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NO. 90620-3

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SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD O. GORRE,

Respondent,

v.

CITY OF TACOMA,

Petitioner,

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES
SUPPLEMENTAL BRIEF**

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ORIGINAL

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I. INTRODUCTION

The Legislature presumes that some medical conditions contracted by firefighters are occupational diseases, but this presumption does not extend to all conditions. RCW 51.32.185. Nor does the firefighter presumption change long-standing principles of workers' compensation law. Under those principles, medical testimony, not a dictionary, determines whether someone has an occupational disease. Using a dictionary to decide whether Edward Gorre had a condition classified as a respiratory disease improperly treats this question as one of law, rather than the question of fact that it is.

Valley Fever is an infectious disease. But it is not an infectious disease the Legislature identified as subject to the presumption. Nor is Valley Fever a respiratory disease—it is an infectious disease with respiratory symptoms. The superior court and Board of Industrial Insurance Appeals correctly declined to apply the firefighter presumption to Valley Fever. This Court should reverse the Court of Appeals and affirm the superior court and Board.

II. ISSUES

1. Does classification of a condition as a respiratory disease require the use of medical testimony or may a court use a dictionary?

2. Did the Legislature intend to limit the presumption regarding infectious diseases to HIV/AIDSs, hepatitis, meningococcal meningitis, and mycobacterium tuberculosis, when RCW 51.32.185(4) specifically designates that the presumption extends to these conditions?

III. STATEMENT OF THE CASE

Edward Gorre contracted coccidioidomycosis (Valley Fever), a disease not endemic to Washington. BR Ayars 100-02; BR Bardana 33; BR Fallah 74.¹ He claims that he contracted it at work and, as such, it should be accepted as an occupational disease. The Department of Labor and Industries, Board, and superior court all rejected his claim. BR 8-9; CP 942.

A. The Medical Community Treats Valley Fever as an Infectious Disease with Respiratory Symptoms

Coccidioidomycosis is caused by an infectious organism, coccidioides immitis and posadasii. BR Ayars 92. Valley Fever is considered an infectious disease, and the medical community treats it as such, even though it can cause respiratory symptoms. BR Ayars 93-94, 100; BR Bardana 11; BR Johnson 9, 11, 16-18; BR Goss 50; BR Bollyky 8. The medical experts for the City and Department explained that Gorre

¹ The certified appeal board record is cited as "BR." Witness testimony is referenced by the witness's name.

has only one diagnosis: Valley Fever, and not a separate respiratory disease. BR Ayars 111; BR Bardana 18; *see also* BR Bollyky 12.²

The organism causing Valley Fever lives in a desert climate. BR Ayars 92; BR Fallah 74, 76. It is endemic to the Sonoran Desert, California (as far north as Red Bluff, which is about 120-150 miles north of Sacramento), Southern Nevada, Arizona, New Mexico, Texas, Southwest Utah, Mexico, and South America. BR Ayars 93, 136; BR Bardana 10; BR Fallah 79; BR Johnson 22. According to the Board record, the organism causing Valley Fever does not live in Western Washington where Gorre worked. BR Fallah 74; BR Ayars 100; BR Goldoft 87.³

B. Gorre Traveled to Las Vegas Where Valley Fever Is Endemic and the Medical Experts Disagreed Whether He Contracted the Disease in Washington or in Las Vegas

Gorre traveled to Las Vegas, and medical experts opined that he contracted Valley Fever there. *See* BR Rivers 36; BR Ayars 111-12, 121, 137, 139; BR Bardana 21. While Gorre claims that he “had not been in

² Gorre’s experts provided differing testimony on the diagnosis. Dr. Johnson believed that Gorre had Valley Fever and that it was the only diagnosis. BR Johnson 20. Dr. Goss, however, thought that there were two different diagnoses, Valley Fever and eosinophilic lung disease. BR Goss 40-41.

³ Going outside the record, the Court of Appeals cites a recent report that there have been two incidents in Eastern Washington of the condition. *Gorre v. City of Tacoma*, 180 Wn. App. 729, 737 n. 10, 324 P.3d 716 (2014). RCW 51.52.115 requires a decision on the Board record, not on facts from an on-line internet search. In any event, Eastern Washington has a different climate than Western Washington, and the Court of Appeals’ facts are not helpful.

any endemic area, in the year prior to presenting with symptoms of [Valley Fever], ruling out the contraction of [Valley Fever] anywhere except in Washington,” he cites to only one doctor’s testimony, Dr. Johnson. Ans. 3 (citing BR Johnson 22). But he ignores that onset may occur more than a year earlier and that Gorre traveled to Las Vegas where the condition is endemic. BR Ayars 92, 137-38; BR Fallah 82; BR Goss 24, 29; BR Bardana 33. Although the symptoms of Valley Fever generally appear shortly after contraction, there are cases of latency with the condition manifesting even years later. BR Ayars 92, 137-38; BR Fallah 82; BR Bardana 33.

Gorre’s friend testified that Gorre took a golfing trip to Las Vegas, with the date range in 2005. BR Rivers 36. Gorre had fever-like symptoms in December 2005. BR Bardana 21. Eventually after several years of symptoms, he was diagnosed with Valley Fever. BR Bardana 33.

Based on that information, Dr. Ayars, Dr. Bardana, and Dr. Bollyky all agreed that Gorre did not acquire Valley Fever in Washington.⁴ BR Ayars 121, 139, 149; BR Bardana 35; BR Bollyky 15, 25. Dr. Ayars testified that the exposure to coccidioidomycosis came from Gorre’s trip to Las Vegas in 2005, as the best choice, or from living

⁴ Dr. Johnson incorrectly thought that because the onset of Valley Fever was generally two to six weeks, if Gorre had not left Washington in the six weeks before the onset of his symptoms, then he acquired Valley Fever in Washington. BR Johnson 22.

in Sacramento. *See* BR Ayars 111-12, 121, 137, 139. Dr. Bardana also testified, on a more probable than not basis, that Gorre did not acquire Valley Fever in Washington. BR Bardana 35. Dr. Bardana believed it occurred in 2005 on the golfing trip, or earlier, as the fungus can lay latent for a long period. BR Bardana 21, 33. Dr. Bollyky concluded that Gorre did not acquire it in Western Washington. BR Bollyky 25.

C. The Board and Superior Court Found That Gorre Only Had the Infectious Disease Valley Fever and That It Is Not Subject to RCW 51.32.185

The Board found that Gorre had Valley Fever and that it was an infectious disease. BR 8. The Board concluded that the presumption in RCW 51.32.185 did not apply because Gorre did not develop a disabling medical condition presumed to be an occupational disease under the statute. BR 9. Separate and apart from that determination, the Board fully considered whether Gorre had a disease that arose naturally and proximately from the distinctive conditions of his employment. BR 9. It found that he did not and concluded that he did not incur any disease that arose naturally and proximately from the distinctive conditions of his employment with the City of Tacoma's Fire Department. BR 8-9.

Gorre appealed to superior court, which affirmed the Board. CP 1, 942. The superior court found Gorre had Valley Fever and that it was an infectious disease. CP 942; BR 8. It concluded it was not subject to the

presumption under RCW 51.32.185. CP 942. It also concluded that he did not contract an occupational disease. CP 942. Gorre appealed to the Court of Appeals, which reversed the superior court on the issue of whether the presumption applied, reasoning that Valley Fever was a respiratory disease and an infectious disease. *Gorre v. City of Tacoma*, 180 Wn. App. 729, 760-61, 324 P.3d 716 (2014), review granted (2015). It remanded to Board to determine whether the City of Tacoma and the Department rebutted the presumption. *Gorre*, 180 Wn. App. at 766.

IV. ARGUMENT

A. **The Court Should Base the Determination of the Existence of a Medical Condition on Medical Testimony, not a Dictionary**

Workers' compensation law is the intersection between legal principles and medical evidence. It is well-established that medical testimony is necessary to make determinations about medical conditions. See 6A *Washington Practice: Washington Pattern Instructions: Civil* 155.13 (6th ed. 2005). This Court should reject Gorre's request (and the Court of Appeals' holding) to use a dictionary to determine if Gorre had a medical condition subject to RCW 51.32.185. Consistent with the statute, the Board and courts should examine the medical testimony about the medical condition instead of using *Webster's Third International Dictionary* to determine if Gorre had a "respiratory disease."

RCW 51.32.185 lists different categories of medical conditions that are subject to the presumption:

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.

Whether the worker's condition is medically classified as one of these conditions is a medical question. For instance, whether someone has a heart problem is a question for a doctor. This is consistent with the long established rule governing testimony in occupational disease cases.

Medical testimony determines if the worker's condition is within the "scientific classification" of an occupational disease. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 602, 206 P.2d 787 (1949); see *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 145, 278 P.2d 666 (1955). This Court emphasized in the context of determining the existence of an occupational disease that "medical testimony forms a vital part of a claimant's proof, particularly where it involves matters which are beyond the knowledge and understanding of laymen." *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). It is "well established in this jurisdiction that in cases where, as in the case at bar, the cause of an injured workman's impaired physical condition must

be ascertained, the triers of fact must depend to a large extent upon the testimony and conclusions of the physicians” *La Lone v. Dep’t of Labor & Indus.*, 3 Wn.2d 191, 196-97, 100 P.2d 26 (1940).⁵ This long-line of cases requires medical testimony to support a claim of disability, including an occupational disease.

Courts look to technical sources over ordinary dictionaries when dealing with statutes that deal with technical matters. “Technical language should be given its technical meaning when used in its technical field.” *City of Spokane ex rel. Wastewater Mgmt. Dep’t v. Wash. State Dep’t of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002). This maxim is consistent with this Court’s directive to use medical testimony to determine if someone has an occupational disease. *Ehman*, 33 Wn.2d at 602. The doctors provide the technical source to determine if someone has a certain medical condition.

By contrast, *Webster’s* dictionary does not define “respiratory disease.” So like the Court of Appeals, one has to ignore the doctor’s testimony regarding Valley Fever and join two dictionary definitions, that of “respiration” and that of “disease.” Following this cobbled together

⁵See also *Page v. Dep’t of Labor & Indus.*, 52 Wn.2d 706, 709, 328 P.2d 663 (1958); *Hyde v. Dep’t of Labor & Indus.*, 46 Wn.2d 31, 34, 278 P.2d 390 (1955); *Johnson v. Dep’t of Labor & Indus.*, 45 Wn.2d 71, 73, 273 P.2d 510 (1954); *Rambeau v. Dep’t of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945); *Weinheimer v. Dep’t of Labor & Indus.*, 8 Wn.2d 14, 17, 111 P.2d 221 (1941); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984).

definition, the presumption would cover any impairment of breathing, basically all respiratory symptoms. *See Gorre*, 180 Wn. App. at 762.

The Legislature, however, did not create a presumption for respiratory symptoms; it created the presumption for “respiratory disease.” RCW 51.32.185(1)(a). This is in contrast to RCW 51.32.185(1)(b), which covers “heart problems” broadly and not the more narrow “heart disease.” If the Legislature wanted to cover any impairment of breathing it would have written the statute to cover “respiratory problems” or “respiratory symptoms.” It did not.

Contrary to Gorre’s erroneous assumption, Valley Fever cannot be both a respiratory disease and an infectious disease. First, the medical community characterizes the condition as an infectious disease. BR Ayars 93, 100; BR Bardana 11; BR Johnson 11, 16-18; BR Goss 50; BR Bollyky 8. Second, considering the statute as a whole, it is clear that the Legislature did not contemplate overlapping categories. For example, the presumption covers some heart problems, but expressly limits application to those occurring within 72 hours of exposure to smoke or within 24 hours of strenuous physical firefighting activities. If Gorre’s reading of the statute is allowed to stand, a person with pulmonary edema, which is often caused by heart problems, could avoid the Legislature’s express limitation by arguing the condition is a respiratory disease simply because

breathing would be affected.⁶ Such a result would contradict the Legislature's plain intent to place a time limit on covered heart problems. RCW 51.32.185(1)(b).

The facts of *Raum v. City of Bellevue* provide another example. Raum reported "shortness of breath with exertion" for his claimed heart problems. 171 Wn. App. 124, 133, 296 P.3d 695 (2012). Under Gorre's analysis, this would be covered as a respiratory disease, even though it arose from heart problems, because shortness of breath is a respiratory symptom. Such a result would also allow avoidance of the Legislature's plain time limitation for heart problems even though the application of the presumption to his claimed heart problems was contested. *See Raum*, 171 Wn. App. at 142, 145.

Likewise, the Legislature did not intend all infectious diseases that have respiratory symptoms, such as influenza or Valley Fever, to be covered as it specifically created a limited infectious disease category. Here there was a disputed question as to how experts classify Valley Fever. The trial court properly decided this issue acting as a fact-finder. *See Raum*, 171 Wn. App. at 144 (jury decided contested issue of firefighter presumption). The trial court found that Valley Fever was an

⁶ <http://www.mayoclinic.org/diseases-conditions/pulmonary-edema/basics/definition/con-20022485> (last visited March 10, 2015).

infectious disease. CP 942; BR 8. Dr. Ayars and Dr. Bardana testified that Valley Fever is considered an infectious disease. *See* BR Ayars 100; BR Bardana 11. Doctors, including Dr. Johnson, an infectious disease expert in coccidioidomycosis, treat it as an infectious disease. *See* BR Johnson 9, 11, 16-18; BR Goss 50; BR Bollyky 8; BR Ayars 93. Dr. Ayars opined that Gorre has only one diagnosis, Valley Fever, and not a separate respiratory disease. BR Ayars 111; *see also* BR Bardana 18; BR Bollyky 12.

While Valley Fever can cause respiratory symptoms, this does not mean it is a respiratory disease. Dr. Ayar's testimony that Valley Fever is an infectious disease and his testimony that there was no separate respiratory disease provides substantial evidence in support of the trial court's finding. This Court should not disturb this fact-finding as it is supported by substantial evidence.

B. The Legislature Did Not Intend for Every Infectious Disease To Be Covered, as Evidenced by Its Listing of Covered Conditions

The Legislature has decided that the firefighter presumption does not extend to all infectious diseases. Although RCW 51.32.185(1)(d) lists infectious diseases as covered under the presumption, the Legislature has defined the specific infectious diseases to which the presumption extends:

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.

RCW 51.32.185(4). The statute only extends the presumption to the conditions listed in (4). The Legislature thus defined the circumstances when the infectious disease provision applies, namely the presumption is “extended” to HIV/AIDS, hepatitis, meningococcal meningitis, or mycobacterium tuberculosis. RCW 51.32.185(4).

The court interprets statutes to give effect to the Legislature’s intent by considering the plain language of the statute. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). Here, the Legislature’s intent was to provide that only certain diseases are subject to a presumption of coverage, which is why it specially listed the four infectious diseases in RCW 51.32.185(4). The Legislature does not engage in meaningless acts. *State v. Wanrow*, 88 Wn.2d 221, 228, 559 P.2d 548 (1977).

The Court of Appeals believes that the Legislature provided the list because the four specified infectious diseases are purportedly not otherwise recognized as occupational diseases. *See Gorre*, 180 Wn. App. at 765. Under that rationale, there is no reason for the Legislature to

include the conditions except as to highlight that they could be included as occupational disease. Essentially the language is meaningless. Under the Court of Appeals' approach the conditions are already covered and so there is no need to list the conditions because they are already covered. This approach gives no meaning to the statutory terms.

In RCW 51.32.185(4), the Legislature plainly intended to delineate what conditions are covered—the conditions that the presumption are extended to. The language “*shall* be extended” is mandatory language and, read in that context, it is a limitation on what conditions are covered. The statute specifically lists four conditions that are covered. Where a statute specially lists things upon which it operates, there is a presumption that the legislating body intended all omissions. *See In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Extended means “to increase in the scope, meaning, or application” or “to reach in scope or application”. *Miriam-Webster.com*, extend.⁷ The “scope or application” that the statute reaches is the four covered infectious diseases, and only those four covered infectious diseases. It does not extend other infectious diseases. Only those covered are listed.

⁷ <http://www.merriam-webster.com/dictionary/extend> (last visited March 10, 2015).

RCW 51.32.185(4) is not ambiguous. But if it were, the legislative history confirms that the Legislature intended to limit the scope of the presumption to these four infectious diseases. In the bill's first draft, all infectious diseases were covered by the presumption (HB 2663). The Legislature chose to add the limiting subsection 4.⁸ The final bill report states: "Infectious' disease means HIV/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis." Final B. Rep. 2.S.H.B. 2663, 57th Leg. Reg. Sess. (Wash. 2002). This Court should give effect to the Legislature's choice to limit the scope of infectious diseases. Not all conditions a firefighter contracts are covered by RCW 51.32.185. The Legislature has provided limits to the presumption, which the Department, Board, and superior court correctly recognized.

C. The Evidence Is Sufficient To Rebut the Presumption and Substantial Evidence Supports That Gorre Did Not Have an Occupational Disease

No need exists to remand this case to the Board to determine if the presumption was rebutted since the presumption does not apply. But if this Court does remand, it should correct dicta in the Court of Appeals'

⁸ Gorre represents that the infectious disease provision "existed in law for 5 years without the existence of RCW 51.32.185(4)." Ans. 18. This is incorrect. The original presumption only included respiratory diseases. Laws of 1987, ch. 515, § 2. The infectious disease provisions, including subsection (4), were added in 2002. Laws of 2002, ch. 337, § 2.

decision implying that the evidence was insufficient to rebut the presumption. First, the Court of Appeals incorrectly states what is necessary to rebut the presumption. It incorrectly states that where no known association exists between the disease and firefighting, that fact cannot be relied upon to rebut the presumption, and the cause of the condition must be shown. *Gorre*, 180 Wn. App. at 758. This standard is not found in the statute. RCW 51.32.185 provides “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.” This simply requires that the presumption may be be rebutted by a preponderance of the evidence, stating that the evidence, “*may include, but is not limited to*” the listed causes. RCW 51.32.185 (emphasis added). There is no limitation on the type of evidence that may rebut the presumption.

Second, this Court should disavow the Court of Appeals’ comment that the facts that (1) Valley Fever is not native to Western Washington and (2) that Gorre travelled to Nevada appears insufficient to rebut the presumption. *Gorre*, 180 Wn. App. at 735, n.3. There is no reason why such evidence would not rebut the presumption. There was medical testimony on a more probable than not basis that Gorre did not acquire

Valley Fever in Washington, but rather acquired it when golfing in Las Vegas, or perhaps living in Sacramento. Dr. Ayars opined that the exposure came from Gorre's trip to Las Vegas in 2005, as the best choice, or from living in Sacramento. *See* BR Ayars 111-12, 121, 137, 139. Dr. Bardana opined that Gorre did not acquire Valley Fever in Washington. BR Bardana 35. He believed that Gorre acquired it on the golfing trip in Las Vegas in 2005. BR Bardana 21.

The presumption may be rebutted by "nonemployment activities." RCW 51.32.185(1). Traveling to Las Vegas and golfing is plainly a nonemployment activity. Gorre has not asserted he was there for any work related activity. It makes far more sense that Gorre acquired Valley Fever in an area where the disease is endemic than in Western Washington where no cases have been reported. BR Ayars 93, 100; BR Bardana 10; BR Fallah 74, 79.

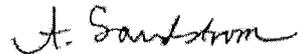
Separate and apart from the presumption issue here, Gorre had the full opportunity to prove that he contracted an occupational disease while working for the City of Tacoma. But the evidence that he was in Las Vegas within the time period of probable contraction of the disease provides substantial evidence to support the trial court's finding that the condition did not arise naturally and proximately from his work as a firefighter and the conclusion it was not an occupational disease.

V. CONCLUSION

Gorre seeks coverage for a disease not found in Western Washington. The Board and the superior court both properly decided that Valley Fever is not a condition subject to the firefighter presumption. Medical science classifies it as an infectious disease, and it is not one of the infectious diseases the Legislature has chosen to include in the presumption. This Court should reverse the Court of Appeals and affirm the trial court.

RESPECTFULLY SUBMITTED this 11th day of March, 2015.

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NO. 90620-3

SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD O. GORRE,

Petitioner,

v.

CITY OF TACOMA and
DEPARTMENT OF LABOR &
INDUSTRIES,

Respondents.

CERTIFICATE OF
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Supplemental Brief and this Certificate of Service in the below described manner:

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DATED this 11th day of March, 2015.



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RE: Edward O. Gorre v. City of Tacoma and DLI
Case Number: 90620-3

Dear Mr. Carpenter:

Attached for filing is the Department's Supplemental Brief and Certificate of Service in the above referenced matter.

Thank you,

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