant’s Hepatitis C was an occupational disease and that the evidence was sufficient to support an inference on a more probable than not basis that he acquired hepatitis while working at the hospital. This was true even though the claimant had a history of drug use, had numerous body piercings, numerous tattoos, and had worked as emergency medical technician in the Navy prior to her employment at the hospital. *Id.*

In the present case, (a) non-employment-related causes were ruled out as being the cause of FF Crane’s pulmonary emboli, (b) all other rebuttable

factors were ruled out, and (c) the actual cause is unknown by the medical experts. Coupling those three facts with the legislature's findings and the fact that FF Crane testified to career exposure to smoke, fumes, toxins and chemicals, the inference is even stronger than in *Harrison* that firefighting is a cause of FF Crane's respiratory disease.

The Department/Employer has not, by a preponderance of the evidence, rebutted the presumption that firefighting is a proximate cause of FF Crane's respiratory disease. The BIIA and the Court erred when it found that the presumption of occupational-causation was rebutted by the Department.

F. NOTWITHSTANDING THE PRESUMPTIVE-DISEASE STATUTE, THE BIIA AND SUPERIOR COURT ERRED BY RULING THAT FF CRANE'S RESPIRATORY DISEASE WAS NOT AN OCCUPATIONAL DISEASE UNDER 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 provisions of this title." *RCW 51.08.140*.

There is no medical testimony establishing a non-employment cause of FF Crane's pulmonary embolism. There is no medical testimony establishing any of the factors set forth in RCW 51.32.185 to rebut firefighting as the cause. On the other hand, FF Crane testified to having career exposures to fumes, smoke, toxins and chemicals as a firefighter, and the legislature has acknowledged and accepted that the employment of firefighting results in

exposure to smoke, fumes, and toxic or chemical substances and that “firefighters as a class have a higher rate of respiratory disease than the general public.” *Legislative Intent, Session Laws 1987 Chapter 515 § 1.*

Just as the Supreme Court in *Harrison* held, the evidence is sufficient to support *an inference on a more probable than not basis* that FF Crane’s exposure to smoke, fumes, toxins and chemicals as a firefighter caused his respiratory disease. The Court erred in ruling that FF Crane did not have an occupational-disease under RCW 51.08.140.

G. STRONG CASE LAW IN FAVOR OF WORKERS IN NON-PRESUMPTIVE CASES SUPPORTS FF CRANE’S ENTITLEMENT TO WORKERS’ COMPENSATION BENEFITS.

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

refrain from narrowly construing provisions of the Act where such an interpretation results in the denial of benefits and statutory language does not suggest that the Legislature intended such a narrow interpretation). Although not burden-shifting, in workers' compensation cases, the court also must give *special* consideration to the opinions of attending physicians because the attending physicians are not merely hired experts giving a particular opinion consistent with one party's view of case. *Young v. Dept. of Labor & Indus.*, 81 Wn. App. 123, 913 P.2d 402 (1996); *Chalmers v. Dept. of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Dept. of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964); *Spalding v. Dept. of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947).

Courts in other jurisdictions have declined to require the injured plaintiff in toxic tort products liability cases to prove the precise chemical that caused his or her injury. *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct.App.1989), (*Exhibit I-1*); *In re Robinson*, 78 Or.App. 581, 717 P.2d 1202 (1986), (*Exhibit I-2*). In *Earl*, the Court of Appeals of Idaho reversed a summary judgment in favor of the manufacturer, holding that the plaintiff presented sufficient evidence to allow a jury to conclude that his lungs were injured as a result of exposure to vapors emitted from a plastic film used in the meat-packing room where he worked. The plaintiff's attending physician

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

“We do not consider it fatal to the plaintiff's case that the etiology of his disease has not been traced to a discrete component or set of components within the heated plastic vapor. As explained by our Supreme Court in *Farmer v. International Harvester Co.*, supra, [97 Idaho 742, 772, 553 P.2d 1306, 1336,] the plaintiff need only show that the product is unsafe; he need not identify and prove the specific defects which render it unsafe. The same approach is reflected in the cases cited at footnote 2, where victims of “meatwrapper's asthma” have been allowed to recover despite scientific uncertainty as to the precise etiological link between their disease and specific chemical(s) in the heated plastic vapors.” *Earl*, 115 Idaho at 1095, 772 P.2d at 733.

The court found the plaintiff's expert could rely on circumstantial evidence such as the plaintiff suffering a worsening of symptoms while on the job and an improvement when he was not working.

In *Robinson*, a furniture store employee sought workers' compensation benefits, claiming that exposure to toxic chemicals in the furniture store where she worked caused her to suffer from headaches, fatigue and dizziness. The claimant testified that the store continually received new furniture which was uncrated weekly in the furniture showroom. The evidence also showed that

new furniture goes through a “gassing out” process whereby it releases quantities of formaldehyde, phenol and hydrocarbons over a period of time. The claimant also testified that the showroom in which she began working was hot, poorly ventilated and had low ceilings. *Robinson*, 717 P.2d at 1203. The employer's insurer argued that the claimant could not show that her work conditions caused her symptoms because living in a mobile home and having new carpet installed had exposed her to formaldehyde. The Court of Appeals of Oregon found, however, that the claimant met her burden of proving that chemical exposure at work was a contributing cause of her disease. The court further ruled that the claimant was not required to pinpoint the precise chemical that caused her sensitivity:

“To recover, a claimant must prove that the conditions at work were the major contributing cause of the disability. Although the specific chemical cause of claimant's sensitivity is not conclusively established, she has shown by a preponderance of the evidence that the major contributing cause was her work environment at Struthers which exposed her to concentrations of chemicals much greater than she was ordinarily exposed to outside the course of employment.” (Citations omitted.) *Robinson*, 717 P.2d at 1206.

These cases show that there is already strong existing law in favor of all injured workers, even without the benefit of any legislative mandated presumption.

It is because of the occupational disease in firefighters that the

legislature created RCW 51.32.185. The statute created the causation between certain diseases and the occupation of firefighting. The statute relieves the firefighter from the burden of identifying a particular substance or exposure in order to receive benefits. The firefighter presumption of occupational disease sits on top of the IIA and grants additional benefits in favor of firefighters.

H. OTHER PERSUASIVE AUTHORITY.

In *Jackson v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 965, 969, 35 Cal. Rptr. 3d 256 (3d Dist. 2005), the Court found that a physician's testimony that there was nothing specific to the deceased correctional officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack was not sufficient to rebut the statutory presumption that the correctional officer's heart problems arose out of and in the course of his employment.

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

Many other cases agree that a presumptive statute cannot be overcome by expert testimony which simply challenges the premise of the presumption. Instead, to overcome the presumption, the Employer must produce clear medical evidence of a cause for the presumptive disease, outside of the claimant's employment. Testimony regarding idiopathic or unknown causes is not sufficient. *City of Frederick et al. v. Shankle*, 136 Md. App. 339, 765 A.2d 1008 (2001), also see the following as cited in *Frederick: Worden v. County of Houston*, 356 N.W.2d 693, 695-96 (Minn. 1984); *Cook v. City of Waynesboro*, 225 Va. 23, 300 S.E.2d 746, 748 (1983); *Superior v. Dept. of Indus. Labor & Human Relations*, 84 Wis.2d 663, 267 N.W.2d 637, 641 (1978); *Cunningham v. City of Manchester Fire Dept.*, 129 N.H. 232, 525 A.2d 714, 718 (1987).

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

court in *Cunningham* determined that although the medical community might disagree as to the role of firefighting in the development of heart problems, the legislature had made a decision to presume a causal connection.

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

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

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

employment.” The burden was put on the employer to prove otherwise as a matter of law.

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

In *Montgomery County v. Pirrone*, 109 Md. App. 201, 674 A.2d 98 (1996), a retired firefighter was entitled to the statutory presumption that his heart attack resulted from his employment for purposes of workers’ compensation, even though the heart attack occurred after his retirement. The court found both the burden of production and the burden of persuasion remain fixed on the employer in determining the applicability of the statutory presumption of compensability. Neither ever shifts to the firefighter. The presumption constitutes affirmative evidence on the firefighter’s behalf

throughout the case, notwithstanding the production of contrary evidence by the employer. *Id.* The jury was properly instructed that it must only find that the firefighter's occupation was a factor in causing the heart disease, not the predominant factor.

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

In spite of the legislative mandate requiring application of the firefighters' presumption, the regulations of the Department have not been modified for decades and the statute is routinely ignored in cases where the legislative presumption is mandatory. The Department and employers continue to refuse to apply the firefighters' presumption statute in violation of the legislative directive.

I. ATTORNEY'S FEES AND COSTS.

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

V. CONCLUSION

The burden of proof should have been placed upon the Department/Employer from the time of application for benefits because the claimant was entitled to the burden shifting in the statute. The Superior Court wrongfully injected requirements into the presumptive disease statute that do not exist. FF Crane has established that he has a presumptive occupational respiratory disease, which the Department/Employer failed to rebut.

FF Crane has also established by a preponderance of evidence that he has an occupational respiratory disease.

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

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APPENDIX

RULE ER 201
JUDICIAL NOTICE OF ADJUDICATIVE FACTS

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

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

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

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

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

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

[Adopted effective April 2, 1979.]

Comment 201

[Deleted effective September 1, 2006.]

RCW 51.32.185

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

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

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

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

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

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

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

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

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

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

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

Notes:

***Reviser's note:** RCW 41.26.030 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (4)(a), (b), and (c) to subsection (16)(a), (b), and (c).

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