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NO. 69125-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SCOTT A. CRANE,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This is a workers' compensation case governed by the Industrial Insurance Act, Title 51 RCW. Under RCW 51.32.185, firefighters who develop certain medical conditions receive a rebuttable evidentiary presumption that the condition is an occupational disease. If the presumption applies, the burden shifts to the firefighter's employer and the Department of Labor and Industries (Department) to present evidence that the condition was not caused by the conditions of the claimant's employment. If the employer or Department effectively rebuts the presumption, the burden shifts back to the firefighter to prove by a preponderance of the evidence the occupational disease is work-related.

Scott Crane, a firefighter, developed bilateral pulmonary emboli which he contends the Department should have accepted as an occupational disease. Crane presented evidence that his pulmonary emboli is a "respiratory" disease, but failed to present any evidence indicating the disease has any connection to any of his activities as a firefighter. The Department, in response, presented the testimony of a medical expert, Dr. Dennis Stumpp, who concluded that Crane's disease did not arise as a proximate result of the conditions of his employment as a firefighter. The Board of Industrial Insurance Appeals (Board) concluded that the presumption of coverage under RCW 51.32.185 applied, but that

the Department had rebutted the presumption through Dr. Stumpp's testimony, and that the preponderance of the evidence did not support the conclusion that Crane's disease was related to his employment. Crane appealed and the superior court affirmed.

Crane argues the Department can rebut a presumption of coverage only by both identifying a non-work-related cause of the condition and "extinguishing" firefighting as one of the causes of his condition. App's Br. at 25, 30. However, neither RCW 51.32.185 nor any other legal authority supports this argument. Because Crane's contention is unsupported and unsupportable, and because Crane presented no evidence establishing that his alleged occupational disease is work-related, this Court should affirm.

II. ISSUES

1. Did the Department successfully rebut the rebuttable presumption of coverage created by RCW 51.32.185 when it presented testimony from a medical expert establishing that Crane's illness did not arise naturally and proximately out of any distinctive conditions of his employment?
2. Did the superior court properly grant summary judgment to the Department when the Department rebutted the presumption that Crane's illness was related to his employment as a firefighter and when Crane failed to present any expert evidence establishing his illness arose naturally and proximately out of his employment activities?
3. Did the superior court commit reversible error when the judge noted, in explaining the court's decision, that the

“type” of respiratory disease appeared relevant, when there is no indication this comment affected the outcome of the case, and when this Court reviews the summary judgment order de novo?

III. STATEMENT OF THE CASE

Scott Crane has been employed as a full-time active duty firefighter since July 1990. BR Crane at 24.¹ At approximately 2:00 A.M. on December 12, 2007, Crane was at his home when he suddenly awoke from sleep and began to experience chest pain. BR Crane at 33. When these symptoms persisted, his wife drove him to the Evergreen Hospital Medical Center emergency room, where he was diagnosed with bilateral pulmonary emboli, which are blood clots that obstruct the pulmonary arteries in both lobes of the lungs. BR Stumpp at 24; BR Eulberg at 14.

Crane was initially hospitalized for two days. BR Crane at 35. When he returned home his breathing worsened, and he was readmitted to the hospital for approximately two weeks. BR Crane at 35-37. A small percentage of persons with pulmonary emboli develop pulmonary infarction, a complication in which the clots compromise the blood flow to the surrounding tissue causing part of the tissue to die. BR Crane at 36; BR Eulberg at 14-15. Crane was diagnosed with this condition during his second admission to the hospital. BR Eulberg at 15; BR Stumpp at 24, 53.

¹ The Certified Appeals Board Record is referred to as “BR” followed by the witness’s name and page number.

The infarction caused Crane to develop hemothorax, blood vessels bleeding into the pleural cavity between the chest wall and the lung. BR Eulberg at 15; BR Stumpp at 59.

Crane underwent a six-month course of Coumadin (a blood thinner) treatment, ending in June 2008. BR Milder at 14. He returned to full-time light-duty work in April 2008 and full-time firefighter duties in June 2008. BR Crane at 38. Crane last met with his treating physician, Michael D. Eulberg, M.D., who is board certified in internal medicine, in October 2009. BR Eulberg at 5, 23. Crane continues to work as a full-time firefighter with no restrictions on his employment-related activities. BR Eulberg at 23.

In October 2009, almost two years after the onset of his symptoms, Crane asked Dr. Eulberg to complete a report of industrial injury or occupational disease regarding his pulmonary embolism condition. BR Eulberg at 25. At the time Dr. Eulberg completed the form he reported to the Department that the diagnosed condition was only possibly, and not probably, caused by an industrial injury or exposure. BR Eulberg at 25-26.

In December 2009, the Department issued an order rejecting the industrial claim. CP at 145-46. Crane appealed the order. CP at 163. In response, the Department reassumed jurisdiction of the claim and

arranged for an independent medical examination (IME) with Dennis Stumpp, M.D., who is board certified in occupational medicine. BR Stumpp at 17. Dr. Stumpp examined Crane and determined that his bilateral pulmonary emboli was not causally related to or exacerbated by his duties as a firefighter. BR Stumpp at 23. In June 2010, the Department issued an order affirming its rejection of the claim. CP at 148-55.

Crane appealed the rejection of his claim to the Board. BR at 34-41. Both Dr. Eulberg and Dr. Stumpp testified as to the cause of Crane's pulmonary emboli condition and agreed as to the process that brings on a pulmonary embolism. BR Eulberg at 18-21; BR Stumpp at 19-25. According to the physicians, a blood clot forms distally in some other part of the body, not the lungs. BR Eulberg at 16-17; BR Stumpp at 23-26. Eighty percent of the time the blood clot forms in the lower extremities. BR Eulberg at 16-17; BR Stumpp at 23-26. Pieces of the clot break off and get caught by the natural flow of blood coming from the periphery to the central part of the body and end up in the smaller blood vessels of the lungs. BR Eulberg 16-17; BR Stumpp at 24.

Dr. Eulberg testified that it was reasonably medically probable that Crane's clot originated in his legs. BR Eulberg at 18. This correlates with Crane's testimony that he felt some "strange leg pain" during the couple of

days prior to his development of chest pain. BR Crane at 34. Dr. Eulberg further testified that he was unable to determine a precipitating cause of Crane's emboli. BR Eulberg at 20. Last, Dr. Eulberg testified that he did not feel Crane's condition was related to work conditions. BR Eulberg at 27-28.

Dr. Stumpp testified that pulmonary emboli are not an occupational disease, and agreed with Dr. Eulberg that Crane's disease was unrelated to his work conditions. BR Stumpp at 25, 28. Dr. Stumpp explained that "pulmonary emboli are not an occupational disease" because nothing specific to the duties of a firefighter would cause an increased risk of developing the condition. BR Stumpp at 25. And Dr. Stumpp further agreed with Dr. Eulberg that no medical studies established any increased risk for firefighters of developing pulmonary emboli over the general population. BR Stumpp at 25-26, 29.

Michael S. Milder, M.D., a board certified hematologist, testified he tested Crane for a possible Protein S abnormality. BR Milder at 10. Protein S is a series of proteins in the blood that inhibits blood clotting; a Protein S deficiency may indicate a predisposition to forming blood clots. BR Milder at 10. Dr. Milder testified that although Crane's initial test at hospitalization showed a slightly decreased Protein S level, a repeat test performed after Crane completed his Coumadin treatment was normal.

BR Milder at 10, 12-13. Dr. Milder opined Crane did not have a genetic Protein S deficiency, and he did not testify as to any other potential cause of Crane's emboli. BR Milder at 13.

On August 16, 2011, the Board published its decision and order, including findings of fact and conclusions of law, concluding there was no occupational disease. CP at 2-7. Crane appealed to superior court. CP at 380-81. Crane moved for summary judgment, arguing that the Department failed to rebut the RCW 51.32.185(1) evidentiary presumption and that his claim must be allowed. CP at 31, 41-44. The Department filed a cross motion for summary judgment, arguing that it had effectively rebutted the presumption by a preponderance of the evidence through Dr. Stumpp's testimony that his condition was not related to his work as a firefighter on a more probable than not basis, and that, because Crane had presented no evidence that the disease was in any way work-related, a reasonable trier of fact could properly conclude only that Crane's occupational disease claim should be rejected.² CP at 13-16. The superior court granted the Department's cross motion for summary judgment and affirmed the Board's decision. CP at 3-5.

² The Board found that Crane's pulmonary emboli was a "respiratory disease" and concluded he was entitled to the RCW 51.32.185 rebuttable presumption. CP at 120-21. The Department did not challenge the Board's finding in superior court. CP at 12-30. Accordingly, the Department concedes that for purposes of the instant appeal, Crane's pulmonary embolism is a "respiratory disease" under RCW 51.32.185 and the presumption of occupational disease applies.

Crane now appeals.

IV. SUMMARY OF THE ARGUMENT

Crane argues that the superior court erred by granting the Department's cross motion for summary judgment because the Department did not effectively rebut the RCW 51.32.185 presumption of occupation disease for firefighters. Without citation to authority, Crane asserts that the Department may rebut a presumption only by both identifying a specific non-work-related cause of the condition and by "extinguishing" firefighting as a potential cause of the condition. But Crane's argument is without merit.

Contrary to Crane assertions, nothing in the plain language of RCW 51.32.185 requires the Department to present rebuttal evidence of a specific non-work-related cause of his disease or to "extinguish" the claimant's employment as a firefighter as a potential cause of his disease. Rather, given the broad language in RCW 51.32.185 that the Department can rebut the presumption through a "preponderance of the evidence," and given the case law addressing the elements that a worker normally needs to prove in order to make a prima facie for acceptance of an occupational disease, the proper inference is that the Department may rebut the presumption of occupational disease by establishing, on a more probable

than not basis, the worker's disease did not arise "naturally" or "proximately" out of distinctive conditions of the worker's employment.

Here the Department has successfully rebutted the presumption through the testimony of competent medical experts establishing that Crane's condition is unrelated to his work. The medical experts reasoned that nothing in Crane's medical records indicated a specific cause of his emboli, such as a work-related trauma, and that there is no known causal relationship between pulmonary emboli and employment as a firefighter.

Crane also argues that the superior court erred in concluding he did not have an occupational disease as defined in RCW 51.08.140. However, once the Department had successfully rebutted the RCW 51.32.185 presumption, the burden shifted back to Crane to prove his disease arose naturally and proximately out of his firefighting occupation. Crane failed to present any evidence establishing that his disease is related to his work as a firefighter, and thus failed to meet his burden of proof. Indeed, Crane's own treating physician testified that firefighting could only "possibly" be a cause of his emboli. Because Crane failed to meet his burden of proof, the superior court properly granted summary judgment to the Department.

Last, Crane argues the superior court committed reversible error when it noted, in an oral comment, that the nature or type of disease may

be “relevant” in determining whether the RCW 51.32.185 presumption applied in a case. But because statements made during an oral ruling but not later incorporated into a written order are not appealable final judgments under RAP 2.2(a), this Court need not address this issue. In any event, Crane has failed to show that any such error was a reversible error, as he failed to establish that it either prejudiced his ability to present his theory of the case or that it materially impacted the outcome of the case. And because the appellate court reviews the summary judgment order de novo, the reasoning of the superior court is now immaterial.

V. STANDARD OF REVIEW

In a worker’s compensation matter, this Court reviews the superior court’s decision under the ordinary civil standard of review. RCW 51.52.140. Where, as here, this Court is reviewing a superior court’s decision to grant summary judgment to a party, this Court engages in the same inquiry as did the superior court. *Solven v. Dep’t of Labor & Indus.*, 101 Wn. App. 189, 193, 2 P.3d 492 (2000) (citing *Romo v. Dep’t of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998); RAP 9.12). This Court conducts a de novo review of any questions of law that are raised by an appeal. *Romo*, 92 Wn. App. at 353.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter

of law. *Solven*, 101 Wn. App. at 193 (quoting *Romo*, 92 Wn. App. at 353-54); CR 56(c). The burden is on the party seeking summary judgment to establish his or her right to judgment as a matter of law, and the court must consider facts and reasonable inferences from the facts in favor of the nonmoving party. *Solven*, 101 Wn. App. at 193 (quoting *Romo*, 92 Wn. App. at 354). Here, the parties agree there is no genuine issue of material fact, and differ only as to whether summary judgment should have been granted to the Department or Crane.

VI. ARGUMENT

A. **The Superior Court Properly Decided That The Department Rebutted RCW 51.32.185's Presumption That Crane's Respiratory Illness Was Related To His Work Through Expert Medical Testimony Establishing The Disease Was Unrelated To His Conditions Of Employment As A Firefighter**

1. **RCW 51.32.185 Requires The Department To Rebut The Presumption By A Preponderance Of The Evidence Only**

Crane assigns error to the superior court's determination that the Department effectively rebutted the RCW 51.32.185(1) presumption of occupational disease. App's Br. at 4. Without citation to authority, Crane argues the Department was required to offer evidence establishing both that "a specific non-occupational cause" produced Crane's pulmonary emboli and that "extinguished" any possibility that firefighting was a cause of his respiratory illness. App's Br. at 4, 29-32. This Court should

reject Crane's attempt to read additional rebuttal requirements into RCW 51.32.185(1) as unsupported by law and contrary to the great weight of legal authority.

An "occupational disease" is defined as a "disease or infection" that "arises naturally and proximately out of employment under the mandatory or elective adoption provisions of" the Industrial Insurance Act. RCW 51.08.140. RCW 51.32.185(1)(a) provides firefighters diagnosed with a "respiratory disease" with a prima facie presumption of occupation disease. To apply the presumption, a firefighter must first show his or her medical condition is one contemplated by the statute to have been presumptively caused by an occupational disease process. *Raum v. City of Bellevue*, 171 Wn. App. 124, 141, 286 P.3d 695, review pending (2012); *In re Edward O. Gorre*, No. 09 13340 (Wash. Bd. of Indus. Ins. Appeals Dec. 8, 2010) WL 5882059 at *1. Once the worker establishes the presumption applies, as Crane did here, the "presumption . . . may be rebutted by a preponderance of the evidence" establishing that the disease is, more probably than not, unrelated to firefighting activities. RCW 51.32.185; *In re Steve A. Goforth*, No. 09 163280 (Wash. Bd. of Indus. Ins. Appeals Dec. 3, 2010) WL 5882058 at *1 (if the presumption applies, the employer has the burden of proving the claim should be denied). If a firefighter's employer or the Department effectively rebuts

the presumption, the burden shifts back to the firefighter to prove his disease arose naturally and proximately out of his employment. *Raum*, 171 Wn. App. at 141 (holding that if RCW 51.32.185's rebuttable evidentiary presumption applies, the burden shifts to the employer until the employer rebuts the presumption); see *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 602, 230 P.3d 199, 201 (2010) (quoting *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 39, 123 P.2d 780 (1942)) (noting that once a presumption is overcome by proper evidence, it ceases to exist and cannot be further considered by the court or jury, or used by counsel in argument).

In industrial insurance cases in which RCW 51.32.185's rebuttable evidentiary presumption does not apply, a worker alleging an occupational disease under RCW 51.08.140 has the burden to show that his or her disease arose both "naturally" and "proximately" out of his or her employment. *Raum*, 171 Wn. App. at 141. To show the disease arose "naturally" out of employment, the worker must establish that it is "a natural consequence or incident of distinctive conditions" of his or her particular employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). To satisfy this element, the worker must show that his or her particular work conditions more probably caused his

or her disability than conditions in everyday life or all employments in general. *Dennis*, 109 Wn.2d at 481.

To show that a disease arises “proximately” out of employment, the worker must establish that it is more probable than not that the conditions of employment were a proximate cause of his or her disease. *Id.* The worker must show by competent medical testimony that his or her employment “probably,” as opposed to “possibly,” caused the claimed condition. *Id.* “[I]f there is no evidence of causation beyond a possibility, it is error to submit the case to the jury.” *Potter v. Dep’t of Labor & Indus.*, ___ Wn. App. ___, 289 P.3d 727, 732 (2012), *motion for reconsideration pending* (citing *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984)).

When the presumption of occupational disease applies, RCW 51.32.185(1) requires the Department to rebut the presumption by a “preponderance of the evidence.” RCW 51.32.185(1) provides a non-exhaustive list of examples of some of the types of evidence that may be used to rebut this evidentiary presumption. The statute expressly states that 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.” (Emphasis added.)

Crane argues that “to rebut the presumption the Department/Employer needs to come forward with evidence of what caused FF Crane’s respiratory disease.” App’s Br. at 28. In other words, Crane contends that the Department must present evidence of a specific, non-work related factor that is most likely responsible for the development of the illness. *See* App’s Br. at 28, 38.

But RCW 51.32.185 contains no language even suggesting that any such specific requirement exists. On its face, RCW 51.32.185(1) requires the Department to rebut only a presumption of occupational disease as defined in RCW 51.08.140 by a “preponderance of the evidence.” RCW 51.32.185(1) does not require the Department to present any particular type of evidence to rebut the presumption and does not expressly exclude any particular type of rebuttal evidence as capable of doing so.

When the broad language in RCW 51.32.185(1) is considered in conjunction with the case law defining when an alleged occupational disease is covered under the Industrial Insurance Act, the most reasonable inference is that the Department may rebut a presumption of occupational disease through any form of competent medical testimony that a reasonable trier of fact could rely upon to conclude that the worker’s

illness either did *not* arise “naturally” out of the worker’s employment as a firefighter or that it was *not* “proximately” caused by that employment.

In other words, because a worker typically must establish that (1) his or her disease is a natural consequence of distinctive conditions of his or her employment, and (2) his or her occupation was a proximate cause of his or her disease on a more probable than not basis, it follows that the Department can successfully rebut a presumption of occupational disease under RCW 51.32.185 by presenting evidence that supports the conclusion that one or both of those elements is not present. *See Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 173-74, 916 P.2d 168 (1996); *see also Raum*, 171 Wn. App. at 144 (RCW 51.32.185 creates no occupational disease claim different from that defined in RCW 51.08.140). This inference is reasonable because RCW 51.32.185(1) does not require any specific form of evidence be presented to rebut a presumption of coverage, while it unambiguously requires the Department to rebut the presumption of occupational disease by a preponderance of the evidence.

Even if this Court concludes the language of RCW 51.32.185(1) is ambiguous as to what evidence may satisfy the rebuttal requirements, the Court should nevertheless reject Crane’s assertion that the Department was required to both prove that a specific non-work-related factor caused him to develop his respiratory illness and “extinguish” any possibility that

his firefighting was a proximate cause of his illness. Crane fails to provide any legal authority to support his facially unreasonable interpretation of the statutory language. See *Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (observing that a party's failure to support its argument with citations to relevant authority will preclude appellate review of the argument).

Moreover, “[s]tatutory construction cannot be used to read additional words into the statute.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 220, 173 P.3d 885 (2007) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). Crane invites this Court to read words into the statute that it does not contain. App’s Br. at 25, 28. The Court should decline to do so.

Crane suggests that RCW 51.32.185(1) must be construed in the fashion he posits because the Industrial Insurance Act is subject to liberal construction. See App’s Br. at 18-21. However, the liberal construction standard cannot be used to construe a statute in a way that is inconsistent with the plain meaning of the statute. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992). Furthermore, the doctrine of liberal construction does not trump the other rules of statutory construction and does not support a court adopting a strained or unrealistic interpretation of a statute. RCW 51.12.010; see *Senate Republican Cmpn.*

Comm. v. Pub. Disclosure Comm'n of State of Wash., 133 Wn.2d 229, 241-43, 943 P.2d 1358 (1997).

Here, Crane's proposed interpretation of RCW 51.32.185 is inconsistent with the plain language of the statute, and rests upon a strained and unrealistic interpretation of its language. Crane seeks to inject words into the statute that the statute itself does not contain. The liberal construction standard does not support his request to construe the statute in such a manifestly unreasonable way, and Crane's reliance on that doctrine is misplaced. *See Sen. Rep. Cmpn. Comm.*, 133 Wn.2d at 241-43.

2. The Department Effectively Rebutted The RCW 51.32.185 Presumption

Here, the Department successfully rebutted the presumption contained within RCW 51.32.185 when it presented evidence that a reasonable trier of fact could rely upon to conclude that Crane's disease did not arise either "naturally" or "proximately" out of his employment as a firefighter.

First, the Department rebutted the "naturally" requirement by establishing that Crane's pulmonary emboli were not a natural consequence of any distinctive condition of his employment as a firefighter. Crane's own witness, Dr. Eulberg, provided testimony that

rebutted the presumption that his illness was work-related. Dr. Eulberg testified that lack of activity or trauma to the inside lining of a vein were common causes of clots. BR Eulberg at 21. Dr. Eulberg opined that a full-time professional firefighter would not likely experience the level of inactivity required to cause clots. BR Eulberg at 21-22. Dr. Eulberg explained that he did not believe Crane's conditions were related to work conditions because he "was aware that there's a significant amount of data causing bronchitis and progressive lung disease, but [he] wasn't aware of any comparable data that talked about firefighters having a higher incidence or risk of developing pulmonary emboli." BR Eulberg at 27.

In addition, Dr. Stumpp testified that "pulmonary emboli are not an occupational disease" because "there's nothing specific to the duties of being a firefighter or any other occupational duties that would predispose a person to emboli as a result of their job." BR Stumpp at 25. Dr. Stumpp agreed with Dr. Eulberg that no medical studies established any increased risk for firefighters of developing pulmonary emboli over the general population. BR Stumpp at 25-26, 29. Dr. Stumpp further testified that he was unaware of any exposures that would increase a firefighter's risk of pulmonary emboli. BR Stumpp at 25-26.

Nothing in the record suggests that bilateral pulmonary emboli are a natural consequence of the distinctive conditions of Crane's occupation

as a firefighter. A reasonable trier of fact could conclude based on Dr. Stumpp's testimony that Crane's illness was not a natural consequence of his employment as a firefighter. *Potter*, 289 P.3d at 732. This, in and of itself, is sufficient to rebut RCW 51.32.185's presumption.

Second, the Department presented evidence that Crane's illness did not arise "proximately" from his employment. Dr. Stumpp testified, on a more probable than not basis, that Crane's occupation was not a proximate cause of his respiratory illness. BR Stumpp at 17, 25-26. And, notably, no witness contradicted him. Dr. Stumpp's testimony is evidence a reasonable trier of fact could rely upon to conclude that Crane's disease did not arise "proximately" out of his employment, and, therefore, it is sufficient to rebut the presumption created by RCW 51.32.185. *Dennis*, 109 Wn.2d at 481; *Raum*, 171 Wn. App. at 144.

RCW 51.32.185(1) requires the Department to rebut the presumption of occupational disease; that is, to show by a preponderance of the evidence that Crane's condition did not arise naturally and proximately from his occupation as a firefighter. Here, because the Department presented competent expert medical testimony indicating that Crane's illness did not arise naturally and proximately out of any distinctive conditions of his employment, this Court should hold that the superior court properly determined the Department effectively rebutted the

statutory presumption. CP at 4; RCW 51.32.185; *see Potter*, 289 P.3d at 735 (explaining that denial of benefits is proper when the record lacks objective evidence to support a finding of occupational disease).

B. The Superior Court Correctly Determined Crane Did Not Have an Occupational Disease As Defined In RCW 51.08.140 And Properly Granted Summary Judgment To The Department Because No Evidence In The Record Supports The Conclusion That Crane Had An Occupational Disease

Next, Crane assigns error to the superior court's determination that it was proper to grant the Department summary judgment because Crane failed to present any evidence supporting his contention that his disease was an occupational disease. App's Br. at 32-33. As discussed above, the Department effectively rebutted the presumption that Crane's illness was work-related. Once the Department rebutted the presumption, the burden shifted back to Crane to prove that his illness arose naturally and proximately out of his employment. *See Raum*, 171 Wn. App. at 141-144. Crane failed to meet that burden.

Indeed, no medical witness testified, on a more probable than not basis, either that Crane's illness arose naturally out of distinctive conditions of his employment or that his employment was a proximate cause of his illness. *See BR Eulberg* at 20-22, 26-27; *see also BR Stumpp* at 25-56. Thus, based on the record, no reasonable trier of fact could have concluded that Crane's illness was related to his employment.

See Dennis, 109 Wn.2d at 481. Because Crane bore the burden of proof once the presumption of coverage was rebutted, and because Crane failed to present any evidence that would support the conclusion that his illness arose naturally and proximately out of his employment, the superior court properly granted the Department's motion for summary judgment. *Raum*, 171 Wn. App. at 141-144.

Crane, citing *Harrison Memorial Hospital v. Gagnon*, 110 Wn. App. 475, 40 P.3d 1221 (2002), argues that in light of the legislature's findings when it enacted RCW 51.32.185, the superior court could have inferred that he was exposed to smoke, fumes, and toxic and chemical substances as a firefighter and that this somehow was responsible for his respiratory illness.³ App's Br. at 32-33. However, in *Harrison*, there was evidence in the record that supported the inference that the worker's illness arose naturally and proximately out of distinctive conditions of employment. 110 Wn. App. at 484. Specifically, in *Harrison*, a hospital worker claiming Hepatitis C as an occupational disease was exposed to

³ Specifically, the legislature provided the following findings:

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.

LAWS OF 1987, ch. 515, § 1.

Hepatitis C many times while working as an operating room technician. *Id.* The worker's treating physician testified that he believed the worker was probably infected while working at the hospital. *Id.* Under those facts, the court held that "[t]he evidence supports a reasonable inference, and a rational trier of fact could find on a more-probable-than-not-basis, that" the worker acquired Hepatitis C while working at the hospital. *Id.*

The *Harrison* Court based its analysis on the facts in the record before it, not on a statutory presumption that certain illnesses are coverable under the Industrial Insurance Act. Moreover, unlike *Harrison*, in this case the worker's own treating physician testified that he believed there was a less than 50 percent possibility that Crane's occupation as a firefighter caused the pulmonary emboli, and no other medical expert contradicted this testimony. BR Eulberg at 25-26.

There is no evidence in the record to support an inference that exposure to smoke, fumes, and toxic or chemical substances caused Crane's condition. Both Dr. Eulberg and Dr. Stumpp testified they were unaware of any medical studies placing firefighters at a higher risk of pulmonary emboli than the general population, and, perhaps more importantly, did not testify there is any connection whatsoever between that exposure and Crane's medical condition. BR Eulberg at 27; BR Stumpp at 25-26, 29. Under these facts, this Court should hold that

the superior court was correct in affirming the Board's determination that Crane did not have an occupational disease under the meaning of RCW 51.08.140.

Furthermore, and contrary to Crane's unsupported suggestion (at App's Br. 32-33), the legislature's finding cannot be used as substantive evidence that his employment as a firefighter proximately caused his illness in particular. Rather, the finding simply helps to explain the legislature's rationale in adopting RCW 51.32.185. Although RCW 51.32.185 is applicable to Crane's case, the statute merely created a rebuttable presumption that the Department effectively rebutted and thereafter ceased to have further relevance to the proper disposition of his appeal. *Raum*, 171 Wn. App. at 147; *Taufen*, 155 Wn. App. at 602 (quoting *Bradley*, 13 Wn.2d at 39). Crane provides no authority supporting the notion that a legislative finding can be treated as substantive evidence in a worker's compensation appeal and this Court should, therefore, reject it. *See Cowiche Canyon*, 118 Wn.2d at 809.

C. Crane's Reliance On Cases From Foreign Jurisdictions Is Misplaced Because The Courts In Those Cases Interpreted Statutes Dissimilar To RCW 51.32.185

Crane cites several additional opinions in support of his appeal but does not explain how those cases support any of his particular arguments. *See App's Br.* at 33-41. Most of the cited opinions are from jurisdictions

outside Washington, and most involve occupational heart disease claims rather than respiratory disease claims. *See* App's Br. at 33-41.

Crane cites *Intalco Aluminum Corp. v. Department of Labor & Industries.*, 66 Wn. App. 644, 833 P.2d 390 (1992), a Washington toxic chemical industrial insurance case; *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989), an Idaho toxic tort products liability case; and *In re Robinson*, 78 Or. App. 581, 717 P.2d 1202 (1986), an Oregon worker's compensation case for the proposition that courts have not required a plaintiff to identify the specific chemical or toxin that caused or contributed to his occupational disease. App's Br. at 33-37.

It is true that *Intalco* shows that a Washington worker claiming an occupational disease is "required to demonstrate that conditions in the workplace more probably than not caused his or her disease," but need not identify the *specific* toxic agent within the conditions of employment that caused the worker to develop that disease. *Intalco*, 66 Wn. App. at 657. But *Intalco* does not support Crane's contentions in this case because Crane, unlike the worker in *Intalco*, failed to present any evidence that he was exposed to any conditions of his employment that were, on a more probable than not basis, proximate causes of his respiratory illness. *Id.* Crane did not simply fail to identify the "specific" toxin (or other specific working condition) that caused his respiratory illness, he failed to

demonstrate that any of his working conditions had any causal role in the development of that illness. Because Crane failed to present such evidence, the Department properly rejected his occupational disease claim, and *Intalco* does not suggest otherwise. *Intalco*, 66 Wn. App. at 657.

Next, Crane, citing *Jackson v. Workers' Compensation Appeals Board.*, 133 Cal. App. 4th 965, 35 Cal. Rptr.3d 256 (3d App. Dist. 2005), and *Meche v. City of Crowley Fire Department*, 96-577 (La. App. 3d Cir. 1997), 688 So.2d 697, asserts that a presumption of coverage cannot be rebutted through medical testimony that indicates there was nothing specific to the worker's occupation subjecting the worker to an increased risk of a heart attack. App's Br. at 37-38. Crane argues that an employer, or in the instant case, the Department, "must produce clear medical evidence of a cause for the presumptive disease, outside of the claimant's employment." App's Br. at 38. But, the cases Crane cites for this proposition are from foreign jurisdictions and are not binding on this Court. *See* App's Br. at 33-41.

Washington's Industrial Insurance Act is unique, and it is well accepted that case law from other jurisdictions is of little assistance in interpreting Washington's Act. *Dennis*, 109 Wn.2d at 482-83; *Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 57, 240 P.2d 567 (1952). That is particularly true here, where the cases Crane relies on are not only

decisions from other states, but are also cases in which the courts interpreted facially dissimilar statutes that were adopted to further different public policy considerations.⁴ Crane makes no attempt to explain how the foreign cases he cites are relevant to the issues before this Court. Therefore, he has failed to establish that he is entitled to any form of relief pursuant to any of those decisions.

D. The Superior Court Did Not Commit Reversible Error When The Court Noted, In An Oral Statement Not Incorporated Into Its Decision, That The “Type” Of Crane’s Respiratory Illness Was “Relevant”

Crane argues the superior court committed reversible error by commenting on the “nature” or “type” of respiratory disease contemplated by the legislature in enacting RCW 51.32.185. App’s Br. at 3, 22-24.

Crane fails, however, to establish that the court’s comments amount to

⁴ *Jackson* involved a question of what evidence may be used to rebut a presumption that a worker’s “heart problems” are work-related. *Jackson v. Workers’ Comp. Appeals Bd.*, 133 Cal. App. 4th 965, 971, 35 Cal. Rptr.3d 256 (3d App. Dist. 2005). The *Jackson* Court concluded that under California’s statutes an employer could effectively rebut the presumption only through evidence of either a contemporaneous, non-work related factor as the sole cause of the worker’s condition or that the disease is the product of a pre-existing illness that is unrelated to employment. *Id.* The *Jackson* Court’s conclusion appears to be grounded not only in the language of California’s statute, but in a finding of the California legislature that there was a split in medical opinion as to whether heart problems are related to job stress or not. *E.g., City & County of San Francisco v. Workers’ Comp. Appeals Bd.*, 22 Cal.3d 103, 108-10, 148 Cal. Rptr. 626 (1978). The California legislature concluded that a worker’s eligibility for benefits should not turn on whether the medical providers who treated and examined him or her happened to believe that heart problems were stress-related. *Id.* In contrast, there is no indication that Washington’s legislature adopted a presumption of coverage for respiratory illnesses to resolve a split in medical opinion as to whether respiratory illnesses are related to smoke inhalation, nor, for that matter, is there any evidence that there is such a divergence of medical opinion. *See* BR Eulberg at 27; BR Stumpp at 25-26, 29. Thus, the rationale underlying California’s statute is wholly absent from RCW 51.32.185.

reversible error because a superior court's oral ruling is "no more than a verbal expression of [its] informal opinion at that time." *State v. Hescoek*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963) (alteration in original)). A superior court's oral ruling is not "binding 'unless it is formally incorporated into findings of fact, conclusions of law, and judgment.'" *Id.* at 606 (quoting *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)) (citations omitted in original); see *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000) (a written order controls over any apparent inconsistency with the court's earlier oral ruling) (citing *State v. Eppens*, 30 Wn. App. 119, 126, 633 P.2d 92 (1981)). And, as relevant to this matter, a party may appeal from only a "final judgment entered in any action or proceeding" or "any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues an action." RAP 2.2(a)(1),(3).

Here, in making its oral ruling, the superior court commented that the "nature of the respiratory disease" may be relevant in determining whether the legislature intended for the RCW 51.32.185(1) presumption to apply. RP (5/23/12) at 22-25. Then, because the parties agreed Crane's condition was a "respiratory disease" and the statutory presumption

applied, the superior court decided whether the Department had rebutted the presumption by a preponderance of the evidence and whether summary judgment should be granted to either Crane or the Department. RP (5/23/12) at 25.

The superior court later issued a written order, granting the Department's cross motion for summary judgment and affirming the Board's decision. CP at 3-5. In the written order, the court concluded that the Department had effectively rebutted the RCW 51.32.185(1) presumption and that Crane failed to present any evidence supporting the conclusion that he had an occupational disease. CP at 4. The court did not incorporate any comments as to the "nature" or "type" of Crane's respiratory disease into the written order. CP at 3-5.

As an initial matter, this Court should not reach this issue because the superior court's oral comments made before entry of the final written order were not incorporated into the final decision and do not constitute an appealable final judgment. RAP 2.2(a)(1). And because the appellate court reviews the summary judgment order de novo, the superior court's reasoning is immaterial on appeal. *See Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008); *see also City of Lakewood v. Pierce County*, 106 Wn. App. 63, 70, 23 P.3d 1, 5 (2001) (noting that an appellate court conducting de novo review of a superior court's summary

judgment ruling may affirm even if the appellate court's reasoning differs from that of the trial court) (citing *State v. Williams*, 93 Wn. App. 340, 347-48, 968 P.2d 26 (1998)).

Even assuming this Court considers this argument, Crane has failed to show that any reversible error was committed. Generally, an error is "reversible" only if it is prejudicial, that is, there is a material probability that the error affected the outcome of the case. See *State v. Thomas*, 110 Wn.2d 859, 863, 757 P.2d 512 (1988); see also *Portch v. Sommerville*, 113 Wn. App. 807, 810, 55 P.3d 661 (2002) (explaining that appellant must demonstrate prejudice to establish reversible error, and concluding that no reversible error occurred because it did not appear the trial court's error in failing to grant a peremptory challenge to a potential juror actually changed the outcome of the case) (citing *State v. Linden*, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997)). Where, as here, an alleged error is not of constitutional magnitude, the burden lies on the appellant to establish that the error was prejudicial. *Thomas*, 110 Wn.2d at 863.

Crane has failed to demonstrate that he was prejudiced by the court's comments because he has failed to show there is a reasonable probability that the court's comments materially affected the outcome of the case. *Portch*, 113 Wn. App. at 810; *Thomas*, 110 Wn. App. at 863. In

any event, it is plain from the record that any alleged error was harmless. The issue of whether his pulmonary emboli qualified as a “respiratory disease” under RCW 51.32.185(1)(a) was not before the superior court because neither party had challenged it in their superior court briefing. CP at 6-50. Indeed, the superior court acknowledged that the presumption applied and decided the case with that understanding. RP (5/23/12) at 25.

Moreover, for the reasons noted above, the superior court properly concluded that the Department rebutted the presumption of coverage and that no evidence in the record supported Crane’s contention that his illness was an occupational disease that arose naturally and proximately out of his employment. Accordingly, even assuming the superior court’s comment regarding the “nature” of Crane’s illness was erroneous, it was harmless error because the comment did not, and could not have, materially impacted the outcome of the case. *See Thomas*, 110 Wn.2d at 863.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests this Court affirm the decision of the superior court, which affirmed the decisions of the Board and of the Department.

RESPECTFULLY SUBMITTED this 5th day of February, 2013.

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