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DIVISION II
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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

EDWARD O. GORRE

Appellant,

v.

CITY OF TACOMA and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondents.

REPLY BRIEF OF APPELLANT

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Edward O. Gorre

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

ORIGINAL

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REPLY TO RESPONDENT'S BRIEF

I. INTRODUCTION

Lt. Gorre suffers from respiratory diseases: eosinophilic lung disease and coccidioidomycosis as well as an infectious disease: coccidioidomycosis. The law presumes that any respiratory disease and any infectious disease is caused by employment as a firefighter, entitling Lt. Gorre to benefits under the Industrial Insurance Appeals Act.

However, if the presumption is not applied properly, the law is meaningless. The Employer's, Board's, and Court's failure to apply the presumptive disease statute correctly and properly rebut the presumption rendered the presumptive disease statute meaningless and constitutes reversible error.

II. ARGUMENT

A. Coccidioidomycosis is entitled to the mandatory presumption under RCW 51.32.185 as an Infectious Disease; the legislature did not intend to limit the presumption to only those infectious diseases specifically enumerated in the statute.

The purpose in interpreting a statute is to ascertain and give effect to the intent and purpose of the legislature as expressed in the act. *Tommy P. v. Board of Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). The act must be construed as a whole, and all language must be given effect. *Id.* All

provisions must be harmonized, if possible. *Id.*

RCW 51.32.185(1)(d) provides that there is a presumption that "...infectious diseases are occupational diseases under RCW 51.08.140." Respondents attempt to argue that infectious diseases are limited to those listed in RCW 51.32.185(4), which reads:

> 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.

This is contrary to both a plain reading of the statute, and the clear legislative intention behind it for two reasons. First, there is no limiting language in (1)(d); nowhere does the statute state the words "any" or "only" in reference to the conditions listed. The listing of traditionally non-occupational diseases, such as HIV which itself carries a stigma, was meant simply to ensure that those conditions were *also* included as presumptive infectious diseases. Had the legislature intended to limit it to just those conditions, it would have used the language that is present in the subsection immediately prior which limited the presumption to *only* certain types of cancer, which reads as follows:

> (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.
>
> ...

RCW 51.32.185(3).

The absence of such limiting language in the adjacent subpart establishes that infectious diseases were not meant to be so limited.

Furthermore, a prior version of the bill *did* seek to specifically limit by defining "infectious diseases" for purposes of the Act as including only those listed. This version was struck in favor of the much more inclusive, yet clearly encompassing, language favored in the final law. It also includes a memorandum which, again, mirrors the version of statute for limiting language concerning cancer but no such limiting language for infectious diseases. Claimant's Renewed Motion for Summary Judgment Reply Brief, *Exhibit B: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals 1479-1497) .

The Senate Bill Report which states "Infectious diseases, *including* acquired immunodeficiency syndrome, hepatitis A, hepatitis B, hepatitis C, bacterial meningitis, and tuberculosis are presumed to be occupational

diseases...". Claimant's Renewed Motion for Summary Judgment Reply Brief, *Exhibit C: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals 1500). The rules of construction have never read the word "including" standing alone to be exclusive; rather, it is a term meant to clarify that certain conditions are specifically included *without* excluding others. The Washington State Council of Fire Fighters Presumptive Disease Legislation report for the Senate Bill provides that the Senate Bill "seeks to provide additional presumptive coverage to fire fighters by extending infectious disease presumption to include, *but not limited to*, Acquired Immunodeficiency Syndrom, Hepatis A..." and so forth. Claimant's Renewed Motion for Summary Judgment Reply Brief, *Exhibit D: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals 1503-1505). The multitude of evidence presented should unequivocally resolve the issue that the term "infectious disease" under RCW 5.32.185 *does* include *all* infectious diseases, including coccidioidomycosis.

Further, it is important to note that RCW 51.32.185(1)(d), making infectious diseases presumptively occupational, existed as law for 5 years without the existence of RCW 51.32.185(4). Respondents' interpretation, that *only* the infectious diseases listed in RCW 51.32.185(4) are

presumptively occupational, ignores that a statutory presumption of occupational-disease was already in effect and explicitly included infectious diseases. Respondents' position asks the Court to adopt a statutory interpretation that is absurd, because if the presumption for infectious diseases are only those listed in RCW 51.32.185(4) then the presumption for infectious diseases already set forth in RCW 51.32.185(1)(d) was meaningless.

When interpreting statutes, strained or absurd results must be avoided. *Briggs v. Thielen,* 49 Wn. App. 650, 654, 745 P.2d 523 (1987), review denied, 110 Wn.2d 1020 (1988).

As an RCW 51.32.185 infectious disease, coccidioidomycosis is entitled to the mandatory presumption. This presumption has never been legitimately rebutted. Though Respondent Department of Labor and Industries confuses the issue (RB 34), Lt. Gorre argues that the hypothetical and speculative nature of Respondents' experts' testimony cannot overcome the strong mandatory presumption intended by the legislature. The speculation on which the Respondents' opinion of causation is built highlights the need for the presumption in RCW 51.32.185; to allow mere speculation to overcome the presumption would be to act against legislative mandate.

B. Lt. Gorre has a clinically separate and defined diagnosis of "Eosinophilic Lung Disease," which is both an RCW 51.32.185 presumptive occupational disease, and an RCW 51.08.140 occupational disease.

It is undisputed that eosinophilic lung disease is a respiratory condition. Dr. Goss has clearly testified that Lt. Gorre had a clinically defined, separate diagnoses of eosinophilic lung disease and coccidiomycosis. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 25(19-25) - 26(1-6) (certified board record on file with Division II Court of Appeals). The City's own expert, Dr. Bardana, refers to eosinophilic lung "disease," thereby acknowledging its existence as a disease. Dr. Emil Bardana, Jr., *Transcripts (June 24, 2010): In re: Edward O. Gorre* 09 13340 (2010), 9(16)(certified board record on file with Division II Court of Appeals). Further, in discussing the sequence of events of Lt. Gorre's illnesses, Dr. Bardana states that Lt. Gorre presented with eosinophilic lung disease. Dr. Emil Bardana, Jr., *Transcripts (June 24, 2010): In re: Edward O. Gorre* 09 13340 (2010), 34(2-3)(certified board record on file with Division II Court of Appeals). The presumption in RCW 51.32.185 does not distinguish between respiratory diseases that are subsets of other diseases, but rather applies to <u>all</u> respiratory diseases. RCW 51.32.185 presumes that <u>all</u> respiratory diseases are occupational and *must* be given the mandatory presumption that it is related to his occupation as a firefighter, regardless of

their origin. Lt. Gorre's eosinophilic lung disease, an undisputed respiratory condition, is at minimum, entitled to the presumption of occupational causation.

Although clearly the eosinophilic lung disease is a respiratory disease for purposes of RCW 51.32.185, it is also an RCW 51.08.140 occupational disease. Lt. Gorre was exposed to immeasurable substances which are known to increase eosinophilic levels in the body, and cause eosinophilic lung disease. *Id.* at 22(15-22). Each day Lt. Gorre was exposed to substances such as diesel fumes, bacteria, mold, allergens, pigeon droppings, inorganic and organic toxins, chemicals, and, literally, hundreds of other toxic or hazardous substances. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 136(16-26) - 141(2) (certified board record on file with Division II Court of Appeals). Any and all of these can, and do, raise the eosinophil levels in the respiratory system, which then causes to eosinophilic lung disease.

The law does not require Lt. Gorre to identify a specific exposure as the cause of the occupational disease. This issue has been the subject of litigation, and is not subject to redetermination. *Intalco Aluminum v. Dept. of Labor & Indus.,* 66 Wn. App. 644, 833 P.2d 390 (1992). In the case of a first responder/firefighter such as Lt. Gorre, who rushes head first into the

most toxic and hazardous situations imaginable, to impose such a standard would be to misconstrue the law, and misappropriate justice.

C. Respondents' did not rebut Lt. Gorre's occupation as a cause of his Eosinophilic Lung Disease or Coccidioidomycosis.

i. Coccidioidomycosis

Respondents' argument that Lt. Gorre acquired coccidioidomycosis while golfing outside of Las Vegas in 2005 is not reasonable.

The City's own doctor, Dr. Ayars, admits that for the typical case, the incubation period is three to six weeks. Dr. Garrison Ayars, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09 13340 (2010), 137(23-26) (certified board record on file with Division II Court of Appeals). Since the incubation period for coccidioidomycosis is six weeks or less, world-renowned expert Royce Johnson, M.D., stated with certainty that since Lt. Gorre did not leave Washington in the six weeks prior to the onset of symptoms, then it is "much more likely than not" that the coccidioidomycosis infection was acquired in the state of Washington. Dr. Royce Johnson, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 22(13-16) (certified board record on file with Division II Court of Appeals). Dr. Johnson testified that Lt. Gorre was in good health until the end of 2006, when he developed flu-like symptoms for which he was evaluated in January of 2007. *Id.* at

19(4-21). Accordingly, Respondents' contention that Lt. Gorre's golf trip to Las Vegas in 2005 caused his coccidioidomycosis is fatally flawed. Since the incubation period is six weeks or less, Lt. Gorre's trip to Las Vegas in 2005 is not relevant.

Respondents' contention that Lt. Gorre could have acquired coccidioidomycosis while a resident of California is similarly flawed. Dr. Johnson noted that it would be very unlikely for someone to have coccidioidomycosis for several years and have no symptoms, then years later present with the disseminated disease. *Id.* at 43 (12-25), 44(1-5). Dr. Johnson set the odds of Lt. Gorre acquiring the disease when he was living in California, and the disease not manifesting itself until the date of injury, at "less than one in 10,000." *Id.* at 45(13-18).

Lt. Gorre's work-related exposures to dust, including work along the I-5 corridor, offers substantial support that he was exposed to coccidioidomycosis while working as a firefighter. Additionally, Dr. Goss testified that Lt. Gorre had a work related respiratory disease, eosinophilic lung disease, that was treated with steroids, and the steroids caused dissemination of coccidioidomycosis. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 25(19-25) - 26(1-6) (certified board record on file with Division II Court of Appeals) Dr. Goss supported this

conclusion since, other than the isolated skin lesion, Lt. Gorre never had cocci in other parts of his body. *Id.* Since Lt. Gorre was fairly quickly weaned off steroids for his work-related eosinophilic lung disease, the steroids kept Lt. Gorre's coccidioidomycosis in check, preventing it from causing lesions on any other part of his body. *Id.* The prednisone administered for the eosinophilic lung disease quickly resulted in an "almost complete resolution of his pulmonary infiltrates." *Id.* at 23(3-7).

That Lt. Gorre noticed a bump on his forehead during the time the prednisone was being tapered off also supports causation as an occupational disease. *Id.* at 23(12-25), 24(1-2). When Lt. Gorre did finally have the bump biopsied, many months after treatment by Dr. Goss, the biopsy showed spores of coccidioidomycosis. *Id.* The doctor explained that the presentation of spores outside the lung is suggestive of disseminated coccidioidomycosis. *Id.*

ii. Eosinophilic Lung Disease/Interstitial Lung Disease

Respondents have not rebutted Lt. Gorre's firefighting duties as a cause of his eosinophilic lung disease/interstitial lung disease. Their own doctor, Dr. Ayars, admitted that chronic eosinophilic pneumonia, a respiratory disease, is idiopathic, meaning it has no known cause. Dr. Garrison Ayars, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09

13340 (2010), 108(14-16) (certified board record on file with Division II Court of Appeals). His many years of career exposures to unknown quantities and types of toxins, including long term mold issues in his fire station, makes chronic eosinophilic respiratory disease the most likely cause of both Lt. Gorre's respiratory and infectious lung diseases.

Lt. Gorre was exposed to immeasurable substances which are known to increase eosinophilic levels in the body, and cause eosinophilic lung disease. Each day Lt. Gorre was exposed to substances such as diesel fumes, bacteria, mold, allergens, pigeon droppings, inorganic and organic toxins, chemicals, and, literally, any other toxic or hazardous substance imaginable. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 136(16-26) - 141(2) (certified board record on file with Division II Court of Appeals). Any and all of these can, and do, raise the eosinophil levels in the respiratory system, which then leads to eosinophilic lung disease. Dr. Christopher Goss, *Depositions: In re: Edward O. Gorre* 09 13340 (2010), 22(8-25) (certified board record on file with Division II Court of Appeals).

Dr. Goss determined Lt. Gorre's original lung condition was related to his employment as a firefighter on a more probable than not basis. *Id.* at 24 (3-25) - 25(1-6). Lt. Gorre's career exposures to smoke, fumes and toxic exposures is substantial. Dr. Goss noted an association with eosinophilic

lung disease and exposure to dust. *Id.* at 22(15-25). He testified the relationship has been well documented in soldiers and in firefighters after 9/11. The symptoms in these situations mirrored Lt. Gorre's in that the symptoms of the disease were "shortness of breath, systemic symptoms and response to steroids." *Id.* at 23(1-7).

Dr. Ayars also testified that Lt. Gorre was more susceptible to respiratory and infectious diseases, and related complications because of his ethnicity. Dr. Garrison Ayars, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09 13340 (2010), 110(17-20) (certified board record on file with Division II Court of Appeals). Lt. Gorre could have the same exposures as that of his coworkers, and be the only one to become symptomatic or experience complications from respiratory or infectious lung diseases. Lt. Gorre's ethnicity makes it far more likely that he would acquire an occupational disease. Importantly, Dr. Ayers had an inaccurate view of the numerous career exposures by Lt. Gorre. *Id.* at 125(16) - 127(12).

It is not Lt. Gorre's burden to point to one specific incidence of exposure. In the case of a first responder/firefighter such as Lt. Gorre, who rushes head first into the most toxic and hazardous situations imaginable, to impose such a standard would be to misconstrue the law, and misappropriate justice, especially when the law provides such exposures need only be a

proximate cause of the disease.

D. Lt. Gorre experienced conditions that arose naturally and proximately from distinctive conditions of employment with the City of Tacoma.

Workplace exposures to smoke, fumes and toxic substances far outweighed any other potential source of exposure leading to eosinophila/ interstitial lung disease and coccidioidomycosis.

Each day Lt. Gorre was exposed to substances such as diesel fumes, bacteria, mold, allergens, pigeon droppings, inorganic and organic toxins, chemicals, and, literally, any other toxic or hazardous substance imaginable. Edward Gorre, *Transcripts (June 7, 2010): In re: Edward O. Gorre* 09 13340 (2010), 136(16-26) - 141(2) (certified board record on file with Division II Court of Appeals). Additionally, Lt. Gorre has been regularly exposed to diesel exhaust, fumes, and other toxins in his career work as a fire fighter. *Id.*

There is no credible proof that Lt. Gorre's occupational exposures were not a cause of his eosinophila/ interstitial lung disease and coccidioidomycosis. Arguments of convenience are not arguments of admissible fact.

E. Lt. Gorre does not have a relevant history of smoking.

Respondents' argument regarding a possible tobacco history is irrelevant. Not only did the Board fail to accept a smoking history based on

the medical records, but the limited history as established by the facts (and not random conjecture by a paid expert of the employer) establishes no relevant smoking history by Lt. Gorre. Dr. Eckert, an Employer hired expert, examined Lt. Gorre on one occasion at the request of the Employer. Dr. Buckley A. Eckert, *Transcripts (June 14, 2010): In re: Edward O. Gorre* 09 13340 (2010), 171(1-2)(certified board record on file with Division II Court of Appeals). Dr. Eckert confirmed that Lt. Gorre last smoked anything approximately two decades ago. *Id.* at 171(26) - 172(1-2).

The testimony of Lt. Gorre is clear that he had an occasional cigar, but in no way supported a history of several cigars a month. He was not a smoker and refusing to apply the presumptive disease statute based on an occasional cigar years ago would make a mockery of the intent of the legislature when making smoking a rebutting factor. Back Form: Personal Health History, *Exhibits: In re: Edward O. Gorre* 09 13340 (2010)(certified board record on file with Division II Court of Appeals) Lt. Gorre is not and never was a smoker. The City does not want to accept this, but the testimony and facts are clear.

F. The Superior Court did not abuse its discretion when it allowed in challenged evidence.

The Washington Supreme Court has mandated that, "[t]he strict rules of trial procedure in civil actions are not to be applied in claims before the

Department of Labor and Industries." *Otter v. Dept. of Labor & Indus.*, 11 Wn.2d 51, 56, 118 P.2d 413 (1941). In other words, the rules of evidence are not to be strictly construed against the injured worker, especially when it comes to the admissibility of highly relevant and important medical testimony.

Cases subject to the Administrative Procedure Act are subject to significantly relaxed rules of evidence. *See, e.g.,* RCW 34.05.452(2) (rules of evidence are "guidelines" under Administrative Procedure Act). Relevant hearsay evidence is admissible in administrative hearings. *Nisqually Delta Ass'n v. City of DuPont,* 103 Wn.2d 720, 734, 696 P.2d 1222 (1985). Hearsay evidence may be admitted at an administrative hearing if the presiding officer determines that it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *Pappas v. State Empl. Sec. Dept.,* 135 Wn. App. 852, 146 P.3d 1208 (2006). Specifically, RCW 34.05.452 provides that "Evidence...is admissible if...it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452(1).

Washington courts have held that denying a party the right to present evidence or rebut evidence in an administrative action rises to a violation of due process. In *State ex rel. Puget Sound Navigation Co. v. Dept. of Trans.,*

33 Wn.2d 448, 495, 206 P.2d 456 (1949), the Washington Supreme Court found a violation of due process as follows:

> This action of the department clearly resulted in a denial to appellant (the common carrier) of due process of law, as appellant was deprived of all opportunity to introduce before the department evidence, which it claims was available, concerning the effect of the increase in its operating expenses that would necessarily follow from the considerably greater amount of wages it would be required to pay.

In *Robles v. Dept. of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987), the Court heard a similar appeal whereby the Board used a medical treatise to reach its decision without permitting the claimant opportunity to rebut the treatise's opinions. The Court ruled that the Board's failure to provide the claimant with "an opportunity to meet, explain, and rebut their contents, amounts to a denial of due process." *Id.* at 494.

A Superior Court reviews a Board of Industrial Insurance Appeals' decision de novo. *Dept. of Labor & Indus. v. Tyson Foods*, 143 Wn. App. 576, 178 P.3d 1070 (2008); *D.W. Clothes Co. v. Dept. of Labor & Indus.*, 143 Wn. App. 118, 177 P.3d 143 (2008). An injured worker has a statutory right to appeal a Board decision, and the decision shall be reversed or modified when the Superior Court finds that the Board has not correctly construed the law with regard to the facts of the case. *RCW 51.52.115.*

In this case, the Board judge incorrectly rejected evidence provided

by Lt. Gorre in support of his entitlement to benefits under the Industrial Insurance Act. These incorrect evidentiary rulings were subject to review and reversal by the Superior Court and were correctly reversed.

G. The Superior Court decision not to award costs other than statutory attorney fees was correct.

The established interpretation of the Industrial Insurance Act attorney fees provision, RCW 51.52.130 limits recovery of fees and costs to injured workers. Recovery is denied to employers. *Pennsylvania Life Ins. Co. v. Dept of Empl. Sec.*, 97 Wn.2d 412, 645 P.2d 693 (1982). RCW 51.52.130(1) is written specifically for those cases where there is an appeal to the superior court from a Board of Industrial Insurance Appeals. The statute provides many different scenarios under which the employee can recover fees and costs from the employer.

RCW 51.52.130 provides that if in a worker compensation appeal (to Superior or Appellate Court), the order of the Board is reversed or modified and the accident or medical aid fund is affected, or, if in an appeal by the Department or self insured employer, the worker's rights to relief is sustained, the fees of medical and other witnesses shall be payable out of the administrative fund of the Department. The purpose of RCW 51.52.130 is to provide an injured worker, who has been denied justice by the Department, a means to adequately present a claim on appeal without incurring legal

expenses which could substantially reduce an award if ultimately granted. *Johnson v. Tradewell Stores*, 24 Wn. App. 53, 600 P.2d 583 (1979).

RCW 51.52.130 makes no similar provision for the Department or self insured employer when the decision of the Board is sustained or reversed in their favor on appeal. Similarly, the attorney fees provision of RCW 51.52.130 limits recovery of attorney fees in court to injured workers who successfully obtain reversal and modification of Board decisions, and denies any such recovery to employers. *Seattle School Dist. No. 1 v. Dept. of Labor & Indus.*, 116 Wn.2d 352, 804 P.2d 621 (1991). In *Rosales v. Dept. of Labor & Indus.*, 40 Wn. App. 712, 700 P.2d 748 (1985), the trial court erred in ordering the Department to pay attorney fees to a worker for fees associated with the hearing before the Board.

When statutory language is unambiguous, the court looks only to that language to determine the legislative intent without considering outside sources. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). The court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

RCW 4.84.010 (7) covers situations where the deposition is generated in Superior Court and used at trial pursuant to the general jurisdiction of that

court, not appellate jurisdiction, where the deposition has been taken in an administrative hearing. An action seeking judicial review of an order of the Board of Industrial Insurance Appeals invokes the appellate jurisdiction of Superior Court, not its general jurisdiction. Acting in its appellate capacity, the Superior Court is a court of limited statutory jurisdiction. *Fay v. N.W. Airlines*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990).

There is no scenario under which the employer or the state can recover fees and costs from the employee. While RCW 51.52.130(1) makes it clear that an appeal from a Board order to the Superior Court does not include recovery of attorney fees and costs from the employee; RCW 51.52.130(2) specifically addresses appeals to superior court when the case involves RCW 51.32.185, the firefighter presumptive statute. The statute provides:

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

RCW 51.32.185(7) is the section of the presumptive statute that directs recovery of fees and costs. The statute allows recovery of fees and costs under three scenarios. None of these scenarios involve payment to employer by firefighter. The only party allowed to recover fees and costs in an RCW 51.32.185 presumptive claim appeal, is the firefighter.

Both RCW 51.52.130 and RCW 51.32.185 allow recovery by the employee from the employer or state. The reverse is not allowed. There is additional statutory direction when the case involves a firefighter presumption claim, as the case at issue does. Neither the City of Tacoma nor the State of Washington recovers attorney fees and costs under any scenario.

The public policy mandate of the Industrial Insurance Act is to protect the employees. *Dennis v. Dept. of Labor & Indus.,* 109 Wn.2d 467, 745 P.2d 1295 (1987); see also *Carnation Co., Inc. v. Hill,* 115 Wn.2d 184; 796 P.2d 416 (1990). This protection becomes even more pronounced with respect to the attorney fees provision. "The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the ***incurring of legal expense or the diminution of his award*** . . ." [bold italic emphasis added] *Harbor Plywood Corp. v. Dept. of Labor & Indus.,* 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Dept. of Labor & Indus.,* 26 Wn.2d 51, 57, 173 P.2d 164 (1946)).

III. CONCLUSION

Respondents have not rebutted the presumption. Respondents have not provided a preponderance of objective medical evidence establishing, on a more probable than not basis, where – or even when – Lt. Gorre developed

his respiratory and infectious diseases. Lt. Gorre should be entitled to all available benefits under the Industrial Insurance Act for his presumptive occupational infectious and respiratory diseases and his occupational infectious and respiratory diseases.

The burden of proof should have been placed upon the Respondents from the time of application for benefits because the claimant was entitled to the burden shifting in the statute.

Regardless, Lt. Gorre has established that he has presumptively occupational and occupational respiratory and infectious diseases of eosinophilic\interstitial lung disease and coccidioidomycosis.

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

DATED: February 5, 2013

RON MEYERS & ASSOCIATES PLLC

By: _____
Ron Meyers, WSBA No. 13169
Ken Gorton, WSBA No. 37597
Tim Friedman, WSBA No. 37983
Attorneys for Appellant

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 43621-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

EDWARD O. GORRE

Appellant,

v.

CITY OF TACOMA and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondents.

DECLARATION OF SERVICE

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Edward O. Gorre

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

ORIGINAL

DECLARATION OF SERVICE

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

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

ORIGINAL AND ONE COPY TO:

David Ponzoha, Court Administrator/Clerk
Washington State Court of Appeals
Division II
950 Broadway Ste 300
Tacoma, WA 98402-4454

[✓] Via U.S. Postal Service
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COPY TO:

Attorneys for Defendant City of Tacoma:
Marne J.Horstman, Esq.
Pratt, Day & Stratton
2102 N Pearl St Ste 106
Tacoma, WA 98406-2550

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
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[ ] Via Email:

Attorney for Defendant Department of Labor and Industries:
Anastasia Sandstrom, AAG
Office of the Attorney General
Labor and Industries Division
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188

[✓] Via U.S. Postal Service
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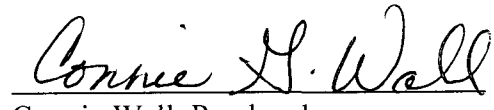
DATED this 5th day of February, 2013, at Lacey, Washington.



Connie Wall, Paralegal