

Brief with appendices

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Supreme Court No. 90620-3

Court of Appeals No. 43621-3-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

EDWARD O. GORRE,

Respondent,

v.

THE CITY OF TACOMA

Petitioner,

THE DEPARTMENT OF
LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

**SUPPLEMENTAL BRIEF OF PETITIONER
CITY OF TACOMA**

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I. INTRODUCTION

RCW 51.32.185 provides, for one defined subset of Washington workers (defined classes of firefighters), a laudable but limited privilege of a rebuttable evidentiary presumption that certain medical conditions are occupational diseases and attorney fee-shifting at the Board level, a privilege not afforded to any other class of Washington workers (not workers in law enforcement, healthcare, agriculture or workers serving indigents), regardless of society's appreciation of their work or the potential distinctive dangers to which they may be exposed.^{1,2} This case involves workers' compensation claimant Gorre's (Gorre) argument that RCW 51.32.185's evidentiary presumption and fee-shifting provisions apply to his workers' compensation claim for coccidioidomycoses (Valley Fever), a fungal infectious disease, and his claim should be allowed. Division II of the Court of Appeals, in *Gorre v. City of Tacoma*, 180 Wn. App. 729, 324 P.3d 716 (2014), reversed the Board's and Superior Court's determinations that RCW 51.32.185 does not apply to Gorre's claim, and his Valley Fever did not arise naturally and proximately out of the distinctive conditions of his employment with the City.³ Although the

¹ The Certified Appeals Board Record is cited as "BR." Clerk's Papers are cited as "CP." Testimony is cited by source.

² RCW 51.32.185 is the only statute in Title 51 that provides fee-shifting at the Board, effective July 22, 2007. All other Washington workers are not entitled to fee-shifting unless they prevail at the superior and appellate court levels.

³ Following the COA decision, Gorre filed a meritless attorney fee motion asserting entitlement to \$227,960 in fees, \$6,427 in costs and a 2.0 multiplier. The Court of Appeals took no action on this baseless motion. Gorre filed his claim in April 2007. CP 701. The statute in effect, Appendix A, did not authorize fee-shifting at the Board level. It is well-established that workers' compensation claims are governed by the law in effect

Court determined Gorre has Valley Fever as his only condition, the Court determined this condition, contrary to the undisputed expert medical evidence and the Board's and Superior Court's Findings of Fact that Valley Fever is an infectious disease, was a respiratory disease and RCW 51.32.185's application is not limited to the four infectious diseases the Legislature identified. The Court remanded the claim to the Board for application of the presumption, resorting to extrinsic evidence outside of the record. This Court granted review on January 8, 2015. The procedural history, arguments and authorities in the City's Amended Petition for Review are incorporated by reference.

II. ISSUES PRESENTED

1. Did the Court of Appeals erroneously usurp the Board's and trial court's fact-finding duty of determining whether a medical condition is a respiratory disease or an infectious disease, a question of medical fact to be decided by the finder of fact based on the medical evidence?
2. Did the Court of Appeals erroneously find as a matter of law, despite explicit limiting language in the statute, that RCW 51.32.185 applies to all "infectious diseases?"
3. Did the Court of Appeals err in relying on statutory construction doctrines in interpreting what it identified as an unambiguous statute?

at the time of injury. *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 27, 380 P.2d 730 (1963). *See also*, City's Response to the attorney fee motion filed with the COA.

4. Did the Court of Appeals improperly rule on a factual dispute not before it by impermissibly reweighing the evidence presented at trial instead of applying the correct substantial evidence standard?
5. Did the Court of Appeals improperly consider non-record, irrelevant and prejudicial fact evidence the Court gathered and investigated?⁵

III. STATEMENT OF THE CASE

Gorre filed the subject application for workers' compensation benefits in April 2007. CP 701. The Department of Labor & Industries (Department) rejected Gorre's claim, then allowed the claim, then on March 24, 2009, ordered the claim rejected. CP 290, 786.

Gorre appealed the Department's order to the Board of Industrial Insurance Appeals (Board). *Id.* Ultimately, the parties presented their respective cases in full live hearings and by perpetuation depositions which resulted in a Proposed Decision and Order. The Board granted review to make additional Findings of Fact, **including Findings of Fact, based on the factual evidence and expert medical testimony presented**, that Gorre contracted the organism that causes Valley Fever when he took a golfing trip to Nevada in November 2005, his Valley Fever became symptomatic in December 2005, Valley Fever is an infectious disease, and Gorre did not contract any respiratory condition that distinctive conditions of his occupation as a firefighter for the City of Tacoma naturally and proximately caused. BR 8, 2-9, 119-127. *In re: Edward O. Gorre*, BIIA

⁵ Issues 4 and 5 remain as briefed in the Amended Petition for Review.

Dec. 09 13340 (2010).⁷ Gorre appealed the Board's order to Pierce County Superior Court. CP 941. After a bench trial, the Superior Court adopted the Board's Findings and Conclusions as its own and made one additional Finding, affirming the Department's March 24, 2009 denial order.⁸ CP 942. Gorre filed a Notice of Appeal to the Court of Appeals, Division II, which reversed in part and affirmed in part. CP 944-50; *See Gorre*, 180 Wn. App. 765. The Court held that evidence supported the Superior Court's finding that Gorre suffered from a single medical condition, *id.* at 731; but that Gorre's Valley Fever was, as a matter of law, a "respiratory disease," and thus presumptively an "occupational disease," *id.* at 732-33; and that Gorre's Valley Fever was also, as a matter of law, an "infectious disease," and thus presumptively an "occupational disease" *Id.* at 733-34. The Court parsed the medical term "respiratory disease" with a standard-issue dictionary analysis of "respiratory" and "disease" to encompass every "discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing" to determine Gorre's Valley Fever falls under RCW 51.32.185 as a "respiratory disease." *Gorre*, 180 Wn. App. at 762-763. The Court also seemingly found that all infectious diseases, whether listed in the

⁷ The Board's Decision and Order and underlying Proposed Decision and Order are attached as Appendix B.

⁸ The City and Gorre filed cross-motions for summary judgment to expedite review, but ultimately the matter was argued as a bench trial resulting in Findings of Fact, Conclusions of Law, Judgment and Order attached as Appendix C.

statute or not, fall under the statute and remanded to the Board.⁹ The Department moved for reconsideration, and the Court of Appeals altered one footnote and eliminated another.^{11, 12} The City filed an Amended Petition for Review, granted on January 8, 2015.

In Gorre's Reply to the City's Petition for Review, despite the substantial evidence standard, Gorre again attempts to reargue the facts of this case in a way that misleads the Court. The City invites the Court to review the record to discern the actual facts. Gorre traveled to Nevada in 2005, a fact he did not reveal to his doctors, Drs. Goss, Bollyky and Johnson, to the independent evaluator Dr. Ayars, or in response to formal discovery. His friend and co-worker, revealed for the first time during cross-examination that he took trips to Las Vegas with Gorre and that Gorre was in an endemic area in 2005 which included golfing outside the Las Vegas city limits. Rivers, p. 51, ll. 16-24; p. 54, l. 20-p. 55, l. 2.

⁹The Court of Appeals' construction of RCW 51.32.185 will arguably result in *each and every condition*, regardless if the condition has never been acquired in Washington or the U.S. by anyone, being treated as a condition falling under RCW 51.32.185, contrary to the legislative intent explained in *Raum v. City of Bellevue*, 171 Wn. App. 124, 153, 286 P.3d 695, 710 (2012), *review denied*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

¹¹ See Order Granting Reconsideration in Part and Amending Opinion and Order Amending Order at Appendix A of Amended Petition for Review.

¹² Prior to the Court's amendment on reconsideration, the Court stated that "evidence in the record is insufficient ..." Though the Court altered its language on this issue, the change of "is" to "appears" is inadequate and ineffective to change the of the Court's reweighing of the factual disputes determined by the Board trial court. The Court of Appeals also eliminated a footnote regarding purportedly relaxed standards for evidence before the Board under the Administrative Procedures Act, which does not apply. Although the Court eliminated this footnote, the Court did not reexamine the conclusions it reached under this relaxed standard, including potentially the Court's application of the statutory **evidentiary** presumption of RCW 51.32.185, error which should be corrected.

Dr. Bardana reviewed Gorre's complete medical records and testified that symptom onset was December 2005, ongoing in 2006 and to 2007. Bardana, p. 21, l. 24-p. 24, l. 23. Gorre himself testified to symptom onset in February or March 2006. Dep. of Gorre, 11/5/09, 67. Gorre also reported to Dr. Ayars that he began having symptoms in February 2006. Ayars, p. 148, ll. 1-23.

Dr. Johnson admitted causation analysis is based in part on history. Johnson, p. 42, ll. 10-12. Yet, he had almost none of Gorre's medical records and no record before Dr. Ayars' September 3, 2008 report. Johnson, p. 42, l. 14-p. 43, l. 11.

Gorre's treating physicians Drs. Goss and Bollyky and independent evaluators Drs. Bardana and Ayars testified on a medically more probable than not basis that Gorre did not acquire Valley Fever in Washington. Only Dr. Johnson, to whom Gorre did not reveal that Gorre was from California and had traveled to Nevada, testified he thought the acquisition was in Washington. However, he also conceded that had Gorre been in an endemic area in the weeks before the onset of his symptomatology, "clearly the odds that he acquired the infection as a firefighter working in Tacoma would be clearly much less germane." Johnson, p. 41, ll. 14-19; p., 46, l. 19-p. 46, l. p. 47.¹³ Hence, contrary to Gorre's assertion that it is most probable that the exposure occurred in

¹³ Given this testimony, if this Court determines the presumption applies and affirms the Court of Appeals' remand to the Board for further proceedings, it is doubtful Dr. Johnson will maintain that Gorre acquired the condition at work in Western Washington.

Washington, the preponderance of evidence, including that of his treating physicians Drs. Goss and Bollyky and independent evaluators Drs. Ayars and Bardana, mycologist Dr. Fallah, and Department of Health witness Dr. Goldoft, establishes that it is **least** probable that he acquired the infectious disease in Washington. *Respondent's Reply to Petition for Review*, 8.

Further, the evidence before the Board and Superior Court did not establish that Valley Fever was a respiratory disease. *Respondent's Reply*, 10. The Board and Superior Court made a Finding of Fact, based on the evidence, that the condition is an infectious disease. There is no evidence in record that Valley Fever is a respiratory disease. The Court of Appeals determination that Valley Fever is a respiratory disease was either an act of judicial legislation or medical fact-finding, but in either event, error.

In fact, the City respectfully submits that if the Court, in reaching its decision, considers the extrinsic evidence gathered by the Court of Appeals, the Court should also consider or take judicial notice of the World Health Organization's International Classification of Diseases (ICD-10) at <http://www.who.int/classifications/icd/en/>,¹⁴ "the standard diagnostic tool for epidemiology, health management and clinic purposes." Just as the experts testified, coccidioidomycosis is an infectious disease, specifically B-38.¹⁵ The condition is **excluded** from classification as a respiratory disease.¹⁶ The medical terms "respiratory disease" and

¹⁴Attached as Appendix D.

¹⁵Attached as Appendix E.

¹⁶Attached as Appendix F.

“infectious disease” should be given their medical meanings in a statutory scheme whose sole purpose is to address workers’ medical conditions.

IV. ARGUMENT

RCW Title 51 is the Industrial Insurance Act for workers’ medical (physical and sometimes mental) conditions. As the Board and Superior Court correctly recognized, whether a medical condition falls under RCW 51.32.185 is a question of medical fact to be determined based on a preponderance of the evidence. The Decisions of the Board, the agency charged with interpreting and applying Title 51, although not binding, are “entitled to great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Janssen v. Dep’t of Labor & Indus.*, 125 Wn. App. 461, 466, 105 P.3d 431 (2005). Likewise, the Orders and decisions of the Department, the agency with original jurisdiction over workers’ compensation claims, are entitled to deference where supported by law and fact. *See Cockle v. Dep’t. of Labor & Indus.*, 142 Wn.2d 801, 829, 16 P.3d 583 (2001) (Talmadge, J., dissenting) (**deference** is due to interpretations of both Department of Labor and Industries and Board).

Here, the Department’s Order and the Board’s well-reasoned Decision and Order, which the Board has designated as a Significant Decision as *In re: Edward O. Gorre*, BIIA Dec. 09 13340 (2010) under RCW 51.52.160, affirmed rejection of the claim and determined RCW 51.32.185 did not apply. The Decision and Order is copiously supported by the evidence in the record, the law, and the legislative history and is correct. As such, the Board’s Decision and Order, including the Board’s

determination that Gorre's Valley Fever is only an infectious disease, and an infectious disease not covered by RCW 51.32.185, is entitled to deference and should be affirmed by this Court.

1. THE COURT OF APPEALS, DIVISION II'S, DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS, DIVISION I'S, DECISION IN RAUM V. CITY OF BELLEVUE, 171 WN. APP. 124.

As noted in the City's Amended Petition, unlike Division II in this case, the Court of Appeals, Division I in *Raum v. City of Bellevue*, 171 Wn. App. 124, 286 P.3d 695, review denied, 176 Wn.2d 1024 (2013), correctly held that whether a particular condition falls under RCW 51.32.185 is a question of fact to be determined by the finder of fact based on the evidence submitted at trial.^{17,18} In addition, the Court in *Raum* held that the finder of fact's determinations regarding the application of the presumption are entitled to deferential "substantial evidence" review. See *Raum*, 171 Wn. App. at 155.

In contrast, Division II in *Gorre* held that which medical conditions fall under RCW 51.32.185 and are entitled to the presumption is a question of law, to be parsed by judges, not one of fact to be decided

¹⁷In *Raum*, the finder of fact was a jury. That this case was decided by a judge at bench trial does not impact the Court's rational or holding.

¹⁸*Raum*, 171 Wn. App. at 146 ("The special verdict form's question 1 *allowed the jury to consider whether the evidentiary presumption applied.*" (emphasis added)); 144 ("The jury instructions [] *allowed Raum to argue that he was entitled to RCW 51.32.185's evidentiary presumption* and that the City failed to rebut the presumption. They also allowed Raum, if he did not qualify for the presumption, to present evidence that his heart condition arose naturally and proximately from his employment." (emphasis added)).

by the finder of fact based on admissible evidence presented and subject to the adversarial process. *See supra* at 3-4.

Further, Division II shifted “the burden of rebutting this presumption to the City to disprove this presumed occupational disease by a preponderance of the evidence that the disease did not arise naturally or proximately out of Gorre's employment[,]” thereby requiring the City to disprove a negative. *Gorre*, 180 Wn. App. at 771. However, the Court failed to recognize that once the evidentiary presumption is rebutted, the presumption falls away, and the worker must establish the contended medical condition arose naturally and proximately out of the distinctive conditions of employment. *Id.* at 719; *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 482-83, 745 P.2d 1295 (1987); *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 42, 123 P.2d 780 (1942). In that event, the evidentiary presumption, the special treatment if you will, falls away. To have the claim allowed with all attendant industrial insurance benefits, the claimant firefighter, just as every other worker who files an occupational disease claim, simply has to meet the occupational disease standard of establishing he has an occupational disease arising naturally and proximately out of the distinctive conditions of employment on a medically more probably than not basis. Gorre has provided no authority to the contrary.

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2. THE COURT OF APPEALS' REWRITING OF RCW 51.32.185 ELIMINATING ALL RESTRICTIONS ON THE INFECTIOUS DISEASES COVERED BY RCW 51.32.185 IS ERRONEOUS.

Here, the Court of Appeals held that “we read the plain language of RCW 51.32.185(4) as reflecting the legislature's intent to include ‘infectious diseases’ in general, not to limit them to only the four specified diseases to which it ‘extended’ coverage for firefighters who contract these four named diseases.” *Gorre*, 180 Wn. App. at 766. However, a plain language analysis of RCW 51.32.185, numerous rules of statutory construction, and a review of the statute’s legislative history establish that the Legislature did not contemplate all infectious diseases, including Valley Fever, would fall under RCW 51.32.185. The Court’s error in eliminating all restrictions on the infectious diseases covered by RCW 51.32.185 is contrary to the Legislature’s intent and is in conflict with decisions of this Court and the Court of Appeals.

First, the Court of Appeals’ “plain language” analysis of the term “extend” is erroneous. Instead of the contorted definition of “extend” used by the Court of Appeals to reach its intended result, the definition of extend as applied to the term in the context of RCW 51.32.185, is “to reach in scope or application.”¹⁹ Using this definition of extend, RCW 51.32.185(4) applies to a defined firefighter who has contracted human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

¹⁹ Merriam-Webster.com, extend, <http://www.merriam-webster.com/dictionary/extend> (last visited July 16, 2014).

This reading of RCW 51.32.185(4) provides no support for the Court of Appeals' suggestion that "the legislature's intent to expand the scope of qualifying 'infectious diseases,' not to limit them." *Gorre*, 180 Wn. App. 765. Instead, it supports the Board's and Superior Court's decisions that the Legislature provided a defined, codified, and exclusive list of infectious diseases covered by RCW 51.32.185.

Even assuming *arguendo* that the language of RCW 51.32.185 is ambiguous, well-established rules of statutory construction and a review of the legislative history establish that Valley Fever is not an "infectious disease" to which the statute was intended to apply. The Court of Appeals, in reaching its desired conclusion, ignored both rules of statutory construction and the legislative history of RCW 51.32.185.

First, the term "infectious disease" is defined after the statute's initial general reference. "When there is a conflict between one statutory provision which treats a subject in a General way and another which treats the same subject in a Specific manner, the Specific statute will prevail." *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). *See also*, *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 870, 271 P.3d 381, *review denied*, 174 Wn.2d 1015, 281 P.3d 687 (2012) ("When statutes conflict, specific statutes control over general ones."). As a result, it is error for the Court to treat RCW 51.32.185 as applying to the entire universe of infectious diseases instead of the diseases codified by the Legislature.

Further, “under the maxim *expressio unius est exclusio alterius*—where a statute specifically designates the things or classes of things on which it operates—an inference arises in law that the legislature intentionally omitted all things or classes of things omitted from it. *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. at 864. “[W]here a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.” *Washington State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000). As Division II has recognized, but failed to apply here, “[t]he principle of *expressio unius est exclusio alterius* is ‘the law in Washington, barring a clearly contrary legislative intent.’ ” *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. at 866 (because amendments precluding wage replacement benefit statutes to voluntarily retired workers were not included in death benefit statute, Court inferred Legislature intentionally omitted application to death benefit statute).

Moreover, statutes should not be construed in a manner which renders any portion meaningless or superfluous. *Cockle*, 142 Wn.2d at 808-809. The Court of Appeals determination that Valley Fever is an infectious disease covered by the general language of RCW 51.32.185(1), renders RCW 51.32.185(4) entirely meaningless. In fact, had the Legislature intended to cover all infectious diseases, there would have been no need to add subsection 4 because all infectious disease were already covered under subsection 1. Application of the sum of these

canons establishes that the term “infectious disease” is a defined term in the specific terms of subsection (4) following its broader use in subsection (1). In disregarding these well-established rules of construction, the Court of Appeals rewrote the statute, effectively striking subsection (4).

In addition, the legislative history of RCW 51.32.185 supports that subsection (4) provides the exclusive list of infectious diseases. Gorre incorrectly, if not misleadingly, advises this Court that the presumption for infectious disease in subsection (1) existed for five years before the Legislature added subsection (4) listing the four identified conditions, seemingly arguing the list was added five years later to ensure that those conditions were also covered. *Respondent’s Reply*, 18.²⁰

As originally enacted, RCW 51.32.185 applied **only** to respiratory disease. *See* Laws of 1987, ch. 515.²¹ The statute was amended for the first time in 2002 and added both subpart (d) to subsection (1) and subsection (4). *See* Laws of 2002, ch. 337, § 2 and Governor’s partial veto.²² The 2002 Legislature did not intend that all infectious diseases would be entitled to the presumption. Rather, it is clear from the attendant Bill Reports that the four identified infectious disease were meant to be the **only** four covered diseases. *See* WA F. B. Rep., 2002 Reg. Sess. H.B.

²⁰ The Washington State Council of Firefighters Report to the Legislature is absolutely no indication of legislative intent being only the lobbying efforts of the Council, a labor union, and its affiliate unions.

²¹ Laws of 1987, ch. 515, § 1 is attached as Appendix G.

²² Laws of 2002, ch. 337, § 2 and bill reports are attached as Appendix H. The statute was amended next in 2007 without any change to the respiratory disease or infectious disease provisions. Laws of 2007, ch. 490 is, however, attached as Appendix I, because it again contains the Governor’s partial veto.

2663; WA H. B. Rep., 2002 Reg. Sess. H.B. (February 11, 2002). On February 5, 2002, Staff Counsel Chris Cordes issued a Memorandum to the House Commerce & Labor Committee regarding changes in proposed Substitute House Bill 2663 noting the proposed substitute bill “[a]dds a definition of “infectious disease” to mean acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.” BR 1493.^{23, 24} The February 11, 2002 House Bill Report reflects: “This bill is a work in progress. The cancers will be redefined in a substitute that’s being drafted. We have already worked on the list of infectious diseases. We are trying to get to a bill that our employers can support.”

As originally proposed, RCW 51.32.185 contained no limitation on which infectious diseases fell within the statute’s presumption. *See* H.B. 2663, 57th Leg., Reg. Sess. (Wa. 2002). The diseases covered by the statute were ultimately limited to only those listed. RCW 51.32.185(4). The Legislature deliberately restricted the conditions to which RCW 51.32.185 applies. In fact, in 2007, the law was amended again. During the hearings before the House Commerce and Labor Committee, Mr. Ryan Spiller testified that in 2002 he worked on the list of presumptive diseases involved in the 2002 amendments. Mr. Spiller stated that there was a list of about nineteen diseases, and that if it were 150%-200% more likely the disease occurred on the job, such disease would be presumed to be

²³ The February 5, 2002 Memorandum is attached as Appendix J.

²⁴ WA F. B. Rep., 2002 Reg. Sess. H.B. 2663 is attached as Appendix K.

contracted on the job. Mr. Spiller further stated that other diseases on that list of nineteen lacked evidence showing they were more likely than not to be contracted on the job **and those diseases were removed from the legislation.**²⁵ *Hearing on H.B. 1833, February 15, 2007: House Commerce and Labor Committee, 2007 Leg., 60th Reg. Sess. (WA 2007), (statement of Ryan Spiller, Lobbyist, Washington Fire Commissioner Association).*

The Court of Appeals ignored the legislative history of RCW 51.32.185 and eliminated the Legislature's restrictions on which infectious diseases fall under the presumption. It is evident from the legislative history that the stakeholders pared the list of infectious diseases, among other amendments, to address concerns that the presumption not be all-encompassing of every condition a firefighter might acquire regardless of how remote the risk that she or he acquired it at work. The legislative findings, bill reports, and the Governor's vetoes of certain broad, medically unsupported, generalizations make clear that the Legislature intended the presumption to apply to conditions for which firefighters face increased risk. The Legislature is free to amend that list from time to time and as supported by evolving science and medicine, but the statute addresses medical conditions that are not subject to judicial interpretation, but better left to the expertise of physicians, epidemiologists and industrial hygienists and managed through the Legislative process so that the

²⁵ See Declaration of Eric L. Leonard and exhibits, BR 1394-1416, Appendix L.

concerns of both labor and employers, including taxpayer-funded municipalities and fire districts, can be fully considered.

3. THE COURT OF APPEALS IMPROPERLY APPLIED STATUTORY CONSTRUCTION TO ITS “PLAIN LANGUAGE” ANALYSIS.

Although the Court of Appeals failed to make an explicit ruling on whether it found RCW 51.32.185 ambiguous, the Court decided the case through a “plain language” analysis of RCW 51.32.185, indicating it found the statute unambiguous.²⁷ See e.g., *Gorre*, 180 Wn. App. 758 (“Under the plain language of the RCW 51.32.185(1)”; 764 (“The plain language of subsection (4)”; 765 (“we read the plain language of RCW 51.32.185(4)”; “nothing in the plain statutory language suggests”).

“[I]t is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.” *Johnson v. Dep’t of Labor & Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949). Yet, when conducting its “plain language” analysis of RCW 51.32.185, the Court reached beyond the plain language of RCW 51.32.185, utilizing two rules of statutory construction that are only to be applied to ambiguous statutes, in violation of the decisions of this Court, the Court of Appeals, and the constitutional doctrine of separation of powers.

First, the Court of Appeals relied heavily on the doctrine of “liberal construction” to “[c]onstrue these **benefits** liberally” and find *Gorre*

²⁷ Liberal construction is a tool of statutory construction for interpretation of ambiguous workers’ compensation statutes. The Court is not to apply the doctrine to questions of fact, including the factual question of whether Valley Fever is a respiratory disease, or in derogation of statutory mandates. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949).

entitled to the presumption because firefighters are exposed to “smoke, fumes, and toxic or chemical substances,” none of which have any bearing on Gorre’s Valley Fever. *Gorre*, 180 Wn. App. at 762 (emphasis added). However, “[r]ules of liberal construction cannot be used to change the meaning of a statute which in its ordinary sense is unambiguous. To allow such rules to be used for such a purpose would require the Court to usurp the legislative function and thereby violate the constitutional doctrine of separation of powers.” *Wilson v. Dep’t of Labor & Indus.*, 6 Wn. App. 902, 906, 496 P.2d 551 (1972).

Here, the Court of Appeals found RCW 51.32.185 to be an unambiguous statute capable of a “plain language” analysis. Hence, its use of the doctrine of “liberal construction” in interpreting RCW 51.32.185 is a legislative act and an unconstitutional usurpation of the constitutionally defined powers of the Legislature. The Court of Appeals, “cannot, under the guise of construction, substitute [its] view for that of the Legislature[,]” as it did in this case. *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 421, 832 P.2d 489 (1992). This Court should correct this obvious constitutional error.

Second, the Court of Appeals, purporting to avoid absurd results by construing the “plain language” of RCW 51.32.185, did the opposite by finding Gorre’s Valley Fever, an infectious disease to which firefighters in Western Washington have no increased risk and which has never been reported as acquired in Western Washington or Pierce County, covered by the statute. *Gorre*, 180 Wn. App. 765.

“[I]t is a well-settled rule that ‘so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.’” *DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller*, 72 Wash. 154, 158, 129 P. 1100 (1913)). This Court has noted the Court shall “resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle ‘that the drafting of a statute is a legislative, not a judicial, function.’” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)). With these tenets in mind, this Court should avoid applying doctrines of statutory construction to the plain meaning of RCW 51.32.185 to solve any perceived public policy concerns with the statute, keeping in mind that just because a condition is not listed in the statute does not mean the firefighter would not be covered for such a condition or that an employer would even contest such a claim.²⁹ There is no evidence in the record that there is an issue with the City, the Department, or any other employer denying firefighter claims for MRSA or other staph infections. In fact, the Court’s rewriting of the statute will result in the exact absurd results the Court

²⁹ In addition to unlawfully applying the “absurd results” doctrine to an unambiguous statute, the Court’s reading of RCW 51.32.185 is erroneous. Although on its face RCW 51.32.185 does not apply to MRSA or other staph infections, just as it does not apply to all sexually transmitted diseases beyond those codified, all workers, including firefighters and healthcare workers, are entitled to workers’ compensation coverage for these conditions when contracted in the course of employment on a more probable than not basis. The Court of Appeals fails to recognize that RCW 51.32.185 does not dictate claim rejection or allowance.

reportedly sought to avoid. By the Court's reasoning and by way of example, RCW 51.32.185 would apply to a firefighter who contracts syphilis, pubic pediculosis, or yellow fever after traveling to South Africa. This was not and cannot have been the Legislature's intent, and the Court of Appeals' obvious error should be corrected.

V. CONCLUSION

Based on the foregoing points and authorities and the points and authorities set forth in the City's Amended Petition for Review, the City requests that this Court reverse the Court of Appeals, determine RCW 51.32.185, including the statute's evidentiary presumption and attorney-fee-shifting provisions, does not apply to all infectious diseases and all medical conditions with respiratory symptoms, does not apply to Gorre's Valley Fever claim, and that substantial evidence supports the Board's and Superior Court's decisions that the claim should remain rejected because Gorre's Valley Fever did not arise naturally and proximately out of the distinctive conditions of Gorre's employment with the City.

RESPECTFULLY SUBMITTED this 11th day of March, 2015.

PRATT, DAY & STRATTON,
PLLC

By 

Marie J. Horstman, # 27339

Eric J. Jensen, # 43265

Attorneys for Petitioner,

City of Tacoma

APPENDIX A

West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

This section has been updated. [Click here for the updated version.](#)

West's RCWA 51.32.185

51.32.185. Occupational diseases--Presumption of occupational
disease for fire fighters--Limitations--Exception--Rules

Effective: [See Text Amendments] to July 21, 2007

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

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

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

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

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

Credits

[2002 c 337 § 2; 1987 c 515 § 2.]

West's RCWA 51.32.185, WA ST 51.32.185
Current through Chapter 4 of the 2015 Regular Session

APPENDIX B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWARD O. GORRE) DOCKET NO. 09 13340
CLAIM NO. SB-29707) DECISION AND ORDER

APPEARANCES:

Claimant, Edward O. Gorre, by
Ron Meyers & Associates, PLLC, per
Ron Meyers

Self-Insured Employer, City of Tacoma, by
Pratt, Day & Stratton, PLLC, per
Marne J. Horstman

Department of Labor and Industries, by
The Office of the Attorney General, per
Pat L. Demarco, Assistant

The claimant, Edward O. Gorre, filed an appeal with the Board of Industrial Insurance Appeals on April 8, 2009, from an order of the Department of Labor and Industries dated March 24, 2009. In this order, the Department set aside an order dated March 26, 2008, and rejected Mr. Gorre's Application for Benefits for the stated reasons that there was no proof of a specific injury at a definite time and place during the course of his employment, his condition was not the result of the injury alleged, the condition was not the result of an industrial injury, as that term is defined in RCW 51.08.100, and the condition was not an occupational disease within the meaning of RCW 51.08.140. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant and employer filed timely Petitions for Review of a Proposed Decision and Order issued on October 1, 2010, in which the industrial appeals judge affirmed the Department order dated March 24, 2009.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We agree with our industrial appeals judge's assessment of the evidence and the conclusions he drew from it. We have granted review to add Findings of Fact and Conclusions of Law to clarify why Mr. Gorre's medical condition cannot be presumed to be an occupational disease

1 under the provisions of RCW 51.32.185, and to briefly explain why we conclude that Mr. Gorre did
2 not satisfy his burden of proof.

3 RCW 51.32.185 creates a rebuttable prima facie presumption that a firefighter who develops
4 certain medical conditions is presumed to have developed the illness because of an occupational
5 disease process. The conditions include respiratory disease, cancer, heart conditions that become
6 manifest within 72 hours of exposure to smoke, fumes, or toxic substances or within 24 hours after
7 strenuous physical exertion and infectious diseases. Subsection (4) of the statute states:

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

14 Mr. Gorre asserts that he did not have to produce any evidence to prove that his condition
15 was presumed to be an occupational disease. We disagree with his interpretation of the
16 applicability of the presumption. For the presumption to apply, a firefighter must first present
17 evidence that his or her medical condition is one contemplated by the statute to have been
18 presumptively caused by an occupational disease process. Only after he or she has done so, does
19 the burden of producing a preponderance of the evidence to rebut the presumption fall to the
20 Department or the firefighter's self-insured employer. If the condition for which Mr. Gorre here
21 seeks industrial insurance coverage is not one presumed by statute to be an occupational disease,
22 he carries the burden of proof.

23 The diagnosis of the condition Mr. Gorre developed is critical to a determination of whether
24 his condition was presumptively an occupational disease. Mr. Gorre advanced two theories to
25 support his prayer for relief. Under one of the theories, Mr. Gorre asserts that he was exposed to
26 harmful substances during the course of his employment that caused him to develop a respiratory
27 disorder, eosinophilic pneumonia, and that the treatment for the respiratory condition resulted in an
28 infectious disease, coccidioidomycosis. The Department and the City of Tacoma contend that
29 Mr. Gorre contracted only coccidioidomycosis, and that distinctive conditions of his employment did
30 not naturally and proximately cause the coccidioidomycosis.

31 Four medical experts, Christopher H. Goss, M.D., Royce H. Johnson, M.D., Garrison H.
32 Ayers, M.D., and Emil J. Bardana, Jr., M.D., detailed their opinions regarding the nature of the
condition Mr. Gorre developed. They agreed that the claimant suffered from coccidioidomycosis.
The ailment is commonly known as Valley Fever. Valley Fever is caused by *Coccidioides immitis*,

1 an organism that lives in the soil in desert areas such as Mexico, the Sonoran desert, other areas of
2 California and Arizona, and in Nevada and other southwestern states. The organism produces
3 arthrospores that become airborne when the soil is disturbed and may be inhaled and cause
4 disease in humans. Because it thrives only in desert climates, the organism cannot live in the
5 northwestern United States. About 60 percent of the people who are exposed to the organism that
6 causes Valley Fever never develop any symptoms. The symptoms from which the other 40 percent
7 suffer are similar to those caused by the flu or colds. Valley Fever is an infectious disease, the
8 symptoms of which can affect a patient's respiratory functions.

9 No case of Valley Fever has ever been reported as having been proximately caused by an
10 exposure that happened in the State of Washington. The few patients who have been treated for
11 the condition in Washington contracted it elsewhere.

12 Mr. Gorre's Relevant Background

13 Mr. Gorre lived in Fair Oaks, California from 1986 until he graduated from high school. Fair
14 Oaks is a suburb of Sacramento. After the claimant graduated, he enlisted in the United States
15 Army and served in the armed forces for three years. He was stationed in Germany for the first two
16 years of his enlistment but ended his Army career after he was posted in Saudi Arabia for the final
17 12 months. He traveled in Iraq and Kuwait during that time.

18 Mr. Gorre then lived in the Sacramento area from 1990 through sometime in 1994. He
19 attended a community college and then obtained his college degree from California State Los
20 Angeles. Mr. Gorre resided in Long Beach, California from 1994 through 1997. He relocated to the
21 State of Washington in early 1997.

22 The firefighter acknowledged that before he moved to Washington, he traveled throughout
23 California. He visited Mexico in the late 1980s, early 1990s, and in 2008. From 1995 through
24 2004, Mr. Gorre visited Fair Oaks between five and ten times to visit his father. In November 2005,
25 Mr. Gorre took a trip to Nevada, where he played golf outside the city limits of Las Vegas.

26 Mr. Gorre conceded that he could not identify one specific instance in which he was
27 exposed to a substance during the course of his work as a firefighter/EMT that proximately caused
28 the condition for which he seeks industrial insurance coverage. The record demonstrated that the
29 claimant responded to few calls to fight fires, but many calls for EMT services from 2005 through
30 early 2007. Considering the time within which Valley Fever usually becomes symptomatic following
31 exposure, it is that time period that is important.

The Medical Evidence

2 No medical witness identified any specific substance to which Mr. Gorre was exposed
3 during the course of his job that was the probable proximate cause of his condition.

4 Mr. Gorre relied on the opinions of two medical experts to support his claim for benefits.

The Theory of Christopher H. Goss, M.D.

5
6 Christopher H. Goss, M.D., is certified by the American Board of Critical Care Physicians as
7 qualified in that medical specialty. The doctor treated Mr. Gorre for the symptoms that are at issue.
8 He concluded that Mr. Gorre actually suffered from two medical conditions. Eosinophilic
9 pneumonia, which the doctor thought was the first disease the claimant contracted, is a respiratory
10 disease of the vessels of a person's airway. Dr. Goss believed that the disease resulted from
11 "multiple occupational exposures," but he could not identify when the exposures happened or the
12 substances that likely caused the pneumonia.

13 Mr. Gorre was treated with steroids for the presumed pneumonia. Dr. Goss believed that
14 while the steroids resolved the pneumonia, they also caused the Valley Fever organism that had
15 lain dormant for many years after the claimant contracted it when he lived in an area in which the
16 organism is endemic, to become active and symptomatic. The record established that in the
17 40 percent of people who become ill after exposure to the Valley Fever organism, symptoms
18 usually begin within two weeks of exposure. The organism may, however, remain dormant for
19 several years.

20 Thus, based on Dr. Goss's testimony, Mr. Gorre contended that the proper and necessary
21 treatment he underwent for a respiratory disease that was proximately caused by occupational
22 exposures "caused dissemination of coccidiomycosis which he may have acquired as a young man
23 while growing up in California . . ." Goss Dep. at 24. While proximate cause may be established
24 under such circumstances, *In re Arvid Anderson*, BIIA Dec., 65,170 (1986), we are not convinced of
25 the efficacy of Dr. Goss's theory.

26 Garrison H. Ayers, M.D., is certified by the American Boards of Internal Medicine, Infectious
27 Diseases, and Allergy and Clinical Immunology as a qualified medical specialist. He examined
28 Mr. Gorre on September 3, 2008. The doctor said that Mr. Gorre did not report having been
29 exposed to any substance that could have caused chronic eosinophilic pneumonia. Dr. Ayers also
30 declared that the symptoms Mr. Gorre had when he saw Dr. Goss were consistent with a person
31 who has Valley Fever, but not eosinophilic pneumonia. He explained:

32 Well, I think, it is clear that this gentleman had coccidioidomycosis, and
that he had been in endemic areas and lived in typical areas, which one

2 would obtain it. And therefore, is at higher risk, and also given the fact
3 that he is Phillipino, which increases his risk of dissemination, and that
4 the picture that, not only from my history that I obtained and reviewing
5 the records goes along perfectly well with that, and the fact that he had
6 biopsy that was not consistent with hypersensitivity pneumonitis.

7 He had clinical symptoms that you don't see with chronic pulmonary
8 eosinophilic pneumonia, and that he had arthralgias and rash, and those
9 kind of symptoms.

10 And then, of course, the icing on the cake, which I did not have in my
11 first visit, by the way, is that he grew coccidioidomycosis. So, I think it is
12 unequivocal that this gentleman had coccidioidomycosis as his initial,
13 and only disease, and it is a farfetched stretch without clinical data to
14 support that he had another disease that resulted in him getting treated
15 with Prednisone that immunosuppressed him more so he came out with
16 coccidioidomycosis. For him to come out with coccidioidomycosis he
17 already had it. It is clear it was present before.

18 6/14/10 Tr. at 104, 105.

19 Paul L. Bollyky, M.D., is certified as a qualified specialist in internal medicine and infectious
20 diseases. As did Dr. Goss, Dr. Bollyky treated Mr. Gorre for the condition that is here at issue. The
21 physician confirmed that the claimant suffered from Valley Fever. He was unsure whether
22 Mr. Gorre ever suffered from the pneumonia that Dr. Goss diagnosed. Dr. Bollyky noted that the
23 symptoms of Valley Fever may be misdiagnosed as a respiratory disease because the symptoms of
24 the infectious disease and of respiratory illnesses are similar.

25 Emil J. Bardana, Jr., M.D., holds credentials from the American Boards of Internal Medicine
26 and Allergy and Immunology. He reviewed a complete set of Mr. Gorre's records in October 2009.
27 Dr. Bardana described the medical records he reviewed as much more comprehensive than the
28 ones Dr. Goss and Dr. Johnson reviewed, as, he said, were the records he read regarding where
29 Mr. Gorre had lived and his history of travel. The doctor concluded that Mr. Gorre developed only
30 one disease, Valley Fever, which is an infectious disease, and that he did not contract any
31 eosinophilic lung, or respiratory disease caused by a harmful exposure during the course of his job
32 as a firefighter. Dr. Bardana stated that unless a firefighter's breathing apparatus either fails or
comes off, "[e]osinophilic lung disease in firefighters is almost a non-issue." 6/24/10 Tr. at 57.

Dr. Bardana determined that Mr. Gorre's travel history was a critical factor in determining
when he was exposed to the Valley Fever organism. He concluded that the claimant was probably
exposed to the organism during his trip to Nevada in November 2005. By way of explanation,
Dr. Bardana outlined Mr. Gorre's medical history after he returned from Nevada. In
December 2005, the claimant had a three or four day episode during which he had an acute febrile

1 illness demonstrated by a fever, muscle pains, arthralgias, sweats, sore throat and headache. The
2 symptoms recurred in January and May 2006. When he experienced another episode in
3 June 2006, Mr. Gorre sought medical treatment.

4 The infectious disease specialist said that between June 2006 and February 2007,
5 Mr. Gorre developed an allergic response or hypersensitivity caused by Valley Fever. The witness
6 noted that of all of the doctors who participated in treating Mr. Gorre during that time, only Dr. Goss
7 steadfastly thought the claimant had a distinct respiratory disease. Dr. Bardana noted that the
8 steroids with which Dr. Goss treated Mr. Gorre improved the claimant's hypersensitivity response
9 but did not address his primary illness of Valley Fever. That condition, which Dr. Bardana
10 concluded caused all of Mr. Gorre's symptoms, not only did not respond to the steroids, the
11 infectious disease "actually flourished and became disseminated, and he later required antifungal
12 therapy." 6/24/10 Tr. at 24.

13 *The Theory of Royce H. Johnson, M.D.*

14 Royce H. Johnson, M.D., enjoys certification as a specialist by his peers in the American
15 Board of Internal Medicine and in a subspecialty of infectious diseases. He promoted the second
16 theory of proximate cause that Mr. Gorre advanced. Dr. Johnson postulated that the claimant's
17 exposure to the Valley Fever organism happened when a vehicle drove through the Tacoma area
18 after having been in one of the southwestern areas of the United States in which the organism is
19 endemic. The vehicle, he thought, probably caught fire on Interstate 5, and Mr. Gorre responded to
20 the scene where he contracted the disease during the course of his employment.

21 Dr. Johnson was unaware that Mr. Gorre had lived in California.

22 We find Dr. Johnson's theory of causation to be highly improbable.

23 Payam Fallah Moghadam, Ph.D., is a mycologist, whose occupation involves the study of
24 organisms. He said that the organism that causes Valley Fever would have immediately died if it
25 was carried to an environment such as Washington's. He also averred that the organism cannot
26 survive fires that reach temperatures of more than 130 degrees F. Both of these factors detract
27 from the persuasiveness of Dr. Johnson's theory.

28 By far, a preponderance of the persuasive evidence leads us to conclude that Mr. Gorre did
29 not contract a respiratory disease that distinctive conditions of his employment as a firefighter
30 naturally and proximately caused. He contracted an infectious disease because of his exposure to
31 the Valley Fever organism that did not happen during the course of his employment for the City of
32 Tacoma.

FINDINGS OF FACT

- 2 1. On April 26, 2007, the claimant, Edward O. Gorre, filed an Application
3 for Benefits with the Department of Labor and Industries, in which he
4 alleged that he contracted an occupational disease that distinctive
5 conditions of his employment with the City of Tacoma Fire Department
6 naturally and proximately caused. The Department rejected the claim
7 for benefits on August 13, 2007, for the stated reason that Mr. Gorre did
8 not provide it with a physician's report or medical proof. In its order the
9 Department also informed Mr. Gorre that he had the right to file another
10 claim with the Department so long as he filed it within one year of the
11 date he was injured. The City of Tacoma protested the order on
12 September 6, 2007. On February 11, 2008, the Department held the
13 August 13, 2007 order in abeyance and rejected Mr. Gorre's claim for
14 benefits because there was no proof of a specific injury at a definite time
15 and place during the course of his employment, his condition was not
16 the result of the injury he alleged, and the condition was not caused by
17 an industrial injury event or occupational disease process. Mr. Gorre
18 protested the order on February 20, 2008. On March 26, 2008, the
19 Department allowed Mr. Gorre's claim for an occupational disease that
20 the Department described as interstitial lung disease, nodular with
21 eosinophilia and granulomatous disease with possible sarcoid. The
22 Department held the order in abeyance one day later. On March 24,
23 2009, the Department canceled the March 26, 2008 order and rejected
24 Mr. Gorre's claim for benefits because there was no proof of a specific
25 injury at a definite time and place during the course of his employment,
26 his condition was not the result of the injury he alleged, and the
27 condition was not caused by an industrial injury event or occupational
28 disease process. Mr. Gorre filed a Notice of Appeal with the Board of
29 Industrial Insurance Appeals from the March 24, 2009 Department order
30 on April 8, 2009. On May 7, 2009, the Board agreed to hear the appeal,
31 and under Docket No. 09 13340, it issued an Order Granting Appeal.
- 32 2. In 2000, Mr. Gorre began working as an EMT for the City of Tacoma's
Fire Department. From that time through April 2007, by far the majority
of the claimant's work duties involved EMT work. The City of Tacoma
hired Mr. Gorre as a firefighter on March 17, 2007.
3. Mr. Gorre was exposed to the organism that causes Valley Fever when
he took a golfing trip to Nevada in November 2005.
4. Valley Fever is an infectious disease.
5. Mr. Gorre became symptomatic from Valley Fever in December 2005.
6. Mr. Gorre did not contract any respiratory condition that distinctive
conditions of his occupation as a firefighter for the City of Tacoma
naturally and proximately caused.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter of and the parties to this appeal.
2. During the course of his employment with the City of Tacoma's Fire Department, Mr. Gorre did not develop any disabling medical condition that the provisions of RCW 51.32.185 mandate be presumed to be an occupational disease.
3. Mr. Gorre did not incur any disease that arose naturally and proximately from distinctive conditions of his employment with the City of Tacoma's Fire Department.
4. The March 24, 2009 order of the Department of Labor and Industries is correct and is affirmed.

Dated: December 8, 2010.

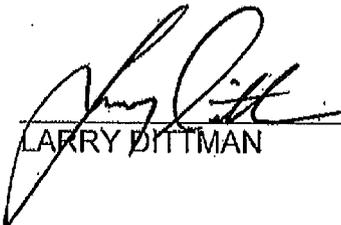
BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



FRANK E. FENNERTY, JR. Member



LARRY DITTMAN Member

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: EDWARD O. GORRE) DOCKET NO. 09 13340
2 CLAIM NO. SB-29707) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Craig C. Stewart
4

5 APPEARANCES:

6 Claimant, Edward O. Gorre, by
7 Ron Meyers & Associates, PLLC, per
8 Ronald G. Meyers

9 Self-Insured Employer, City of Tacoma, by
10 Pratt, Day & Stratton, PLLC, per
11 Marne J. Horstman

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Pat L. DeMarco, Assistant

15 The claimant, Edward O. Gorre, filed an appeal with the Board of Industrial Insurance
16 Appeals on April 8, 2009, from an order of the Department of Labor and Industries dated March 24,
17 2009. In this order, the Department rejected the claim because there was no proof of a specific
18 injury at a definite time and place in the course of employment, the claimant's condition was not the
19 result of injury alleged, the condition was not the result of an industrial injury as defined by the
20 Industrial Insurance Act, and the condition was not an occupational disease. The Department order
21 is **AFFIRMED**.

22 **PROCEDURAL AND EVIDENTIARY MATTERS**

23 On June 16, 2009, the parties agreed to include the Jurisdictional History in the Board's
24 record. That history establishes the Board's jurisdiction in this appeal.

25 On November 23, 2009, the Board received the claimant's motion for summary judgment
26 along with a declaration of Edward O. Gorre dated November 19, 2009. The motion for summary
27 judgment was based on RCW 51.32.185 regarding the respiratory disease presumption for
28 firefighters in occupational disease cases. On January 4, 2010, the Board received the employer's
29 response to the motion for summary judgment. Attached to the response were the declarations
30 of: Emil J. Bardana, Jr., M.D., with Exhibits A and B; Garrison H. Ayers, M.D., with Exhibits A-H;
31 Marne J. Horstman, with Exhibits A-G; Britta Holm, with Exhibits A-E; Angela M. Hardy; and
32 Jolene D. Davis, with Exhibit A. On January 4, 2010, the Board received the Department's

1 opposition to the claimant's summary judgment motion. Along with this brief came the declaration
2 of Rebecca O'Connor-Cox, with Attachments A-I, and Appendixes A and B. On January 7, 2010,
3 the Board received the claimant's reply brief in support of the summary judgment motion. This
4 included a declaration of Breckan Scott. Oral argument was held on the motion on January 12,
5 2010. At that time, I denied the claimant's motion because of questions of fact that were not
6 answered because of the lack of supporting medical evidence to support the claimant's motion.

7 On January 28, 2010, the Board received the claimant's renewed motion for summary
8 judgment. This included a declaration of Breckan Scott and Exhibits 1-39. On February 18, 2010,
9 the Board received the Department's opposition to the renewed motion. On February 25, 2010,
10 the Board received the employer's response to the renewed motion. This response included a
11 declaration of Eric R. Leonard, with Exhibits A-G, and supplemental declarations of: Marne J.
12 Horstman, with Exhibits H and I; Dr. Garrison H. Ayers, with Exhibit 1; and Britta Holm. On
13 March 3, 2010, the Board received the claimant's reply brief and a declaration of Breckan Scott with
14 Exhibits A-E. Oral argument was held on this motion on March 8, 2010. At that time, I again
15 denied the claimant's motion and ruled that the case would proceed as a normal rejection of an
16 occupational disease claim with the claimant bearing the burden of proof. I was in agreement with
17 the Department's brief that indicated that the Department has initial jurisdiction over the claim and
18 there was a question of fact regarding whether valley fever is a respiratory disease or an infectious
19 disease.

20 Objections were made regarding Board Ex. No. 1 and rulings on those objections are found
21 in an Interlocutory Order issued on December 30, 2009. The claimant presented the depositions of
22 Dr. Royce H. Johnson, taken on January 7, 2010, and Dr. Christopher H. Goss, taken on May 6,
23 2010. The employer presented the deposition of Dr. Paul L. Bollyky, taken on June 25, 2010.
24 These depositions are published. In Dr. Johnson's deposition, the objection on page 24 is
25 sustained and Exhibit 1 is renumbered Board Ex. No. 10 and admitted. In Dr. Goss' deposition,
26 Exhibit 1 is renumbered Board Ex. No. 11 and admitted. With the claimant's further testimony on
27 July 26, 2010, Ex. Nos. 7 and 8 are rejected.

28 At the June 24, 2010 hearing, the employer moved to publish the discovery deposition of
29 Edward O. Gorre, taken on November 5, 2009; that motion was granted. In Mr. Gorre's discovery
30 deposition, signature was reserved but the record shows that more than 30 days have elapsed
31 since the receipt of his deposition, and no report of irregularities or errors have been received.
32 Therefore, pursuant to CR 32 (d)(4), any irregularities or errors are deemed waived.

1 All other objections and motions in the depositions are overruled and denied.

2 ISSUE

3 Did the claimant sustain a respiratory occupational disease during the course of his
4 employment with the Tacoma Fire Department?

5 DISCUSSION

6 Edward O. Gorre testified that he had been employed by the Tacoma Fire Department since
7 1997. He had been an ambulance driver in California before this job. Mr. Gorre testified that he
8 worked as an emergency medical technician, and in that position he was exposed to many filthy
9 environments and assisted in the care of nursing home patients and transients. There is no way of
10 knowing all of the medical maladies of these individuals. He indicated that this type of work, rather
11 than fire calls, was the majority of his work. Mr. Gorre indicated that he was frequently called to
12 assist after collisions and fires along the Interstate 5 corridor. He also believes that he was
13 exposed to diesel exhaust and mold while he was employed out of Station 9. He made an estimate
14 of the number of fire calls, both residential and commercial, motor vehicle responses, and HAZMAT
15 calls in which he participated.

16 Mr. Gorre was raised in a suburb of Sacramento. After graduation in 1986, he joined the
17 Army and served in Desert Storm. He returned to Sacramento from 1990 until 1993. He then
18 moved to Long Beach, California before coming to the Northwest. Mr. Gorre testified that he has
19 traveled to Mexico on occasion. He visited family in California at Christmas time 2004 and in
20 July 2009. Mr. Gorre denied smoking tobacco in the past relevant years.

21 Darrin S. Rivers testified that he is a firefighter and paramedic for the Tacoma Fire
22 Department. He has known Mr. Gorre for a number of years and worked as his EMS partner in the
23 first part of 2007. Mr. Rivers testified that in this job he is exposed to all forms of particulates that
24 come from residential and commercial fires. In addition, the EMS is exposed to all forms of bodily
25 fluid and anything that may be present in a home. Mr. Rivers testified regarding the use of SCBA
26 (self contained breathing apparatus) and the N-95 mask, mainly in use after 2006. When there is a
27 need to respond to highway calls they are exposed to fumes and other materials that come from
28 traffic. He indicated that he traveled to Las Vegas with Mr. Gorre, and they probably played golf in
29 that area in about December 2005.

1 Glen Zatterberg testified that he is a Lieutenant with the Tacoma Fire Department and is
2 currently a safety officer. He described the operation of a typical fire fighting operation and
3 materials to which they are exposed. Mr. Zatterberg did not recall the fire calls he had participated
4 in with Mr. Gorre.

5 Matthew Simmons, an employee of Rural Metro Ambulance, testified that he has been on
6 numerous calls with Mr. Gorre. He verified the poor condition of the residences they enter and the
7 wide variety of potential exposure to which they come in contact. Mr. Simmons observed Mr. Gorre
8 being lethargic and having some breathing problems.

9 Dr. Christopher H. Goss, a pulmonary specialist, testified for the claimant. He first saw
10 Mr. Gorre in May 2007 on a referral from another pulmonary physician, Dr. Sandstrom. Mr. Gorre
11 had been treated with Prednisone and his symptoms improved. A lung biopsy was consistent with
12 hypersensitivity pneumonitis. Mr. Gorre had responded so well to the steroids that valley fever was
13 not contemplated, especially without a history of travel to the Southwest. At the time he treated
14 Mr. Gorre he developed a bump, but it was not biopsied until months later. Those biopsy cultures
15 grew into valley fever and Mr. Gorre was referred to Dr. Bollyky to treat this infectious disease.
16 Dr. Goss' opinion was that Mr. Gorre developed two disease processes. He developed eosinophilic
17 lung disease related to his firefighting work and exposures. His treatment with steroids then caused
18 dissemination of valley fever, which he contracted as a youth in California.

19 Dr. Goss is aware that Dr. Johnson does not agree with his belief that Mr. Gorre has two
20 conditions. He did not receive a complete medical record of Mr. Gorre's treatment before 2006.
21 Dr. Goss believed that Mr. Gorre responded frequently to fires and also worked as a paramedic.
22 There is no indication that he knew of Mr. Gorre's trip to Las Vegas or playing golf in that area.

23 Dr. Royce H. Johnson, a physician certified in internal medicine and infectious disease,
24 testified for the claimant. He is the head of an infectious disease clinic which has a separate valley
25 fever clinic. He has also written on the subject of valley fever. Dr. Johnson examined Mr. Gorre on
26 January 21, 2009 on a referral from Dr. Bollyky. Dr. Johnson learned that Mr. Gorre was in good
27 health before 2006 and developed flu-like symptoms in January 2007. Mr. Gorre underwent
28 diagnostic studies and was treated with Prednisone. In March 2008, Mr. Gorre had a chance
29 meeting with a dermatologist at a social event. That physician noticed a skin lesion. That lesion
30 was biopsied and grew the culture for valley fever. Mr. Gorre was then referred to Dr. Bollyky for
31 treatment and he had improved by the time he saw Dr. Johnson. Dr. Johnson was very clear on his
32 diagnosis of valley fever. He indicated that the diagnosis became unequivocal after the biopsy that

1 showed disseminated valley fever. He believed that the Washington medical records he reviewed
2 were of little assistance because of those physicians' limited knowledge of valley fever.

3 Dr. Johnson testified that valley fever is almost always due to inhalation of spores in the
4 southwest United States. These fomites travel to the lungs where they establish a site and produce
5 fungal pneumonia. He indicated that this process normally takes between three and six weeks.
6 With that knowledge, it was his opinion that if Mr. Gorre had not traveled outside Washington in the
7 six weeks before his symptoms developed, he acquired valley fever in Washington. His opinion
8 was that Mr. Gorre most likely got valley fever as a part of his work with the Tacoma Fire
9 Department because of the history he received of frequent dealings with vehicle fires and calls on
10 Interstate 5. These vehicles likely carried the fomites from an endemic zone to Washington.

11 Dr. Johnson indicated that outside the endemic zone valley fever can be misdiagnosed. He
12 believed that valley fever caused Mr. Gorre's preliminary diagnosis of pneumonia with eosinophilia.
13 Dr. Johnson testified that valley fever rarely lays dormant in the body and then later disseminates.

14 Dr. Paul L. Bollyky, a physician who does infectious disease research, testified for the
15 employer. Mr. Gorre was referred to him for treatment after his skin biopsy was cultured and grew
16 valley fever. He knew that Dr. Goss had previously treated Mr. Gorre and had entertained
17 diagnoses other than valley fever. Dr. Bollyky believed that valley fever was a surprise diagnosis
18 because of its lack of existence in Washington. Dr. Bollyky believed that Mr. Gorre was inoculated
19 through lung exposure at some point and that his early presentation of symptoms could be
20 explained by valley fever, even though it was not diagnosed.

21 Dr. Bollyky diagnosed Mr. Gorre as having disseminated, not primary, valley fever and was
22 recovering nicely. He testified that valley fever does not exist in this state and occurs here only
23 after individuals travel to endemic areas. It was his opinion that this is how Mr. Gorre developed
24 this condition.

25 Dr. Garrison H. Ayars, a physician who practices allergy and immunology, testified for the
26 employer. He has published articles regarding eosinophilia. Dr. Ayars indicated that valley fever
27 does not exist in the state of Washington, but can here travel in individuals who have gone to the
28 Southwest. He indicated that many individuals who are exposed to valley fever do not exhibit
29 symptoms. The incubation time for the disease is within a few weeks after exposure, although
30 there can be a delay of many years.

31 Dr. Ayars evaluated Mr. Gorre on September 3, 2008, and since that time has reviewed
32 extensive medical records, sick leave records, and declarations and transcripts. These records

1 also included statistics from the Washington State Health Department which indicated 15 reported
2 cases of valley fever here between 1997 and 2008, none coming from the soils in Washington.

3 Dr. Ayars testified that valley fever is an infectious disease which can cause respiratory
4 symptoms. He disagreed with Dr. Goss regarding the development of the condition in Mr. Gorre
5 after he was immunocompromised by Prednisone treatment. Dr. Ayars' opinion was that Mr. Gorre
6 clearly developed valley fever because of his symptom presentation and culture study. His opinion
7 was that with a symptom onset in February 2006, Mr. Gorre was exposed to the Valley fever spores
8 when he was in the Las Vegas area in about December 2005. He indicated that Mr. Gorre was at a
9 greater risk for valley fever symptoms because of his Filipino ancestry. Dr. Ayars did not believe
10 that Mr. Gorre had any other respiratory diagnosis. He saw no other history of other organic dust
11 exposures and did not find Mr. Gorre's symptoms to correlate with hypersensitivity pneumonitis or
12 exposure to organic dusts.

13 Angela M. Hardy, a human resource analyst for the City of Tacoma, testified that she is the
14 individual who receives industrial insurance claims. She then sends that material to a third party for
15 claims administration. She reviewed Mr. Gorre's records and determined the number of hours of
16 sick leave he used in the ten and two year periods before this claim.

17 Jonathan E. Chaffey testified that he is a battalion chief for the Tacoma Fire Department. In
18 that position he is also the health and safety officer. He testified regarding the policy and usage of
19 SCBA and N-95 masks. Mr. Chaffey was aware of diesel fume complaints at Stations 8 and 9 and
20 observed a video that tested the dissemination of smoke at those stations. He did not know of any
21 mold remediation at Station 9. Mr. Chaffey had a limited recollection of responding to fires with
22 Mr. Gorre but did remember him using his SCBA at a car fire in 2008.

23 Jolene D. Davis testified that she is an assistant chief for the Tacoma Fire Department.
24 She is also a liaison between fire administration and the city's workers' compensation department.
25 Ms. Davis gathered Mr. Gorre's call logs from June 1, 2005 through April 15, 2007, and these
26 reflect that the vast majority of his work was EMS calls. In that time period there were 51 incidents
27 that were categorized as fire calls.

28 Dr. Buckley A. Eckert, a physician who practices internal medicine, indicated he saw
29 Mr. Gorre on March 8, 2007. At that time, Mr. Gorre indicated that he had night sweats, decreased
30 energy, chest pain, back pain, and a recent episode of hives for which he received Prednisone. In
31 his social history Mr. Gorre indicated that he was a past smoker who ceased in 1990. In a later

32

1 chart note at that clinic, Mr. Gorre indicated that he uses a mask when exposed to smoke at work.
2 A prior clinical note indicated no tobacco usage.

3 Dr. Stuart M. Weinstein testified that he evaluated Mr. Gorre on April 18, 2002, and learned
4 that he had been a non-smoker since age 30.

5 Dr. Emil J. Bardana, Jr., a physician who practices in allergies and immunology, testified for
6 the employer. He indicated that Filipinos have an increased risk for the development of valley
7 fever. He described this condition as a fungal infectious disease. Dr. Bardana practices in
8 Portland, Oregon and has not seen the condition as a common part of his practice. When he has
9 seen the condition, it has been in individuals who have traveled outside the Northwest and he then
10 refers them to an infectious disease physician for treatment. Dr. Bardana reviewed extensive
11 records in this matter. His opinion is that Mr. Gorre developed valley fever and no other lung
12 condition. Dr. Bardana did not find that Mr. Gorre sustained any acute inhalation during his work for
13 the Tacoma Fire Department. His opinion was that the primary point of exposure was when
14 Mr. Gorre was in Nevada and played golf. He did not find that Mr. Gorre's smoking played any role
15 in this case.

16 Dr. Payam Fallah Moghadam, a Ph.D. mycologist, testified for the employer. He testified
17 that the valley fever spore is a unique organism that thrives in hot and dry environments with an
18 alkali soil. It does not like competition and is not found in the state of Washington. The airborne
19 spores can be up to seven microns and then get larger in their host. An N-95 mask will not allow
20 this size of spore to penetrate.

21 Dr. Marcia J. Goldoft, a medical epidemiologist with the Washington Department of Health,
22 testified for the employer. The Health Department tracks notifiable conditions in this state, but
23 valley fever is not one of those conditions. She verified the small number of cases of valley fever
24 found in Washington with no known exposures in this state.

25 DECISION

26 Mr. Gorre asks that his occupational disease claim be allowed because of the exposures he
27 has sustained during his work at the Tacoma Fire Department. Many lay witnesses have testified
28 regarding those exposures, both in fire settings and as an EMT. Mr. Gorre presented a prima facie
29 case for claim allowance through the medical testimony of Drs. Johnson and Goss. The employer
30 then presented a far more convincing case that rebuts that information and shows that Mr. Gorre
31 did not sustain an occupational lung disease proximately caused by his work for the Tacoma Fire
32 Department.

1 The medical testimony is clear that Mr. Gorre developed valley fever. Dr. Goss tried to show
2 that he had a different diagnosis, which was then treated with steroids and led to the onset of his
3 quiescent valley fever. No other medical provider agrees with this scenario, not even the claimant's
4 other medical expert, Dr. Johnson. I cannot agree with this opinion expressed by Dr. Goss. Valley
5 fever spores do not exist in the state of Washington or any area north of the California and Oregon
6 border. The only cases of this infectious disease that are reported in this state come from
7 individuals who have traveled to the endemic region of the Southwest desert area. Dr. Johnson's
8 opinion is that Mr. Gorre was exposed to the spores while fighting fires or other calls on vehicles
9 along the Interstate 5 corridor. I do not believe this theory. Mr. Gorre developed symptoms during
10 the early winter. The evidence shows that the valley fever spore does not like cold or wet
11 conditions. The spore would have had to travel a few hundred miles through this environment in
12 order to get to the Tacoma area. Under Dr. Johnson's theory it would also have been subjected to
13 potentially further insult of a fire and water exposure. He may be an expert in the treatment of
14 valley fever, but his proximate cause opinion is implausible. The most likely cause of Mr. Gorre's
15 valley fever is his trip to the Las Vegas area and playing golf, although it is impossible to exactly
16 quantify when he was exposed. Such exposure did not come about through his work for the
17 Tacoma Fire Department and the rejection of this occupational disease claim is correct and
18 affirmed.

19 FINDINGS OF FACT

- 20 1. On April 26, 2007, the Department of Labor and Industries received an
21 application for benefits alleging a lung problem arising out of the
22 claimant's work for the Tacoma Fire Department. On August 13, 2007,
23 the Department issued an order that rejected the claim because no
24 licensed physician's report or medical proof had been filed as required
25 by law. On September 6, 2007, the Department received the employer's
26 protest to the August 13, 2007 order, and it was placed in abeyance.
27 On February 11, 2008, the Department issued an order that held the
28 August 13, 2007 order for naught and rejected the claim because there
29 was no proof of a specific injury at a definite time and place in the
30 course of employment, the claimant's condition was not the result of
31 injury alleged, the condition was not the result of an industrial injury as
32 defined by the Industrial Insurance Act and the condition was not an
occupational disease. On February 20, 2008, the Department received
the claimant's protest to the February 11, 2008 order. On March 26,
2008, the Department issued an order that cancelled the February 11,
2008 order and allowed the claim as an occupational disease on
March 18, 2007. On March 27, 2008, the Department issued an order
that placed the March 26, 2008 order in abeyance. On March 24, 2009,
the Department issued an order that rejected the claim because

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5 there was no proof of a specific injury at a definite time and place in
the course of employment, the claimant's condition was not the result
of injury alleged, the condition was not the result of an industrial
injury as defined by the Industrial Insurance Act and the condition was
not an occupational disease. On April 8, 2009, the Board received the
claimant's appeal from the March 24, 2009 order, and it was assigned
Docket No. 09 13340.

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2. In February 2006, Mr. Gorre developed symptoms of and was later diagnosed with an infectious disease, valley fever. Mr. Gorre did not develop a respiratory disease or a lung condition.
 3. Mr. Gorre's valley fever condition did not arise naturally and proximately out of the distinctive conditions or exposures in his work as a firefighter/paramedic with the Tacoma Fire Department.

CONCLUSIONS OF LAW

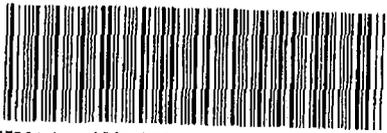
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The claimant did not develop an occupational disease that arose naturally and proximately from the distinctive conditions of his employment within the meaning of RCW 51.08.140.
3. The March 24, 2009 order of the Department of Labor and Industries is correct and is affirmed.

DATED: OCT 01 2010



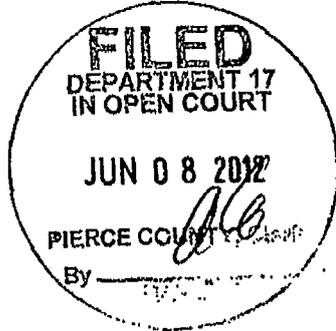
Craig C. Stewart
Industrial Appeals Judge
Board of Industrial Insurance Appeals

APPENDIX C



11-2-05064-1 38668750 JD 06-12-12

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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

EDWARD O. GORRE,

Plaintiff,

v.

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

Defendants.

NO: 11-2-05064-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Judgment Creditors: State of Washington Department of Labor and Industries and the City of Tacoma
- 2. Judgment Debtor: Edward O. Gorre
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees to Department: \$200.00
- 6. Statutory Attorney Fees to City of Tacoma: \$200.00
- 7. Costs payable to the City of Tacoma: ~~\$830.30~~ *Q mch* *[Signature]* LG
- 8. Other Recovery Amounts: \$0

FINDINGS OF FACT, CONCLUSIONS
OF LAW, JUDGMENT

ORIGINAL

OFFICE OF THE ATTORNEY GENERAL,
1250 Pacific Ave, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

1 9. Principal Judgment Amount shall bear interest at 0% per annum.

2
3 10. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

4 11. Attorney for Judgment Creditor, Pat L. DeMarco, Assistant Attorney General
Department of Labor & Industries:

5
6 12. Attorney for Judgment Creditor, Marne J. Horstman
City of Tacoma:

7 13. Attorney for Judgment Debtor: Ron Meyers

8
9 This matter came on regularly before the Honorable Ronald C. Culpepper, in open
10 court on March 30, 2012. The Plaintiff, Edward Gorre, appeared by his counsel, Ron Meyers;
11 The Defendant, City of Tacoma was represented by its attorneys, Pratt, Day & Stratton PLLC,
12 per Marne J. Horstman; the Defendant, Department of Labor and Industries (Department),
13 appeared by its counsel, Robert M. McKenna, Attorney General, per Pat L. DeMarco,
14 Assistant Attorney General. The Court reviewed the records and files herein, including the
15 Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of
16 Counsel. Therefore, being fully informed, the Court makes the following:

17
18 **I. FINDINGS OF FACT**

19 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on June 7,
20 June 14, June 25, and July 26, 2010, and the testimony of other witnesses was
perpetuated by deposition.

21 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on
22 October 1, 2010, from which Plaintiff and the Self-insured Employer filed timely Cross
23 Petitions for Review on October 14, 2010, for Plaintiff and November 18, 2010 for the
24 City of Tacoma. On December 8, 2010, the Board, having considered the Cross
25 Petitions for Review, granted review to add Findings of Fact and Conclusions of Law
to clarify why Mr. Gorre's medical condition cannot be presumed to be an occupational
disease under the provisions of RCW 51.32.185, and to briefly explain why the Board
concluded that Mr. Gorre did not satisfy his burden of proof. The Board's Decision
and Order was issued on December 8, 2010.

26 Plaintiff thereupon timely appealed the Board's December 8, 2010 order to this Court.

1 1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts
2 as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts
3 Nos. 1 through 6 of the December 8, 2010 Decision and Order issued by the Board of
Industrial Insurance Appeals.

4 Based upon the foregoing Findings of Fact, the Court now makes the following

5 **II. CONCLUSIONS OF LAW**

6 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

7 2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the
8 Board's Conclusions of Law Nos. 1 through 4 of the December 8, 2010 Decision and
Order issued by the Board of Industrial Insurance Appeals.

9 2.3 The Board's December 8, 2010 Decision and Order is correct and is affirmed.

10 2.4 The March 24, 2009 Department order which set aside a March 26, 2008 order and
11 rejected Mr. Gorre's claim because there was no proof of a specific injury at a definite
12 time and place during the course of his employment, his condition was not the result of
the injury alleged, the condition was not the result of an industrial injury as that term is
13 defined in RCW 51.08.100, and the condition was not an occupational disease within
the meaning of RCW 51.08.140 is correct and is affirmed.

14 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
15 judgment as follows:

16 **III. JUDGMENT**

17 3.1 The December 8, 2010 Board of Industrial Insurance Appeals Decision and Order
which affirmed the Department of Labor and Industries March 24, 2009 order, be and
the same is hereby affirmed.

18 3.2 The Defendant City of Tacoma is awarded, and the Plaintiff is ordered to pay, costs and
19 disbursements herein in the amounts of \$830.30 as set forth in the City of Tacoma's
Cost Bill pursuant to RCW 4.84.010 and RCW 4.84.090.

~~MJH~~
LG

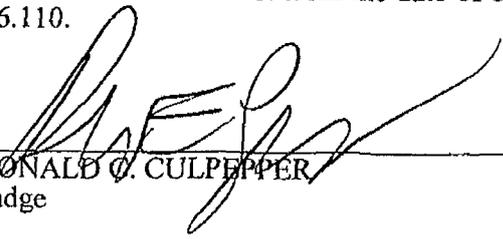
20 3.3 The Defendant City of Tacoma is awarded, and the Plaintiff is ordered to pay, a
21 statutory attorney fee of \$200.00 pursuant to RCW 4.84.080. The Defendant
Department of Labor & Industries is also awarded, and the Plaintiff is ordered to pay a
22 statutory attorney fee of \$200.00.

23 */// Finding of fact 1.3: Mr. Gorre was not a smoker. Mr. Gorre had*
24 */// coccidioidomycosis. Mr. Gorre did not have*
25 */// separate diseases of eosinophilia or*
26 */// interstitial lung disease. Mr. Gorre's*
/// symptoms were manifestations of his
/// coccidioidomycosis.

~~MJH~~
LG

1 3.4 The Department and the City of Tacoma are awarded interest from the date of entry of
2 this judgment as provided by RCW 4.56.110.

3 DATED this 8th day of ~~May~~ ^{June}, 2012.

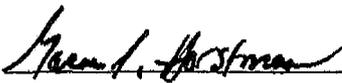
4 
RONALD O. CULPEPPER
Judge

5 Presented by:
6 ROBERT M. McKENNA
Attorney General

7 
8 Pat L. DeMarco, WSBA #16897
9 Assistant Attorney General

10 Copy received,
11 Approved as to form and
notice of presentation waived:

12 
13 Ron Meyers WSBA # 16897
14 Attorney for Plaintiff,
Edward O. Gorre
15 Pratt, Day & Stratton, PLLC

16 
17 Marnie J. Horstman
18 WSBA # 27339
19 Attorney for the Defendant,
City of Tacoma



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APPENDIX D



Classifications

International Classification of Diseases (ICD)

The International Classification of Diseases (ICD) is the standard diagnostic tool for epidemiology, health management and clinical purposes. This includes the analysis of the general health situation of population groups. It is used to monitor the incidence and prevalence of diseases and other health problems, providing a picture of the general health situation of countries and populations.

ICD is used by physicians, nurses, other providers, researchers, health information managers and coders, health information technology workers, policy-makers, insurers and patient organizations to classify diseases and other health problems recorded on many types of health and vital records, including death certificates and health records. In addition to enabling the storage and retrieval of diagnostic information for clinical, epidemiological and quality purposes, these records also provide the basis for the compilation of national mortality and morbidity statistics by WHO Member States. Finally, ICD is used for reimbursement and resource allocation decision-making by countries.

All Member States use the ICD which has been translated into 43 languages. Most countries (117) use the system to report mortality data, a primary indicator of health status.

ICD-10 was endorsed by the Forty-third World Health Assembly in May 1990 and came into use in WHO Member States as from 1994. ICD is currently under revision, through an ongoing Revision Process, and the release date for ICD-11 is 2017.

Implementation of ICD

ICD Revision

Revision News

Steering Group

Topic Advisory Groups

WHO-FIC Network Meeting 2015

2015 Network Meeting in
Manchester, United Kingdom

ICD-10 ONLINE

Current Version
ICD-10 Online version

Other materials

ICD-10 Training

ICF ONLINE

**International Classification of
Functioning, Disability and
Health**

Online version

Updating process

ICD Information Sheet

Frequently Asked Questions about ICD-11

ICF Practical Manual -
Exposure draft for comments
pdf, 1.52Mb

WHOFIC Resolution 2012:
Merger of ICF-CY INTO ICF
pdf, 311kb

ICD-10 ONLINE

Current version

ICD-10 Volume-2 Instruction Manual (2010)
pdf, 2.16Mb

Other versions

DOWNLOADS

ICD-10 classification in various formats such as ClaML and other related materials can be downloaded from our download area. You will need to register and accept the license before downloading.

Classification Download Area

ICD TRAINING

The WHO Electronic ICD-10-training tool is designed for self-learning and classroom use. The modular structure of this ICD-10 training permits user groups specific tailoring of courses on individual paths, if desired.

Online and downloadable offline versions are available:

ICD-10 Online Training

Offline Training Package is available in our download area

ICD ADAPTATIONS

International Classification of Diseases for Oncology, 3rd Edition
(ICD-O-3)

International Classification of External Causes of Injury (ICECI)

International Classification of Primary Care, Second edition (ICPC-2)

The ICD-10 for Mental and Behavioural Disorders Diagnostic
Criteria for Research
pdf, 732kb

HISTORY OF UPDATES

ICD-10 Updates

ICF Updates

The ICD-10 for Mental and Behavioural Disorders Clinical
Descriptions and Diagnostic Guidelines
pdf, 1.35Mb

HISTORY OF UPDATES

ICD-10 Updates

Language Versions

ICD-10 is available in the six official languages of WHO (Arabic, Chinese, English, French, Russian and Spanish) as well as in 36 other languages.

ICD Language Versions
pdf, 84kb

APPENDIX E

ICD-10 Version:2015

I Certain infectious and parasitic diseases

A00-A09 Intestinal infectious diseases

A15-A19 Tuberculosis

A20-A28 Certain zoonotic bacterial diseases

A30-A49 Other bacterial diseases

A50-A64 Infections with a predominantly sexual mode of transmission

A65-A69 Other spirochaetal diseases

A70-A74 Other diseases caused by chlamydiae

A75-A79 Rickettsioses

A80-A89 Viral infections of the central nervous system

A90-A99 Arthropod-borne viral fevers and viral haemorrhagic fevers

B00-B09 Viral infections characterized by skin and mucous membrane lesions

B15-B19 Viral hepatitis

B20-B24 Human immunodeficiency virus [HIV] disease

B25-B34 Other viral diseases

B35-B49 Mycoses

B35 Dermatophytosis

B36 Other superficial mycoses

B37 Candidiasis

B38 Coccidioidomycosis

B39 Histoplasmosis

B40 Blastomycosis

B41 Paracoccidioidomycosis

B42 Sporotrichosis

B43 Chromomycosis and phaeomycotic abscess

B44 Aspergillosis

B45 Cryptococcosis

B46 Zygomycosis

B47 Mycetoma

B48 Other mycoses, not elsewhere classified

B49 Unspecified mycosis

B50-B64 Protozoal diseases

B65-B83 Helminthiases

B85-B89 Pediculosis, acariasis and other
infestations

B90-B94 Sequelae of infectious and parasitic
diseases

B95-B98 Bacterial, viral and other infectious agents

B99-B99 Other infectious diseases

II Neoplasms

III Diseases of the blood and blood-forming organs and
certain disorders involving the immune mechanism

IV Endocrine, nutritional and metabolic diseases

V Mental and behavioural disorders

VI Diseases of the nervous system

VII Diseases of the eye and adnexa

VIII Diseases of the ear and mastoid process

IX Diseases of the circulatory system

X Diseases of the respiratory system

XI Diseases of the digestive system

XII Diseases of the skin and subcutaneous tissue

XIII Diseases of the musculoskeletal system and
connective tissue

XIV Diseases of the genitourinary system

XV Pregnancy, childbirth and the puerperium

XVI Certain conditions originating in the perinatal
period

XVII Congenital malformations, deformations and

chromosomal abnormalities

XVIII Symptoms, signs and abnormal clinical and
laboratory findings, not elsewhere classified

XIX Injury, poisoning and certain other consequences of
external causes

XX External causes of morbidity and mortality

XXI Factors influencing health status and contact with
health services

XXII Codes for special purposes

APPENDIX F

International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10)-2015-WHO Version for ;2015

Chapter X Diseases of the respiratory system (J00-J99)

Note: When a respiratory condition is described as occurring in more than one site and is not specifically indexed, it should be classified to the lower anatomic site (e.g., tracheobronchitis to bronchitis in J40).

Excl.: certain conditions originating in the perinatal period (P00-P96)
certain infectious and parasitic diseases (A00-B99)
complications of pregnancy, childbirth and the puerperium (O00-O99)
congenital malformations, deformations and chromosomal abnormalities (Q00-Q99)
endocrine, nutritional and metabolic diseases (E00-E90)
injury, poisoning and certain other consequences of external causes (S00-T98)
neoplasms (C00-D48)
symptoms, signs and abnormal clinical and laboratory findings, not elsewhere classified (R00-R99)

This chapter contains the following blocks:

J00-J06 Acute upper respiratory infections
J09-J18 Influenza and pneumonia
J20-J22 Other acute lower respiratory infections
J30-J39 Other diseases of upper respiratory tract
J40-J47 Chronic lower respiratory diseases
J60-J70 Lung diseases due to external agents
J80-J84 Other respiratory diseases principally affecting the interstitium
J85-J86 Suppurative and necrotic conditions of lower respiratory tract
J90-J94 Other diseases of pleura
J95-J99 Other diseases of the respiratory system

Asterisk categories for this chapter are provided as follows:

J17* Pneumonia in diseases classified elsewhere

J91* Pleural effusion in conditions classified elsewhere
J99* Respiratory disorders in diseases classified elsewhere

APPENDIX G

partnership wholly owned by the original transferor and/or the transferor's spouse or children, within five years of the original transfer to which this exemption applies, excise taxes shall become due and payable on the original transfer as otherwise provided by law.

*Sec. 8 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 9. Sections 4 through 7 of this act are each added to chapter 18.85 RCW.

NEW SECTION. Sec. 10. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. There is appropriated from the general fund to the department of licensing for the biennium ending June 30, 1989, the sum of eighty-four thousand three hundred seventy-two dollars, or so much thereof as may be necessary, to carry out the purposes of sections 4 through 7 of this act.

Passed the House April 26, 1987.

Passed the Senate April 26, 1987.

Approved by the Governor May 19, 1987, with the exception of certain items which were vetoed.

Filed in Office of Secretary of State May 19, 1987.

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

"I am returning herewith, without my approval as to section 8, Engrossed House Bill No. 435 entitled:

"AN ACT Relating to real estate brokers and salesmen."

Section 8 would exempt from the real estate excise tax assumed mortgages on real property which are refinanced.

Refinancing assumed mortgages is simply one means of financing the purchase of real property; no public goal or objective is served by this selective exemption. Washington cannot afford the loss of several million dollars caused by such an exemption.

With the exception of section 8, Engrossed House Bill No. 435 is approved."

CHAPTER 515

[Engrossed Substitute Senate Bill No. 5801]

FIRE FIGHTERS—OCCUPATIONAL DISEASES

AN ACT Relating to industrial insurance; amending RCW 51.08.100; and adding new sections to chapter 51.32 RCW.

Be it enacted by the Legislature of the State of Washington:

*NEW SECTION. Sec. 1. The legislature finds that the employment of fire fighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that fire fighters 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 fire fighters.

The legislature also finds that fire fighters and law enforcement officers are required to respond to emergencies in a rapid manner to save lives, reduce property damage, and protect the public. As a result, these officers are often subject to extreme mental and physical stress and life-threatening circumstances during the course of their employment. The legislature therefore finds that the judicial doctrine requiring unusual exertion for compensation in heart attack injuries should be abrogated for these workers.

*Sec. 1 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 2. (1) In the case of fire fighters as defined in RCW 41.26.030(4)(a), (b), and (c) who are covered under Title 51 RCW, there shall exist a prima facie presumption that respiratory disease is an occupational disease under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence controverting the presumption. Controverting evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

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

*Sec. 3. Section 51.08.100, chapter 23, Laws of 1961 and RCW 51.08.100 are each amended to read as follows:

(1) "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

(2) In the case of fire fighters as defined in RCW 41.26.030(4)(a), (b), and (c) who are covered under Title 51 RCW, and law enforcement officers as defined in RCW 41.26.030(3) who are covered under Title 51 RCW, for the purpose of heart attacks the definition of "injury" shall be construed without regard to whether the member's exertion was usual or unusual.

*Sec. 3 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 4. Sections 1 and 2 of this act are each added to chapter 51.32 RCW.

Passed the Senate April 22, 1987.

Passed the House April 15, 1987.

Approved by the Governor May 19, 1987, with the exception of certain items which were vetoed.

Filed in Office of Secretary of State May 19, 1987.

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

"I am returning herewith, without my approval as to the second paragraph of section 1 and all of section 3, Engrossed Substitute Senate Bill No. 5801, entitled:

"AN ACT Relating to industrial insurance."

This bill would change the rules under which certain firefighters and law enforcement officers may qualify for workers' compensation benefits when they suffer from respiratory disease or have heart attacks. It stipulates that for those firefighters under the LEOFF II pension system, respiratory disease will be presumed to be job related, unless the employer can prove otherwise. It also changes the definition of injury for LEOFF II firefighters and police officers. They would no longer have to prove that a heart attack was due to unusual exertion on the job to qualify for workers' compensation.

I recognize the need to ease the burden of proof required for firefighters who contract respiratory diseases. The establishment of a rebuttable presumption that a respiratory disease is occupationally related for those employees will address a major problem for those who incur legitimate work place respiratory diseases.

However, I do not believe that it is appropriate to change the definition of injury, as proposed in the second paragraph of section 1 and affected in section 3, so that a heart attack is presumed to be job related. While the definition of injury has been the topic of considerable study and discussion for the past two years, there is no conclusive evidence to demonstrate that there is a higher incidence of job-related heart problems in firefighters and law enforcement officers than those in other professions.

With the exception of second paragraph of section 1 and all of section 3, Engrossed Substitute Senate Bill No. 5801 is approved."

CHAPTER 516

[House Bill No. 1205]

WATER POLLUTION FACILITIES—EXTENDED GRANT PAYMENTS

AN ACT Relating to authorizing the department of ecology to distribute funds from the water quality account for water pollution facilities, using extended grant payments; and adding a new section to chapter 70.146 RCW.

Be it enacted by the Legislature of the State of Washington:

*NEW SECTION. Sec. 1. A new section is added to chapter 70.146 RCW to read as follows:

(1) The department of ecology may enter into contracts with local jurisdictions which provide for extended grant payments under which eligible costs may be paid on an advanced or deferred basis.

(2) Extended grant payments shall be in equal annual payments, the total of which does not exceed, on a net present value basis, fifty percent of the total eligible cost of the project incurred at the time of design and construction. The duration of such extended grant payments shall be for a period not to exceed twenty years. The total of federal and state grant moneys received for the eligible costs of the project shall not exceed fifty percent of the eligible costs.

(3) Any moneys appropriated by the legislature from the water quality account shall be first used by the department of ecology to satisfy the conditions of the extended grant payment contracts.

APPENDIX H

temporary restraining order to abate and prevent the continuance or recurrence of the act.

(4) The court may issue a permanent injunction to restrain, abate, or prevent the continuance or recurrence of the violation of section 1 of this act. The court may grant declaratory relief, mandatory orders, or any other relief deemed necessary to accomplish the purposes of the injunction. The court may retain jurisdiction of the case for the purpose of enforcing its orders.

NEW SECTION. Sec. 3. Any law enforcement-related, corrections officer-related, or court-related employee or volunteer who suffers damages as a result of a person or organization selling, trading, giving, publishing, distributing, or otherwise releasing the residential address, residential telephone number, birthdate, or social security number of the employee or volunteer in violation of section 1 of this act may bring an action against the person or organization in court for actual damages sustained, plus attorneys' fees and costs.

NEW SECTION. Sec. 4. Sections 1 through 3 of this act are each added to chapter 4.24 RCW.

Passed the Senate March 11, 2002.

Passed the House March 5, 2002.

Approved by the Governor April 3, 2002.

Filed in Office of Secretary of State April 3, 2002.

CHAPTER 337

[Second Substitute House Bill 2663]

FIRE FIGHTERS—OCCUPATIONAL DISEASES

AN ACT Relating to occupational diseases affecting fire fighters; amending RCW 51.32.185; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

***NEW SECTION. Sec. 1.** *(1) The legislature finds that:*

(a) Benzene is detected in most fire environments and has been associated with leukemia and multiple myeloma. Given the established exposure to benzene in a fire environment, there is biologic plausibility for fire fighters to be at increased risk of these malignancies;

(b) Increased risks of leukemia and lymphoma have been described in several epidemiologic studies of fire fighters. The risks of leukemia are often two or three times that of the population as a whole, and a two-fold risk of non-Hodgkin's lymphoma has also been found;

(c) Epidemiologic studies assessing fire fighters' cancer risks concluded that there is inadequate support for a causal relationship between fire fighting and brain cancer;

(d) Fire fighters are exposed to polycyclic aromatic hydrocarbons as products of combustion and these chemicals have been associated with bladder

cancer. The epidemiologic data suggests fire fighters have a three-fold risk of bladder cancer compared to the population as a whole;

(e) A 1990 review of fire fighter epidemiology calculated a statistically significant risk for melanoma among fire fighters;

(f) Fire fighters are exposed to extremely hazardous environments. Potentially lethal products of combustion include particulates and gases and are the major source of fire fighter exposures to toxic chemicals; and

(g) The burning of a typical urban structure containing woods, paints, glues, plastics, and synthetic materials in furniture, carpeting, and insulation liberates hundreds of chemicals. Fire fighters are exposed to a wide variety of potential carcinogens, including polycyclic aromatic hydrocarbons in soots, tars, and diesel exhaust, arsenic in wood preservatives, formaldehyde in wood smoke, and asbestos in building insulation.

(2) The legislature further finds that some occupational diseases resulting from fire fighter working conditions can develop slowly, usually manifesting themselves years after exposure.

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

Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read as follows:

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

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

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

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

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

Passed the House March 11, 2002.

Passed the Senate March 7, 2002.

Approved by the Governor April 3, 2002, with the exception of certain items that were vetoed.

Filed in Office of Secretary of State April 3, 2002.

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

"I am returning herewith, without my approval as to section 1, Second Substitute House Bill No. 2663 entitled:

"AN ACT Relating to occupational diseases affecting fire fighters;"

Second Substitute House Bill No. 2663 creates a rebuttable prima facie presumption that certain heart problems, cancer and infectious diseases are occupational diseases for fire fighters covered by industrial insurance. This is a law that I strongly support.

However, the assumptions in section 1 of this bill have not been clearly validated by science and medicine. Allowing those assumptions to become law could have several unintended consequences, including modifying the legal basis of the presumptions in section 2 of the bill, providing an avenue for the allowance of disease claims in other industries; and unnecessarily limiting the use of new scientific information in administering occupational disease claims.

For these reasons, I have vetoed section 1 of Second Substitute House Bill No. 2663.

With the exception of section 1, Second Substitute House Bill No. 2663 is approved."

CHAPTER 338

[Substitute House Bill 2754]

MANDATORY ARBITRATION—FILING FEES

AN ACT Relating to mandatory arbitration; and amending RCW 7.06.010, 36.18.016, and 7.36.250.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 7.06.010 and 1991 c 363 s 7 are each amended to read as follows:

In counties with a population of more than one hundred fifty thousand, mandatory arbitration of civil actions under this chapter shall be required. In counties with a population of ~~((seventy thousand or more))~~ one hundred fifty thousand or less, the superior court of the county, by majority vote of the judges thereof, or the county legislative authority may authorize mandatory arbitration of civil actions under this chapter. ~~((In all other counties, the superior court of the~~

WA F. B. Rep., 2002 Reg. Sess. H.B. 2663

Washington Final Bill Report, 2002 Regular Session, House Bill 2663

April 30, 2002

Washington Legislature

Fifty-seventh Legislature, Second Regular Session, 2002

Synopsis as Enacted

Brief Description: Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller).

House Committee on Commerce & Labor

House Committee on Appropriations

Senate Committee on Labor, Commerce & Financial Institutions

Senate Committee on Ways & Means

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law. To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

Members of the law enforcement officers' and fire fighters' retirement system plan II (LEOFF II) are covered for workplace injuries and occupational diseases under the industrial insurance law. For LEOFF II supervisory and actively employed full-time fire fighters, the industrial insurance law provides a presumption that respiratory diseases are occupational diseases. This presumption may be rebutted by a preponderance of controverting evidence, including the use of tobacco products, physical fitness, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. The presumption extends to a covered fire fighter for up to five years after terminating service (three months for each year of service).

A number of states allow fire fighters to use presumptions to establish that cancer, heart disease, various infectious diseases, or other conditions are work-related under disability or workers' compensation laws.

Summary:

Legislative findings are made concerning the exposure of fire fighters to hazardous substances in fire environments and the increased risk of developing various conditions.

Three new categories are added to the list of diseases presumed to be occupational diseases for specified fire fighters under the industrial insurance law:

- heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances;
- primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma and bladder, ureter, and kidney cancer. To be covered, an active or former fire fighter must have cancer that developed or manifested itself after at least 10 years of service and must have had a qualifying medical examination at the time of becoming a fire fighter that showed no evidence of cancer;

- infectious diseases. "Infectious disease" means HIV/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

These new presumptions apply to supervisory and active full-time fire fighters in public employment who are covered by industrial insurance. In addition, the existing presumption for respiratory disease and the new presumptions apply to full-time, fully compensated fire fighters, including supervisors, employed by a private sector employer's fire department that has more than 50 fire fighters.

Beginning July 1, 2003, the occupational disease presumptions do not apply to a fire fighter who develops a heart or lung condition and is a regular user of tobacco products or has a history of tobacco use. The extent of tobacco use that excludes a fire fighter from the presumption must be defined in administrative rule.

Votes on Final Passage:

House	98	0	
Senate	48	0	(Senate amended)
House	94	0	(House concurred)

Effective: June 13, 2002

Partial Veto Summary: The Governor vetoed the legislative findings concerning the association of certain diseases with the employment conditions to which fire fighters are exposed.

WA F. B. Rep., 2002 Reg. Sess. H.B. 2663

WA B. Hist., 2002 Reg. Sess. H.B. 2663

Washington Bill History, 2002 Regular Session, House Bill 2663

April 17, 2002

Washington Legislature

Fifty-seventh Legislature, Second Regular Session, 2002

HB 2663 Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: Representatives Conway; Clements; Cooper; Reardon; Sullivan; Delvin; Simpson; Armstrong; Hankins; Benson; Cairnes; Lysen; Kirby; Edwards; Chase; Kenney; Campbell; Barlean; Santos; Talcott; Wood; Rockefeller

-- 2002 REGULAR SESSION --

Jan 23 First reading, referred to Commerce & Labor.

Feb 6 CL - Executive action taken by committee.

CL - Majority; 1st substitute bill be substituted, do pass.

Minority; do not pass.

Feb 8 Referred to Appropriations.

Feb 11 APP - Majority; 2nd substitute bill be substituted, do pass.

Feb 12 Placed on second reading.

Feb 14 2nd substitute bill substituted.

Rules suspended. Placed on Third Reading.

Third reading, passed: yeas, 98; nays, 0; absent, 0.

-- IN THE SENATE --

Feb 16 First reading, referred to Labor, Commerce & Financial Institutions.

Mar 1 LCF - Majority; do pass.

And refer to Ways & Means.

Minority; do not pass.

Referred to Ways & Means.

Mar 4 WM - Majority; do pass with amendment(s).

Passed to Rules Committee for second reading.

Mar 5 Made eligible to be placed on second reading.

Mar 6 Placed on second reading by Rules Committee.

Mar 7 Committee amendment adopted with no other amendments.

Rules suspended. Placed on Third Reading.

Third reading, passed: yeas, 48; nays, 0; absent, 1.

-- IN THE HOUSE --

Mar 11 House concurred in Senate amendments.

Passed final passage: yeas, 94; nays, 0; absent, 4.

Mar 12 Speaker signed.

-- IN THE SENATE --

Mar 14 President signed.

-- OTHER THAN LEGISLATIVE ACTION --

Delivered to Governor.

Apr 3 Governor partially vetoed.

Chapter 337, 2002 Laws PV.

Effective date 6/13/2002.

WA B. Hist., 2002 Reg. Sess. H.B. 2663

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WA H.R. B. Rep., 2002 Reg. Sess. H.B. 2663

Washington House Bill Report, 2002 Regular Session, House Bill 2663

March 11, 2002

Washington House of Representatives
Fifty-seventh Legislature, Second Regular Session, 2002

As Passed Legislature

Title: An act relating to occupational diseases affecting fire fighters.

Brief Description: Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller).

Brief History:

Committee Activity:

Commerce & Labor: 1/28/02, 2/6/02 [DPS];

Appropriations: 2/9/02, 2/11/02 [DP2S(w/o sub CL)].

Floor Activity:

Passed House: 2/14/02, 98-0.

Senate Amended.

Passed Senate: 3/7/02, 48-0.

House Concurred.

Passed House: 3/11/02, 94-0.

Passed Legislature.

Brief Summary of Second Substitute Bill

•Adds certain heart problems, specified cancers, and infectious diseases to the list of conditions that are presumed to be occupational diseases for fire fighters covered under the industrial insurance law.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Clements, Ranking Minority Member; Kenney and Lysen.

Minority Report: Do not pass. Signed by 1 member: Representative Chandler.

Staff: Chris Cordes (786-7103).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Commerce & Labor. Signed by 25 members: Representatives Sommers, Chair; Doumit, 1st Vice Chair; Fromhold, 2nd Vice Chair; Sehlin, Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Cox, Dunshee, Grant, Kagi, Kenney, Kessler, Linville, Lisk, Mastin, McIntire, Pearson, Pflug, Ruderman, Schual-Berke, Talcott and Tokuda.

Staff: Linda Brooks (786-7153).

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law. To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

Members of the law enforcement officers' and fire fighters' retirement system plan II (LEOFF II) are covered for workplace injuries and occupational diseases under the industrial insurance law. For LEOFF II supervisory and actively employed full-time fire fighters, the industrial insurance law provides a presumption that respiratory diseases are occupational diseases. This presumption may be rebutted by a preponderance of controverting evidence, including the use of tobacco products, physical fitness, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

The presumption extends to a covered fire fighter for up to five years after terminating service (three months for each year of service).

A number of states have presumptions to establish that cancer, heart disease, various infectious diseases, or other conditions are work-related under disability or workers' compensation laws.

Summary of Second Substitute Bill:

Legislative findings are made concerning the exposure of fire fighters to hazardous substances in fire environments and the increased risk for various conditions.

The industrial insurance law is amended to add three new categories to the list of diseases presumed to be occupational diseases for specified fire fighters:

- heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances;
- primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma and bladder, ureter, and kidney cancer. To be covered, an active or former fire fighter must have cancer that developed or manifested itself after at least 10 years of service and must have had a qualifying medical examination at the time of becoming a fire fighter that showed no evidence of cancer;
- infectious diseases. "Infectious disease" means HIV/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

These new presumptions apply to supervisory and active full-time fire fighters in public employment who are covered by industrial insurance. In addition, the existing presumption for respiratory disease and the new presumptions apply to full-time, fully compensated fire fighters, including supervisors, employed by a private sector employer's fire department that has more than 50 fire fighters.

Beginning July 1, 2003, the occupational disease presumptions do not apply to a fire fighter who develops a heart or lung condition and is a regular user of tobacco products or has a history of tobacco use. The extent of tobacco use that excludes a fire fighter from the presumption must be defined in administrative rule.

Appropriation: None.

Fiscal Note: Requested February 11, 2002 on the substitute bill.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Commerce & Labor) There are onerous requirements under the industrial insurance law for fire fighters to prove an occupational disease. In some cases, lengthy investigations cannot show any other possible source of exposure, other than work. It is costly for both sides to develop proof that can meet the required standard. There will never be a perfect correlation between the exposure and the disease that develops.

Testimony For: (Appropriations) This bill is a work in progress. The cancers will be redefined in a substitute that's being drafted. We have already worked on the list of infectious diseases. We are trying to get to a bill that our employers can support.

(Concerns) The Fire Commissioners' Association has been working to get this bill to a point where we can support it. There has been progress made on infectious diseases, and we're working on the cancers. We have two remaining issues. One, we would like to remove the presumption that heart or lung disease is an occupational disease for firefighters who are regular smokers. Two, we know the state is in a fiscal bind, and that you know the local governments are in a bind as well. We won't say that we have to have money, but every little bit (that may be provided) helps.

Testimony Against: (Commerce & Labor) Some scientific evidence is needed to justify covering a condition as an occupational disease. The costs are uncertain and this is not a good time to impose greater costs on local governments when revenues are being dramatically reduced. The bill is too broad because it covers conditions for which no correlation to fire fighting exposure is known. With a liberal construction clause under industrial insurance and other protections, fire fighters are already able to make their case for coverage.

Testimony Against: (Appropriations) We appreciate the work that has been done to narrow the list of infectious diseases. We would like a minor change to the standard for rebuttal so that it reads as, "This presumption of occupational disease may be rebutted by a preponderance of the evidence." We oppose the bill because of the fiscal note. The local government fiscal note indicates that the employers' rates paid to the accident and medical aid funds would double. When you add the cost of the rates doubling to the costs incurred by local governments that are self-insured, you get to the \$4.5 million hit per year on local governments.

Testified: (Commerce & Labor) (In support) Kelly Fox, Washington State Council of Fire Fighters; and Jeff Bunnell.

(Opposed) Roger Ferris, Washington Fire Commissioners Association; and Jim Justin, Association of Washington Cities.

Testified: (Appropriations) (In support) Kelly Fox, Washington State Council of Fire Fighters.

(Concerns) Ryan Spiller, Washington Fire Commissioners Association.

(Opposed) Jim Justin, Association of Washington Cities; and Ryan Spiller, A Foreign Affair.

WA H.R. B. Rep., 2002 Reg. Sess. H.B. 2663

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WA S. Amend., 2002 Reg. Sess. H.B. 2663

Washington Senate Bill Amendment, 2002 Regular Session, House Bill 2663

March 8, 2002

Washington Senate

Fifty-seventh Legislature, Second Regular Session, 2002

2SHB 2663 - S AMD 806

By Senator Keiser

NOT ADOPTED 03/07/02

On page 3, after “{+ products +}” on line 5, delete “{+ or who has a history of tobacco use +}”.

{+ EFFECT: +} Clarifies that firefighters who have a past history of tobacco use, but are not current regular users of tobacco products, are not excluded from the rebuttable presumption in the act.

WA S. Amend., 2002 Reg. Sess. H.B. 2663

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WA S. Amend., 2002 Reg. Sess. H.B. 2663

Washington Senate Bill Amendment, 2002 Regular Session, House Bill 2663

March 8, 2002

Washington Senate

Fifty-seventh Legislature, Second Regular Session, 2002

2SHB 2663 - S COMM AMD

By Committee on Ways & Means

ADOPTED 03/07/02

Strike everything after the enacting clause and insert the following:

“{+ NEW SECTION. +} Sec. 1. (1) The legislature finds that:

(a) Benzene is detected in most fire environments and has been associated with leukemia and multiple myeloma. Given the established exposure to benzene in a fire environment, there is biologic plausibility for fire fighters to be at increased risk of these malignancies;

(b) Increased risks of leukemia and lymphoma have been described in several epidemiologic studies of fire fighters. The risks of leukemia are often two or three times that of the population as a whole, and a two-fold risk of non-Hodgkin's lymphoma has also been found;

(c) Epidemiologic studies assessing fire fighters' cancer risks concluded that there is adequate support for a causal relationship between fire fighting and brain cancer;

(d) Fire fighters are exposed to polycyclic aromatic hydrocarbons as products of combustion and these chemicals have been associated with bladder cancer. The epidemiologic data suggests fire fighters have a three-fold risk of bladder cancer compared to the population as a whole;

(e) A 1990 review of fire fighter epidemiology calculated a statistically significant risk for melanoma among fire fighters;

(f) Fire fighters are exposed to extremely hazardous environments. Potentially lethal products of combustion include particulates and gases and are the major source of fire fighter exposures to toxic chemicals; and

(g) The burning of a typical urban structure containing woods, paints, glues, plastics, and synthetic materials in furniture, carpeting, and insulation liberates hundreds of chemicals. Fire fighters are exposed to a wide variety of potential carcinogens, including polycyclic aromatic hydrocarbons in soots, tars, and diesel exhaust, arsenic in wood preservatives, formaldehyde in wood smoke, and asbestos in building insulation.

(2) The legislature further finds that some occupational diseases resulting from fire fighter working conditions can develop slowly, usually manifesting themselves years after exposure.

Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read as follows:

(1) In the case of fire fighters as defined in RCW 41.26.030(4) (a), (b), and (c) who are covered under Title 51 RCW {+ and fire fighters, including supervisors, employed on a full-time, fully compensated basis as a fire fighter of a private sector employer's fire department that includes over fifty such fire fighters +}, there shall exist a prima facie presumption that {+ : (a) R +}respiratory disease (({- is an -})) {+ ; (b) heart problems that are experienced within seventy-two hours of exposure

to smoke, fumes, or toxic substances; (c) cancer; and (d) infectious diseases are +} occupational disease{+ s +} under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence (({- controverting the presumption -})). (({- Controverting -})) {+ Such +} evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

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

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

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

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

{+ 2SHB 2663 +} - S COMM AMD

By Committee on Ways & Means
ADOPTED 03/07/02

On page 1, line 1 of the title, after “fighters;” strike the remainder of the title and insert “amending RCW 51.32.185; and creating a new section.”

{+ EFFECT: +} Clarifies that a regular user of tobacco products includes someone with a history of tobacco use.

WA S. Amend., 2002 Reg. Sess. H.B. 2663

End of Document

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WA S. B. Rep., 2002 Reg. Sess. H.B. 2663

Washington Senate Bill Report, 2002 Regular Session, House Bill 2663

March 4, 2002

Washington Senate

Fifty-seventh Legislature, Second Regular Session, 2002

As Reported By Senate Committee On:

Labor, Commerce & Financial Institutions, February 28, 2002

Ways & Means, March 4, 2002

Title: An act relating to occupational diseases affecting fire fighters.

Brief Description: Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller).

Brief History:

Committee Activity: Labor, Commerce & Financial Institutions: 2/25/02, 2/28/02 [[[DP-WM, DNP].

Ways & Means: 3/1/02, 3/4/02 [DPA].

SENATE COMMITTEE ON LABOR, COMMERCE & FINANCIAL INSTITUTIONS

Majority Report: Do pass and be referred to Committee on Ways & Means.

Signed by Senators Prentice, Chair; Keiser, Vice Chair; Benton, Deccio, Fairley, Franklin, Gardner, Rasmussen, Regala and Winsley.

Minority Report: Do not pass.

Signed by Senator Hochstatter.

Staff: Jack Brummel (786-7428)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

Signed by Senators Brown, Chair; Regala, Vice Chair; Fairley, Vice Chair; Fraser, Hewitt, Kline, Kohl-Welles, Long, Poulsen, Rasmussen, Roach, Rossi, Sheahan, B. Sheldon, Snyder, Spanel, Thibaudeau, Winsley and Zarelli.

Staff: Brian Sims (786-7431)

Background: A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law. To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

A number of states have presumptions to establish that cancer, heart disease, various infectious diseases, or other conditions are work-related under disability or workers' compensation laws. In 1987, the Legislature created a rebuttable presumption that respiratory diseases in fire fighters are occupationally related.

Summary of Amended Bill: Legislative findings are made concerning the exposures and risks of disease faced by fire fighters. The bill applies to private sector fire fighters in a fire department with over 50 fire fighters as well as public sector fire fighters.

A rebuttable presumption is established that a fire fighter's heart problem is an occupational disease if it is experienced within 72 hours of exposure to smoke, fumes, and toxic or chemical substances. Brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, and kidney cancer are presumed to be occupational diseases if the claimant has served as a fire fighter for ten or more years and showed no evidence of cancer upon becoming a fire fighter. HIV/AIDS, hepatitis, meningitis, and tuberculosis are also presumed to be occupational diseases.

Beginning July 1, 2003, the occupational disease presumptions do not apply to a fire fighter who develops a heart or lung condition and is a regular user of tobacco products.

Amended Bill Compared to Second Substitute Bill: The amended bill clarifies that a history of tobacco use also excludes a fire fighter with heart or lung problems from a presumption of occupational disease.

Appropriation: None.

Fiscal Note: Requested on February 21, 2002.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill is more restricted in scope than it was when originally introduced. It now represents a compromise with no opposition. The list of cancers is more narrow. The bill now denies the presumption that a heart or lung condition is an occupational disease to regular smokers.

Testimony Against: None.

Testified: PRO: Representative Conway; Kelly Fox, WA State Council of Fire Fighters.

NEUTRAL: Jim Justin, Assoc. of WA Cities.

WA S. B. Rep., 2002 Reg. Sess. H.B. 2663

WA H.R. B. Rep., 2002 Reg. Sess. H.B. 2663

Washington House Bill Report, 2002 Regular Session, House Bill 2663

February 11, 2002

Washington House of Representatives
Fifty-seventh Legislature, Second Regular Session, 2002

As Reported by House Committee On:

Commerce & Labor

Appropriations

Title: An act relating to occupational diseases affecting fire fighters.

Brief Description: Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller.

Brief History:

Committee Activity:

Commerce & Labor: 1/28/02, 2/6/02 [DPS];

Appropriations: 2/9/02, 2/11/02 [DP2S(w/o sub CL)].

Brief Summary of Second Substitute Bill

• Adds certain heart problems, specified cancers, and infectious diseases to the list of conditions that are presumed to be occupational diseases for fire fighters covered under the industrial insurance law.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Clements, Ranking Minority Member; Kenney and Lysen.

Minority Report: Do not pass. Signed by 1 member: Representative Chandler.

Staff: Chris Cordes (786-7103).

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law. To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

Members of the law enforcement officers' and fire fighters' retirement system plan II (LEOFF II) are covered for workplace injuries and occupational diseases under the industrial insurance law. For LEOFF II supervisory and actively employed full-time fire fighters, the industrial insurance law provides a presumption that respiratory diseases are occupational diseases. This presumption may be rebutted by a preponderance of controverting evidence, including the use of tobacco products, physical

fitness, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. The presumption extends to a covered fire fighter for up to five years after terminating service (three months for each year of service).

A number of states have presumptions to establish that cancer, heart disease, various infectious diseases, or other conditions are work-related under disability or workers' compensation laws.

Summary of Substitute Bill:

Legislative findings are made concerning the exposure of fire fighters to uncontrolled environments because of their employment. These environments may contain various hazardous substances such as smoke, infectious diseases, carcinogens, and toxic substances.

The industrial insurance law is amended to add three new categories to the list of diseases presumed to be occupational diseases for specified fire fighters:

- Heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances.
- Cancer affecting the skin, breasts, central nervous system, or lymphatic, digestive, hematological, urinary, skeletal, oral, or reproductive systems. To be covered, an active or former fire fighter must have cancer that developed or manifested itself after at least 10 years of service and must have had a qualifying medical examination at the time of becoming a fire fighter that showed no evidence of cancer.
- Infectious diseases. "Infectious disease" means acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

These new presumptions apply to supervisory and active full-time fire fighters in public employment who are covered by industrial insurance. In addition, the existing presumption for respiratory disease and the new presumptions apply to full-time, fully compensated fire fighters, including supervisors, employed by a private sector employer's fire department that has more than 50 fire fighters.

Substitute Bill Compared to Original Bill:

The substitute bill adds a definition of "infectious disease" to mean acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: There are onerous requirements under the industrial insurance law for fire fighters to prove an occupational disease. In some cases, lengthy investigations cannot show any other possible source of exposure, other than work. It is costly for both sides to develop proof that can meet the required standard. There will never be a perfect correlation between the exposure and the disease that develops.

Testimony Against: Some scientific evidence is needed to justify covering a condition as an occupational disease. The costs are uncertain and this is not a good time to impose greater costs on local governments when revenues are being dramatically reduced. The bill is too broad because it covers conditions for which no correlation to fire fighting exposure is known. With a liberal construction clause under industrial insurance and other protections, fire fighters are already able to make their case for coverage.

Testified: (In support) Kelly Fox, Washington State Council of Fire Fighters; and Jeff Bunnell.

(Opposed) Roger Ferris, Washington Fire Commissioners Association; and Jim Justin, Association of Washington Cities.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Commerce & Labor. Signed by 25 members: Representatives Sommers, Chair; Doumit, 1st Vice Chair; Fromhold, 2nd Vice Chair; Sehlin, Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Cox, Dunshee, Grant, Kagi, Kenney, Kessler, Linville, Lisk, Mastin, McIntire, Pearson, Pflug, Ruderman, Schual-Berke, Talcott and Tokuda.

Staff: Linda Brooks (786-7153).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Commerce & Labor:

The intent section of the original bill is replaced with language that summarizes conclusions from various studies showing the increased risk of specific cancers and other diseases after exposure to conditions under which fire fighters work. The list of cancers subject to the presumption is revised to list the following cancers: Primary brain cancer; malignant melanoma; leukemia; non-Hodgkin's lymphoma; bladder cancer; ureter cancer; and kidney cancer.

The presumption section does not apply, beginning July 1, 2003, to a fire fighter who develops a heart or lung condition if the fire fighter is a regular user of tobacco products. Language specifying that rebutting evidence is evidence that "controverts" the presumption is deleted. Technical corrections are made to clarify the references to private sector fire fighters and to HIV/AIDS.

Appropriation: None.

Fiscal Note: Requested February 11, 2002 on the substitute bill.

Effective Date of Second Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: This bill is a work in progress. The cancers will be redefined in a substitute that's being drafted. We have already worked on the list of infectious diseases. We are trying to get to a bill that our employers can support.

(Concerns) The Fire Commissioners' Association has been working to get this bill to a point where we can support it. There has been progress made on infectious diseases, and we're working on the cancers. We have two remaining issues. One, we would like to remove the presumption that heart or lung disease is an occupational disease for firefighters who are regular smokers. Two, we know the state is in a fiscal bind, and that you know the local governments are in a bind as well. We won't say that we have to have money, but every little bit (that may be provided) helps.

Testimony Against: We appreciate the work that has been done to narrow the list of infectious diseases. We would like a minor change to the standard for rebuttal so that it reads as, "This presumption of occupational disease may be rebutted by a preponderance of the evidence." We oppose the bill because of the fiscal note. The local government fiscal note indicates that the employers' rates paid to the accident and medical aid funds would double. When you add the cost of the rates doubling to the costs incurred by local governments that are self-insured, you get to the \$4.5 million hit per year on local governments.

Testified: (In support) Kelly Fox, Washington State Council of Fire Fighters.

(Concerns) Ryan Spiller, Washington Fire Commissioners Association.

(Opposed) Jim Justin, Association of Washington Cities; and Ryan Spiller, A Foreign Affair.

WA H.R. B. Rep., 2002 Reg. Sess. H.B. 2663

APPENDIX I

established in the list. The legislature may also specify or otherwise limit in the appropriations act the implementation dates for actions approved by the board under this section.

~~(3) When the board develops its priority list in the 1999-2001 biennium, for increases proposed for funding in the 2001-2003 biennium, the board shall give top priority to proposed increases to address documented recruitment and retention increases, and shall give lowest priority to proposed increases to recognize increased duties and responsibilities. When the board submits its prioritized list for the 2001-2003 biennium, the board shall also provide: A comparison of any differences between the salary increases recommended by the department of personnel staff and those adopted by the board; a review of any salary compression, inversion, or inequities that would result from implementing a recommended increase; and a complete description of the information relied upon by the board in adopting its proposals and priorities.~~

~~(4)) This section does not apply to the higher education hospital special pay plan or to any adjustments to the classification plan under RCW 41.06.150(4) that are due to emergent conditions. Emergent conditions are defined as emergency conditions requiring the establishment of positions necessary for the preservation of the public health, safety, or general welfare.~~

Passed by the House March 7, 2007.

Passed by the Senate April 13, 2007.

Approved by the Governor May 15, 2007.

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

CHAPTER 490

[Engrossed Substitute House Bill 1833]

FIREFIGHTERS—OCCUPATIONAL DISEASES

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

Be it enacted by the Legislature of the State of Washington:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) It shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director or the director's designee for services performed by an attorney for such worker or beneficiary, if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the department is communicated to the party making the application.

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

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

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

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

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall

take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

(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.

Passed by the House April 18, 2007.

Passed by the Senate April 10, 2007.

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

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

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

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

"AN ACT Relating to occupational diseases affecting firefighters."

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

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

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

CHAPTER 491

[Engrossed House Bill 2391]

GAIN-SHARING—ALTERNATE PENSION BENEFITS

AN ACT Relating to retirement system gain-sharing and alternate benefits; amending RCW 41.31A.020, 41.32.765, 41.32.835, 41.32.875, 41.35.420, 41.35.610, 41.35.680, 41.40.630, 41.40.820, and 41.45.070; adding a new section to chapter 41.32 RCW; adding a new section to chapter 41.40 RCW; creating new sections; repealing RCW 41.31.010, 41.31.020, 41.31.030, 41.31A.010, 41.31A.020, 41.31A.030, and 41.31A.040; providing effective dates; and declaring an emergency.

APPENDIX J

State of
Washington
House of
Representatives



February 5, 2002

MEMORANDUM

TO: Members, House Commerce & Labor Committee

FROM: Chris Cordes, Staff Counsel

RE: Changes made to House Bill 2663 in proposed Substitute House Bill 2663

House Bill 2663 modifies the conditions that are presumed to be occupational diseases for fire fighters by adding certain heart problems, certain cancers, and infectious diseases.

The proposed substitute bill makes the following change to the original bill:

- (1) Adds a definition of "infectious disease" to mean acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

APPENDIX K

WA F. B. Rep., 2002 Reg. Sess. H.B. 2663

Washington Final Bill Report, 2002 Regular Session, House Bill 2663

April 30, 2002

Washington Legislature

Fifty-seventh Legislature, Second Regular Session, 2002

Synopsis as Enacted

Brief Description: Changing conditions that are presumed to be occupational diseases of fire fighters.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller).

House Committee on Commerce & Labor

House Committee on Appropriations

Senate Committee on Labor, Commerce & Financial Institutions

Senate Committee on Ways & Means

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law. To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

Members of the law enforcement officers' and fire fighters' retirement system plan II (LEOFF II) are covered for workplace injuries and occupational diseases under the industrial insurance law. For LEOFF II supervisory and actively employed full-time fire fighters, the industrial insurance law provides a presumption that respiratory diseases are occupational diseases. This presumption may be rebutted by a preponderance of controverting evidence, including the use of tobacco products, physical fitness, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. The presumption extends to a covered fire fighter for up to five years after terminating service (three months for each year of service).

A number of states allow fire fighters to use presumptions to establish that cancer, heart disease, various infectious diseases, or other conditions are work-related under disability or workers' compensation laws.

Summary:

Legislative findings are made concerning the exposure of fire fighters to hazardous substances in fire environments and the increased risk of developing various conditions.

Three new categories are added to the list of diseases presumed to be occupational diseases for specified fire fighters under the industrial insurance law:

- heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances;
- primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma and bladder, ureter, and kidney cancer. To be covered, an active or former fire fighter must have cancer that developed or manifested itself after at least 10 years of service and must have had a qualifying medical examination at the time of becoming a fire fighter that showed no evidence of cancer;

- infectious diseases. "Infectious disease" means HIV/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.

These new presumptions apply to supervisory and active full-time fire fighters in public employment who are covered by industrial insurance. In addition, the existing presumption for respiratory disease and the new presumptions apply to full-time, fully compensated fire fighters, including supervisors, employed by a private sector employer's fire department that has more than 50 fire fighters.

Beginning July 1, 2003, the occupational disease presumptions do not apply to a fire fighter who develops a heart or lung condition and is a regular user of tobacco products or has a history of tobacco use. The extent of tobacco use that excludes a fire fighter from the presumption must be defined in administrative rule.

Votes on Final Passage:

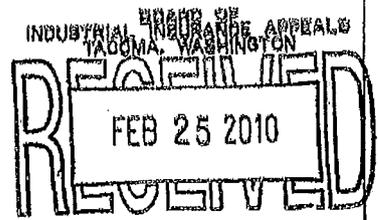
House	98	0	
Senate	48	0	(Senate amended)
House	94	0	(House concurred)

Effective: June 13, 2002

Partial Veto Summary: The Governor vetoed the legislative findings concerning the association of certain diseases with the employment conditions to which fire fighters are exposed.

WA F. B. Rep., 2002 Reg. Sess. H.B. 2663

APPENDIX L



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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWARD GORRE

Claimant,

Claim No. SB-29707

DOCKET NO. 09 13340

**DECLARATION OF ERIC R.
LEONARD**

ERIC R. LEONARD, under penalty of perjury of the laws of the State of Washington,
declares as follows:

1. I am an Associate Attorney with Pratt, Day & Stratton, PLLC, attorneys for the employer, City of Tacoma. I am familiar with the contents of Edward Gorre's claim file for Claim No. SB-29707. I am over the age of 18, am competent to testify, and make this Declaration in support of the Employer's Response to the Claimant's Motion for Summary Judgment based on my personal knowledge, my knowledge of this file, and my personal review of archived legislative materials regarding RCW 51.32.185.
2. The firefighter presumption statute, RCW 51.32.185, was passed in 1987. The legislative history reveals that it was not the intention of the Legislature that everyone who filed a claim would automatically have an allowed claim and recover benefits as a result of the statute. Attached hereto and incorporated herein by reference as Exhibit A is a true and correct copy of the Floor Synopsis

DECLARATION OF ERIC R. LEONARD- 1

PRATT, DAY & STRATTON, PLLC
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FACSIMILE: (253) 672-6570

1394

1 associated with SSB 5801.

2 3. Likewise, the legislative documents reflect that it was not the intent of the
3 Legislature that the presumption, standing alone, would establish an industrial
4 insurance claim if the employer or Department of Labor & Industries could show
5 the disease was the result of other factors. The firefighter is still required to show
6 that the disease is occupationally related. The statute was meant to ease the
7 burden of proof and provide proof for the firefighter "to establish a case in the
8 absence of any evidence to the contrary." Attached hereto and incorporated
9 herein by reference as Exhibit B is a true and correct copy of an April 27, 1987,
10 letter from State Representative Art Wang, Chair, Committee on Commerce &
11 Labor, to Governor Booth Gardner.

12
13
14 4. In drafting the firefighter presumption statute, the Legislature borrowed heavily
15 from the laws in New Hampshire and California. The law in New Hampshire is
16 described as "the middle ground on the ability to rebut the presumption." The
17 Maryland law is considered to be one extreme where the presumption is "virtually
18 irrefutable" because "the presumption standing alone constitutes affirmative
19 evidence." Attached hereto and incorporated herein by reference as Exhibit C is a
20 true and correct copy of a July 25, 1986, Memorandum from Bill Lynch, Staff
21 Coordinator, to Members, Joint Select Committee on Industrial Insurance.
22 Reference to the fact that the Washington law borrowed heavily from New
23 Hampshire is found in the recording of a March 5, 1987 Senate Hearing.

24
25 5. In 2002, the Legislature amended the firefighter presumption statute. Included in
26

DECLARATION OF ERIC R. LEONARD- 2

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1395

1 this amendment, "infectious diseases" were added to the presumptive conditions.
2 In the original bill as introduced to the House, it was proposed the infectious
3 diseases, with no limiting language, were presumptive occupational diseases for
4 firefighters. In the first Substitute House Bill, infectious diseases were limited to
5 "acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal
6 meningitis, and mycobacterium tuberculosis." The law, as finally enacted, listed
7 the defined infectious diseases falling within the statute as "Human
8 immunodeficiency virus/acquired immunodeficiency syndrome, all strains of
9 hepatitis, meningococcal meningitis, or mycobacterium tuberculosis." Attached
10 hereto and incorporated herein by reference as Exhibits D, E, F, and G are true
11 and correct copies of House Bill 2663, Substitute House Bill 2663, Second
12 Substitute House Bill 2663, and Second Substitute House Bill 2663 Session Law.

13
14
15 6. In 2007, the law was amended again. During the hearings before the House
16 Commerce and Labor Committee, Mr. Ryan Spiller testified that in 2002 he
17 worked on the list of presumptive diseases involved in the 2002 amendments.
18 Mr. Spiller stated that there were a list of about nineteen diseases, and that if it
19 were 150%-200% more likely the disease occurred on the job, such disease would
20 be presumed to be contracted on the job. Mr. Spiller further stated that other
21 diseases on that list of nineteen lacked evidence showing they were more likely
22 than not to be contracted on the job and those diseases were removed from the
23 legislation. This information is from the recording of the February 15, 2007
24 hearing, before the House Commerce and Labor Committee.
25
26

DECLARATION OF ERIC R. LEONARD- 3

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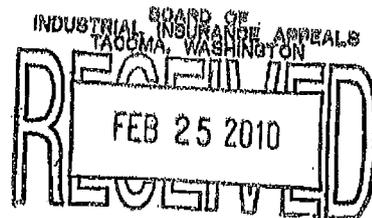
1396

1 7. Section 1 of the final legislation for Second Substitute House Bill 2663 was
2 vetoed because, in the words of Governor Locke, "the assumptions in section 1 of
3 this bill have not been clearly validated by science and medicine." Attached
4 hereto and incorporated herein by reference as Exhibit G is a true and correct
5 copy of Second Substitute House Bill 2663 Session Law.
6

7 8. I make this Declaration in opposition to the Claimant's Renewed Motion for
8 Summary Judgment.

9 DATED this 25th day of February, 2010, at Tacoma, Washington.
10

11 
12 Eric R. Leonard



DECLARATION OF ERIC R. LEONARD- 4

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1397

FLOOR SYNOPSIS

BILL No. SSB 5801

A. WHAT THE BILL DOES

THE BILL ESTABLISHES A REBUTTABLE PRESUMPTION THAT RESPIRATORY AND HEART DISEASE FOR FIRE FIGHTERS, AND HEART DISEASE FOR LAW ENFORCEMENT OFFICERS ARE OCCUPATIONAL DISEASES FOR INDUSTRIAL INSURANCE COVERAGE; THEY ARE REBUTTABLE.

THE PRESUMPTIONS CONTINUE AFTER A MEMBER TERMINATES SERVICE FOR THE PERIOD OF 3 CALENDAR MONTHS FOR EACH YEAR OF SERVICE. THERE IS A 5-YEAR CAP ON HOW LONG THE PRESUMPTION CONTINUES AFTER LEAVING EMPLOYMENT.

*NOTE: THIS WOULD ONLY APPLY TO LEOFF II MEMBERS. LEOFF I MEMBERS' MEDICAL IS COVERED BY THE PENSION SYSTEM WHILE LEOFF II MEMBERS' MEDICAL IS UNDER L&I.

B. WHY IT IS NEEDED

NUMEROUS STUDIES SHOW THAT FIRE FIGHTERS AND LAW ENFORCEMENT OFFICERS HAVE A MUCH HIGHER INCIDENCE OF CERTAIN ILLNESSES THAN OTHER MALE-DOMINATED OCCUPATIONS.

IT IS DIFFICULT UNDER WA LAW TO ESTABLISH A CLAIM FOR OCCUPATIONAL DISEASE. A PERSON MUST PROVE THAT THE ILLNESS IS UNIQUE TO THEIR OCCUPATION. WASHINGTON IS IN THE CLEAR MINORITY AMONG STATES ON THIS REQUIREMENT. THE BILL WOULD ALLOW FIRE FIGHTERS AND LAW ENFORCEMENT OFFICERS TO GET OVER THIS 1ST HURDLE. THE EMPLOYER COULD STILL USE EVIDENCE TO DISPUTE THE CLAIM.

EXHIBIT A

1398

C. FISCAL IMPLICATIONS OF THE BILL

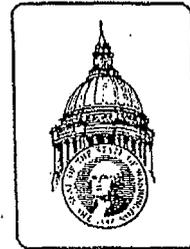
ANY EFFECTS WILL PROBABLY NOT MATERIALIZE FOR 15-20 YEARS BECAUSE MOST LEOFF II MEMBERS ARE YOUNG. BREATHING APPARATUS AND OTHER EQUIPMENT ARE ALSO COMMONLY IN USE NOW. THERE WILL BE SOME IMPACT ON THE TRUST FUND BECAUSE MORE PENSIONS WILL BE GRANTED. THIS MAY MEAN A RISE IN INDUSTRIAL INSURANCE RATES FOR CITIES AND COUNTIES.

D. PERSONS WHO SPOKE FOR AND AGAINST THE BILL

JIM CASON, FIREFIGHTER - PRO
KATHLEEN COLLINS, ASSN. OF WA CITIES - CON

E. COMMENTS

THIS WAS A RECOMMENDATION OF THE JOINT SELECT COMMITTEE ON INDUSTRIAL INSURANCE. IT IS IMPORTANT TO NOTE THAT THIS BILL DOES NOT MEAN THAT EVERYONE WHO FILES A CLAIM WILL RECOVER. THE PRESUMPTION CAN BE REBUTTED BY THE EMPLOYER.



House of Representatives

STATE OF WASHINGTON
OLYMPIA

April 27, 1987

The Honorable Booth Gardner
Governor, State of Washington
Legislative Building
Olympia, Washington 98504

EXHIBIT B

Dear Governor Gardner:

In recent weeks, several misleading articles about Engrossed Substitute Senate Bill 5801 (establishing presumptions for fire fighters for occupational disease) have been circulated. I would like to take this opportunity to clarify the issues, describe the House amendments, and urge your support for the bill that passed both houses of the legislature by large margins.

The bill addresses a major problem that faces public safety officers who incur legitimate workplace injuries or diseases. In certain cases, these officers find it more difficult than other injured workers to prove an industrial insurance claim. During the last two years, the Joint Select Committee on Industrial Insurance reviewed the impact of the definition of injury and occupational disease on public safety employees. This year the committee recommended that a presumption be established for certain classes of public safety officers that respiratory and heart ailments are occupationally induced. The committee was aware that at least nineteen states had a similar presumption for some conditions; our information now indicates that as many as thirty-seven states have some kind of presumption for public safety employees.

The committee's recommendation was based on unique features of Washington's industrial insurance law. To recover for an occupational disease, the industrial insurance claimant must prove that the particular occupation exposed him or her to a greater risk of contracting the disease than other kinds of employment or nonemployment. For some diseases, this requirement may be extremely difficult to meet. For example, although many respiratory diseases occur commonly in nonemployment life, these diseases also occur with high frequency among fire fighters. This frequency indicates that the unusually hazardous employment exposure suffered by fire fighters is a significant contributing factor to the development of disease. Nevertheless, a fire fighter who proves that employment caused the disease may not recover if the "greater risk of contracting the disease" test cannot be met.

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Residence: • 3319 North Union • Tacoma, Washington 98407 • 206-752-1714
Law Office - Davies Pearson, P.C. • P.O. Box 1657 • Tacoma, Washington 98401 • 206-383-5461
Committees: • Chair, Commerce & Labor • Human Services • Judiciary

1400

Letter to Governor Gardner
April 27, 1987
Page Two

Similarly, public safety employees may not be able to recover for injuries or death resulting from a job-related heart attack. In this case, the claimant must show that the occupational exertion that caused the heart attack was an "unusual exertion" not ordinarily required in the course of the employment. This judicially imposed doctrine is particularly onerous to public safety employees for whom strenuous exertion in the course of the employment is routine.

With these requirements in mind, legislation was introduced to ease the burden of proof required of public safety officers who suffer occupational disease. The establishment of a presumption of occupational disease would not change the need to show that the disease was occupational related. It would simply provide the claimant with enough proof to establish a case in the absence of any evidence to the contrary. If the employer or the Department of Labor and Industries could show that the disease was the result of other factors, such as heavy smoking or a weight condition, the presumption, standing alone, would not be enough to establish an industrial insurance claim.

The House did respond, however, to the concerns about the broad coverage of the original bill. Several significant changes were made to ESSB 5801. The House amendment retains the presumption for fire fighters with regard to respiratory disease. The presumption for heart conditions is deleted for both fire fighters and law enforcement officers. This change keeps in place the presumption that is most strongly corroborated by common sense -- that fire fighters suffer more frequent respiratory diseases because of exposure to hazardous and toxic substances in their employment.

The second major change in the bill is the treatment of heart attack cases. For both fire fighters and law enforcement officers, the claimant is not required to prove that an unusual exertion precipitated the heart attack. The public safety officer will still be required to prove that the exertion caused the heart attack, a very heavy burden of proof in most cases.

The department's cost estimate for the state fund under the provisions as adopted in the House amendment is \$95,000 for the first year, with a \$2,000,000 total for the first six years. This is a significant reduction from the department's estimates under the original bill of \$150,000 in the first year and \$3,200,000 for the six year total.

There is one misconception that should be dispelled. This bill does not recreate a LEOFF I pension system. The LEOFF II public safety employees who are compensated for workplace injuries and diseases under the industrial insurance system are still subject to those provisions under this legislation. Industrial insurance benefits are not entitlements that the legislature is unable to revise when experience and changing conditions warrant such adjustments.

Letter to Governor Gardner
April 27, 1987
Page Three

I am, of course, aware that cities and counties have concerns about adding "new" benefits for LEOFF II employees. Underlying the concern appears to be a fear of creating a trend toward ever expanding benefits for public safety officers. I believe that the fear is unfounded. The purpose of ESSB 5801 is to account for the special circumstances under which public safety officers work and to allow these officers to bring workers' compensation claims on an equitable basis.

Again, I request your support of this bill when it reaches your desk. It makes possible the payment of compensation to workers suffering from legitimate workplace injuries and diseases for claims that, under present Washington law, would be denied.

Sincerely,

ART WANG
State Representative
Chair, Committee on Commerce & Labor

sb5801.gov/d#cc7



WASHINGTON STATE LEGISLATURE

Senate • House of Representatives • Legislative Building • Olympia, Washington 98504

JOINT SELECT COMMITTEE ON INDUSTRIAL INSURANCE

MEMORANDUM

DATE: July 25, 1986

TO: Members, Joint Select Committee on Industrial Insurance

FROM: Bill Lynch, Staff Coordinator

SUBJECT: Occupational Disease Presumptions for Public Safety Employees in Other States

There are currently nineteen states that have enacted statutes granting special compensation coverage to firefighters or police officers.¹ The various state statutes differ widely in who is covered and the strength of the presumption.² Any statute that may be contemplated in Washington should be drafted broadly enough to include all the categories of employees desired, because the courts have shown a reluctance to expand coverage judicially.³

Coverage questions have arisen over such employees as deputy sheriffs,⁴ campus police,⁵ a deputy coroner,⁶ and "active" versus clerical or sedentary workers.⁷ Once the public officer is considered to be within

¹The states are Alabama, California, Connecticut, Florida, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Wisconsin. Larson, Workmen's Compensation Law, volume 1B, section 41-72.

²Larson, Workmen's Compensation law, volume 1B, section 41.72

³Larson, *supra*.

⁴Soper v. Montgomery County, 449 A. 2d 1158 (1982).

⁵Saal v. Workmen's Comp. Appeals Bd., 123 Cal. Rptr. 506 (1975).

⁶State Compensation Insurance Fund v. Workmen's Compensation Appeals Bd., 59 Cal. Rptr. 760 (1967).

⁷Andes v. City of Lancaster, 350 A. 2d 457 (1976).

1403

EXHIBIT 6

the coverage of the presumption statute, however, the presumption applies even when the public officer is on vacation, on disability leave, or in retirement.⁸

The injuries most frequently covered are heart and respiratory diseases.⁹ California concluded that its coverage of "heart trouble" included hypertension,¹⁰ but refused to extend the term to include cerebral vascular stroke.¹¹ Any statute, once again, should be drafted broadly enough to include all the injuries desired to be covered.

The ability to rebut the statutory presumption "varies from virtually irrebuttable to a virtually worthless presumption".¹² Professor Larson believes that Louisiana and New Hampshire represent the middle ground on the ability to rebut the presumption. In those states, the employer has the burden of proof on employment causation. Employers in those states must prove that employment did not cause the injury.¹³

Maryland's presumption of coverage is virtually irrebuttable because the presumption standing alone constitutes affirmative evidence.¹⁴ Oregon's statute is considered the weakest because any evidence that challenges the work-relatedness of the injury will "dispute" the presumption - putting the parties back where they would be without the statute.¹⁵

BL:bn4-8

⁸Larson, supra, section 41.72(c).

⁹Larson, supra, section 41.72(d).

¹⁰Muznik v. WCAB, 124 Cal. Rptr. 407 (1975).

¹¹Coyne v. WCAB, 138 Cal. Rptr. 373 (1977).

¹²Larson, supra, section 41.72(a).

¹³Larson, supra, section 41.72(a).

¹⁴Larson, supra, section 41.72(a).

¹⁵Larson, supra, section 41.72(a).

HOUSE BILL 2663

State of Washington 57th Legislature 2002 Regular Session

By Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller

Read first time 01/23/2002. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to occupational diseases affecting fire fighters;
2 amending RCW 51.32.185; and creating a new section.

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

4 NEW SECTION. Sec. 1. The legislature finds and declares that by
5 reason of their employment, fire fighters are required to work in the
6 midst of and are subject to smoke, fumes, infectious diseases, and
7 toxic substances; that fire fighters are continually exposed to a vast
8 and expanding field of hazardous substances; that fire fighters are
9 constantly entering uncontrolled environments to save lives, provide
10 emergency medical services, and reduce property damage and are
11 frequently not aware or informed of the potential toxic and
12 carcinogenic substances, and infectious diseases that they may be
13 exposed to; that fire fighters, unlike other workers, are often exposed
14 simultaneously to multiple carcinogens; that fire fighters so exposed
15 can potentially and unwittingly expose coworkers, families, and members
16 of the public to infectious diseases; and that exposures to fire
17 fighters, whether cancer, infectious diseases, and heart or respiratory
18 disease develop very slowly, usually manifesting themselves years after
19 exposure. The legislature further finds and declares that all the

1 aforementioned conditions exist and arise out of or in the course of
2 such employment.

3 Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read
4 as follows:

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

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

24 (3) The presumption established in subsection (1)(c) of this
25 section shall only apply to any active or former fire fighter who has
26 cancer that develops or manifests itself after the fire fighter has
27 served at least ten years and who was given a qualifying medical
28 examination upon becoming a fire fighter that showed no evidence of
29 cancer. The presumption within subsection (1)(c) of this section shall
30 only apply to cancers affecting the skin, breasts, central nervous
31 system, or lymphatic, digestive, hematological, urinary, skeletal,
32 oral, or reproductive systems.

--- END ---

SUBSTITUTE HOUSE BILL 2663

State of Washington 57th Legislature 2002 Regular Session

By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller)

Read first time 02/06/2002. Referred to Committee on .

1 AN ACT Relating to occupational diseases affecting fire fighters;
2 amending RCW 51.32.185; and creating a new section.

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

4 NEW SECTION. Sec. 1. The legislature finds and declares that by
5 reason of their employment, fire fighters are required to work in the
6 midst of and are subject to smoke, fumes, infectious diseases, and
7 toxic substances; that fire fighters are continually exposed to a vast
8 and expanding field of hazardous substances; that fire fighters are
9 constantly entering uncontrolled environments to save lives, provide
10 emergency medical services, and reduce property damage and are
11 frequently not aware or informed of the potential toxic and
12 carcinogenic substances, and infectious diseases that they may be
13 exposed to; that fire fighters, unlike other workers, are often exposed
14 simultaneously to multiple carcinogens; that fire fighters so exposed
15 can potentially and unwittingly expose coworkers, families, and members
16 of the public to infectious diseases; and that exposures to fire
17 fighters, whether cancer, infectious diseases, and heart or respiratory
18 disease develop very slowly, usually manifesting themselves years after
19 exposure. The legislature further finds and declares that all the

1 aforementioned conditions exist and arise out of or in the course of
2 such employment.

3 Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read
4 as follows:

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

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

24 (3) The presumption established in subsection (1)(c) of this
25 section shall only apply to any active or former fire fighter who has
26 cancer that develops or manifests itself after the fire fighter has
27 served at least ten years and who was given a qualifying medical
28 examination upon becoming a fire fighter that showed no evidence of
29 cancer. The presumption within subsection (1)(c) of this section shall
30 only apply to cancers affecting the skin, breasts, central nervous
31 system, or lymphatic, digestive, hematological, urinary, skeletal,
32 oral, or reproductive systems.

33 (4) For the purposes of this act, "infectious disease" means
34 acquired immunodeficiency syndrome, all strains of hepatitis,
35 meningococcal meningitis, and mycobacterium tuberculosis.

--- END ---

SECOND SUBSTITUTE HOUSE BILL 2663

State of Washington 57th Legislature 2002 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller)

Read first time 02/11/2002. Referred to Committee on .

1 AN ACT Relating to occupational diseases affecting fire fighters;
2 amending RCW 51.32.185; and creating a new section.

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

4 NEW SECTION. Sec. 1. (1) The legislature finds that:

5 (a) Benzene is detected in most fire environments and has been
6 associated with leukemia and multiple myeloma. Given the established
7 exposure to benzene in a fire environment, there is biologic
8 plausibility for fire fighters to be at increased risk of these
9 malignancies;

10 (b) Increased risks of leukemia and lymphoma have been described in
11 several epidemiologic studies of fire fighters. The risks of leukemia
12 are often two or three times that of the population as a whole, and a
13 two-fold risk of non-Hodgkin's lymphoma has also been found;

14 (c) Epidemiologic studies assessing fire fighters' cancer risks
15 concluded that there is adequate support for a causal relationship
16 between fire fighting and brain cancer;

17 (d) Fire fighters are exposed to polycyclic aromatic hydrocarbons
18 as products of combustion and these chemicals have been associated with

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1 bladder cancer. The epidemiologic data suggests fire fighters have
2 threefold risk of bladder cancer compared to the population as a whole;

3 (e) A 1990 review of fire fighter epidemiology calculated a
4 statistically significant risk for melanoma among fire fighters;

5 (f) Fire fighters are exposed to extremely hazardous environments.
6 Potentially lethal products of combustion include particulates and
7 gases and are the major source of fire fighter exposures to toxic
8 chemicals;

9 (g) The burning of a typical urban structure containing woods,
10 paints, glues, plastics, and synthetic materials in furniture,
11 carpeting, and insulation liberates hundreds of chemicals. Fire
12 fighters are exposed to a wide variety of potential carcinogens,
13 including polycyclic aromatic hydrocarbons in soots, tars, and diesel
14 exhaust, arsenic in wood preservatives, formaldehyde in wood smoke, and
15 asbestos in building insulation.

16 (2) The legislature further finds that some occupational diseases
17 resulting from fire fighter working conditions can develop slowly,
18 usually manifesting themselves years after exposure.

19 Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read
20 as follows:

21 (1) In the case of fire fighters as defined in RCW 41.26.030(4)
22 (a), (b), and (c) who are covered under Title 51 RCW and fire fighters,
23 including supervisors, employed on a full-time, fully compensated basis
24 as a fire fighter of a private sector employer's fire department that
25 includes over fifty such fire fighters, there shall exist a prima facie
26 presumption that: (a) Respiratory disease ((is an)); (b) heart
27 problems that are experienced within seventy-two hours of exposure to
28 smoke, fumes, or toxic substances; (c) cancer; and (d) infectious
29 diseases are occupational diseases under RCW 51.08.140. This
30 presumption of occupational disease may be rebutted by a preponderance
31 of the evidence ((controverting the presumption. Controverting)).
32 Such evidence may include, but is not limited to, use of tobacco
33 products, physical fitness and weight, lifestyle, hereditary factors,
34 and exposure from other employment or nonemployment activities.

35 (2) The presumptions established in subsection (1) of this section
36 shall be extended to an applicable member following termination of
37 service for a period of three calendar months for each year of

1 requisite service, but may not extend more than sixty months following
2 the last date of employment.

3 (3) The presumption established in subsection (1)(c) of this
4 section shall only apply to any active or former fire fighter who has
5 cancer that develops or manifests itself after the fire fighter has
6 served at least ten years and who was given a qualifying medical
7 examination upon becoming a fire fighter that showed no evidence of
8 cancer. The presumption within subsection (1)(c) of this section shall
9 only apply to primary brain cancer, malignant melanoma, leukemia, non-
10 Hodgkin's lymphoma, bladder cancer, ureter cancer, and kidney cancer.

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

16 (5) Beginning July 1, 2003, this section does not apply to a fire
17 fighter who develops a heart or lung condition and who is a regular
18 user of tobacco products.

--- END ---

1411

CERTIFICATION OF ENROLLMENT
SECOND SUBSTITUTE HOUSE BILL 2663

Chapter 337, Laws of 2002

(partial veto)

57th Legislature
2002 Regular Session

FIRE FIGHTERS--OCCUPATIONAL DISEASES

EFFECTIVE DATE: 6/13/02

Passed by the House March 11, 2002
Yeas 94 Nays 0

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate March 7, 2002
Yeas 48 Nays 0

BRAD OWEN
President of the Senate

Approved April 3, 2002, with the
exception of section 1, which is
vetoed.

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the
House of Representatives of the State
of Washington, do hereby certify that
the attached is SECOND SUBSTITUTE
HOUSE BILL 2663 as passed by the
House of Representatives and the
Senate on the dates hereon set forth.

CYNTHIA ZEHNDER
Chief Clerk

FILED

April 3, 2002 - 10:45 a.m.

Secretary of State
State of Washington

1412

EXHIBIT G

SECOND SUBSTITUTE HOUSE BILL 2663

AS AMENDED BY THE SENATE

Passed Legislature - 2002 Regular Session

State of Washington 57th Legislature 2002 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Conway, Clements, Cooper, Reardon, Sullivan, Delvin, Simpson, Armstrong, Hankins, Benson, Cairnes, Lysen, Kirby, Edwards, Chase, Kenney, Campbell, Barlean, Santos, Talcott, Wood and Rockefeller)

Read first time 02/11/2002. Referred to Committee on .

1 AN ACT Relating to occupational diseases affecting fire fighters;
2 amending RCW 51.32.185; and creating a new section.

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

4 *NEW SECTION. *Sec. 1. (1) The legislature finds that:*

5 *(a) Benzene is detected in most fire environments and has been*
6 *associated with leukemia and multiple myeloma. Given the established*
7 *exposure to benzene in a fire environment, there is biologic*
8 *plausibility for fire fighters to be at increased risk of these*
9 *malignancies;*

10 *(b) Increased risks of leukemia and lymphoma have been described in*
11 *several epidemiologic studies of fire fighters. The risks of leukemia*
12 *are often two or three times that of the population as a whole, and a*
13 *two-fold risk of non-Hodgkin's lymphoma has also been found;*

14 *(c) Epidemiologic studies assessing fire fighters' cancer risks*
15 *concluded that there is adequate support for a causal relationship*
16 *between fire fighting and brain cancer;*

17 *(d) Fire fighters are exposed to polycyclic aromatic hydrocarbons*
18 *as products of combustion and these chemicals have been associated with*
19 *bladder cancer. The epidemiologic data suggests fire fighters have a*

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1 three-fold risk of bladder cancer compared to the population as a
2 whole;

3 (e) A 1990 review of fire fighter epidemiology calculated a
4 statistically significant risk for melanoma among fire fighters;

5 (f) Fire fighters are exposed to extremely hazardous environments.
6 Potentially lethal products of combustion include particulates and
7 gases and are the major source of fire fighter exposures to toxic
8 chemicals; and

9 (g) The burning of a typical urban structure containing woods,
10 paints, glues, plastics, and synthetic materials in furniture,
11 carpeting, and insulation liberates hundreds of chemicals. Fire
12 fighters are exposed to a wide variety of potential carcinogens,
13 including polycyclic aromatic hydrocarbons in soots, tars, and diesel
14 exhaust, arsenic in wood preservatives, formaldehyde in wood smoke, and
15 asbestos in building insulation.

16 (2) The legislature further finds that some occupational diseases
17 resulting from fire fighter working conditions can develop slowly,
18 usually manifesting themselves years after exposure.

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

20 Sec. 2. RCW 51.32.185 and 1987 c 515 s 2 are each amended to read
21 as follows:

22 (1) In the case of fire fighters as defined in RCW 41.26.030(4)
23 (a), (b), and (c) who are covered under Title 51 RCW and fire fighters,
24 including supervisors, employed on a full-time, fully compensated basis
25 as a fire fighter of a private sector employer's fire department that
26 includes over fifty such fire fighters, there shall exist a prima facie
27 presumption that: (a) Respiratory disease ((is--an)); (b) heart
28 problems that are experienced within seventy-two hours of exposure to
29 smoke, fumes, or toxic substances; (c) cancer; and (d) infectious
30 diseases are occupational diseases under RCW 51.08.140. This
31 presumption of occupational disease may be rebutted by a preponderance
32 of the evidence ((controverting the presumption)). ((Controverting))
33 Such evidence may include, but is not limited to, use of tobacco
34 products, physical fitness and weight, lifestyle, hereditary factors,
35 and exposure from other employment or nonemployment activities.

36 (2) The presumptions established in subsection (1) of this section
37 shall be extended to an applicable member following termination of
38 service for a period of three calendar months for each year of

1 requisite service, but may not extend more than sixty months following
2 the last date of employment.

3 (3) The presumption established in subsection (1)(c) of this
4 section shall only apply to any active or former fire fighter who has
5 cancer that develops or manifests itself after the fire fighter has
6 served at least ten years and who was given a qualifying medical
7 examination upon becoming a fire fighter that showed no evidence of
8 cancer. The presumption within subsection (1)(c) of this section shall
9 only apply to primary brain cancer, malignant melanoma, leukemia, non-
10 Hodgkin's lymphoma, bladder cancer, ureter cancer, and kidney cancer.

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

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

Passed the House March 11, 2002.

Passed the Senate March 7, 2002.

Approved by the Governor April 3, 2002, with the exception of
certain items that were vetoed.

Filed in Office of Secretary of State April 3, 2002.

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

2 "I am returning herewith, without my approval as to section 1,
3 Second Substitute House Bill No. 2663 entitled:

4 "AN ACT" Relating to occupational diseases affecting fire fighters;"

5 Second Substitute House Bill No. 2663 creates a rebuttable prima
6 facie presumption that certain heart problems, cancer and infectious
7 diseases are occupational diseases for fire fighters covered by
8 industrial insurance. This is a law that I strongly support.

9 However, the assumptions in section 1 of this bill have not been
10 clearly validated by science and medicine. Allowing those assumptions
11 to become law could have several unintended consequences, including
12 modifying the legal basis of the presumptions in section 2 of the bill,
13 providing an avenue for the allowance of disease claims in other
14 industries; and unnecessarily limiting the use of new scientific
15 information in administering occupational disease claims.

1 For these reasons, I have vetoed section 1 of Second Substitute
2 House Bill No. 2663.

3 With the exception of section 1, Second Substitute House Bill No.
4 2663 is approved."

SUPREME COURT NO. 90620-3

COURT OF APPEALS NO. 43621-3-II

EDWARD O. GORRE,

Respondent,

v.

CITY OF TACOMA,

Petitioner,

and DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2015, I filed and served the **Supplemental Brief of Petitioner City of Tacoma** and this **Certificate of Service** upon the following parties, addressed as follows:

**Brief without Appendices and Certificate via e-filing and e-service;
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DATED this 11th day of March, 2015, at Tacoma, Washington.



Brianna M. Larkin