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No. 66974-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

PATRICK E. MCKEOWN,

Appellant,

v.

CITY OF MOUNTLAKE TERRACE AND WASHINGTON STATE
LABOR & INDUSTRIES,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Patrick E. McKeown seeks *de novo* review by the Washington State Court of Appeals Division I of all decisions of the Board of Industrial Insurance Appeals and the Snohomish County Superior Court.

The decisions include Board of Industrial Insurance Appeals Judge Kirkendoll granting the Department's request for protective order on October 23, 2009 and granting the Department's CR 12(b)(1) motion to bar presumptive occupational disease and industrial injury as grounds for relief on October 16, 2009; and the Decision and Order of the Board of Industrial Insurance Appeals (Certified Appeal Board Record page 23-38) before the Honorable Karen K. Kirkendoll, Industrial Appeals Judge, entered on March 22, 2010 and confirmed on April 30, 2010, which incorrectly denied firefighter McKeown's claim for Industrial Insurance benefits.

Firefighter McKeown also seeks review of the Superior Court Order incorrectly denying his Motion for Summary Judgment, finding Dr. Holland's testimony was proper, finding foreign cases cited by firefighter McKeown were not relevant, and incorrectly granting Respondents' Cross Motion for Summary Judgment (CP 8-11) entered on March 9, 2011 before the Honorable Thomas J. Wynne, Snohomish County Superior Court, Cause Number 10-2-04794-6.

At no time has either the Board of Industrial Insurance Appeals or

Snohomish County Superior Court properly acknowledged the timeliness of firefighter McKeown's claim, or properly applied the mandatory occupational disease presumption found in RCW 51.32.185.

II. ASSIGNMENTS OF ERROR

Did the Board of Industrial Insurance Appeals commit error in holding that:

(1) Firefighter McKeown failed to file a claim for industrial injury within the time limitation of one year for filing an application or enforcing a claim for injury, pursuant to RCW 51.28.050;

(2) Firefighter McKeown failed to file a claim for firefighters' presumptive occupational disease within the time limitation of 60 months following his last date of employment with the City of Mount Lake Terrace Fire Department pursuant to RCW 51.32.185;

(3) As of September 2, 2008, firefighter McKeown did not have an occupational disease that arose naturally and proximately from distinctive conditions of his employment, within the meaning of RCW 51.08.140, and;

(4) The order of the Department of Labor and Industries, dated September 2, 2008, was correct.

Firefighter McKeown also requests that this court determine whether the Board of Industrial Insurance Appeals committed error in holding that:

(1) The Department was entitled to a CR 26(c) protective order on

claim file information; and,

(2) The Department was entitled to an order granting its CR 12(b)(1) motion to bar presumptive occupational disease and industrial injury as grounds for relief.

Did the trial court commit error in holding that:

(1) The Department was entitled to judgment as a matter of law affirming the Board's decision that firefighter McKeown is time-barred from eligibility for the occupational disease evidentiary presumption;

(2) Dr. Holland's testimony was properly before the Court;

(3) Foreign cases cited by firefighter McKeown were not applicable;
and,

(4) Claimant/Appellant McKeown is not entitled to an award of attorneys fees, litigation costs, or expert witness fees.

III. STATEMENT OF THE CASE

A. Statement of Facts.

Appellant Patrick E. McKeown is a disability-retired firefighter from the City of Mountlake Terrace Fire Department. *See Board transcript (TR) page 6, lines 11-18; page 62, lines 13-18.*

From 1981 to 1983, firefighter McKeown was a volunteer firefighter for the City of Mount Lake Terrace. *TR page 83, lines 5-20.* He was hired by the city as a full time professional firefighter on April 18, 1983. *TR page*

83, *lines 5-20*. On July 16, 2000, after 19 years as a firefighter, Mr. McKeown was forced to retire as a result of heart damage arising from infectious viral cardiomyopathy. TR page 86, lines 8-12.

Firefighter McKeown and his wife have been married for over 30 years. TR page 6, lines 7-8. His hobbies used to include hunting, hiking, fishing and camping. TR page 6, lines 19-23. He is no longer able to perform these activities without significant modifications. TR page 6, lines 19-23.

Firefighter McKeown reasonably estimated that he responded to approximately 1,800 fire suppression and emergency medical service (EMS) calls per year as a full-time firefighter. TR page 32, lines 2-23; page 64, lines 9-12. Toward the end of his career, EMS calls made up approximately 80 percent of his workload. TR page 37, lines 3-11; page 51, lines 10-13; page 64, lines 13-20. He came into contact with bodily fluids (saliva, tears, sweat, vomit, urine, feces, and blood) on approximately 25 to 35 percent of the EMS calls to which he responded. TR page 43, lines 17-26; page 44, lines 1-25; page 46, lines 5-10; page 65, lines 2-26. He was in close contact with thousands of members of the public due to the nature of his work as a full time professional firefighter/EMS. TR page 32, lines 24-26; page 33, lines 1-23; page 53, lines 13-25; page 67, lines 14-26; page 68, lines 1-26; page 69, lines 1-17. He was also exposed to smoke, fumes, toxic substances and hazardous conditions on a regular basis. TR page 24, lines 24-26; page 25,

lines 1-16; page 39, lines 1-26; page 80, lines 8-26; page 81, lines 1-18.

Approximately two years prior to his July 2000 retirement, firefighter McKeown recalled needing to catch his breath more often during calls and strenuous work, and being physically unable to accomplish tasks he used to be able to do with ease. *TR page 70, lines 2-26.* Eventually, the shortness of breath and fatigue affected his ability not only to work, but to hunt, hike and perform chores around the house. *TR page 72, lines 2-22; page 76, lines 17-26; page 77, lines 1-2.* During this time, he experienced significant difficulty with fatigue and catching his breath while responding to calls and performing physical activities at work. *TR page 70, lines 2-26.*

These facts were corroborated by testimony from firefighter McKeown's coworkers. Paul Rice is a firefighter captain. *TR page 15, lines 3-15.* He is firefighter McKeown's superior. He has worked with him for many years. *TR page 15, lines 16-26; page 16, lines 1-2.* He described firefighter McKeown as "the guy that was always able to do all the heavy lifting for us" and who never seemed to tire. *TR page 17, lines 4-21.* However, about two years prior to firefighter McKeown's disability retirement, Captain Rice noticed firefighter McKeown began needing to take more breaks and that he tired more easily responding to calls and performing strenuous physical activity. *TR page 17, lines 22-26; page 18, lines 1-8.* He also noticed that his complexion would no longer turn red upon exertion, but

rather turned white. *TR page 18, lines 23-26; page 19, lines 1-2.*

Scott Crane was a firefighter with the City of Mountlake Terrace at the same time as firefighter McKeown. *TR page 27, lines 5-21.* He also noticed that firefighter McKeown began to display marked effort and difficulty breathing in responding to calls and during strenuous activity at work to the point that the medics were monitoring him during calls due to his visibly deteriorating health. *TR page 28, lines 8-26; page 29, lines 1-20; page 31, lines 5-15.*

Another firefighter who worked with firefighter McKeown, Bradley Lutthans, testified that firefighter McKeown never wore out. *TR page 47, lines 12-21.* However, he did see him slow down physically in the two years prior to his disability retirement. *TR page 48, lines 3-9.*

The three firefighters also corroborated firefighter McKeown's memory of exposure to the full spectrum of bodily fluids during his long career that included thousands of EMS calls. *TR page 46, lines 5-25; page 78, lines 25-26; page 79, lines 1-26; page 80, lines 1-7.*

In July 2000, firefighter McKeown experienced an episode where he became rapidly and progressively short of breath. *Dr. John Holland redirect, December 7, 2009, page 26, lines 16-26; page 27, lines 1-8.* For the first time he was forced to seek out medical attention for his symptoms of extreme tiredness and shortness of breath. *Dr. Siecke depo. May 20, 2009, page 11,*

lines 14-25; page 12, lines 1-6.

Firefighter McKeown was seen by Dr. Richard Crohn, a cardiologist with Stevens Cardiology Group (now known as Swedish Heart and Vascular), in October 2000. *Dr. Siecke depo., page 26, lines 12-15.* Dr. Crohn performed a coronary angiography and formal heart catheterization on October 11, 2000. The doctor specifically noted in his surgical report that firefighter McKeown had a sudden illness that led him into heart failure in July of that year. *Dr. Siecke depo., page 40, lines 6-13.*

Dr. Crohn referred firefighter McKeown to Dr. Neil Siecke, a member of the same cardiology practice group as Dr. Crohn. On February 3, 2008, Dr. Siecke notified firefighter McKeown that he had an occupational disease, and on February 5, 2008, Dr. Siecke signed the claim form, which was provided to the Department of Labor and Industries on February 12, 2008. *Wendy Devries depo., September 25, 2009, page 60, lines 14-25; page 61, line 1; page 61, lines 12-14.* On the claim form, Dr. Siecke diagnosed firefighter McKeown with “***[h]eart enlarged by viral infection from someone with pneumonia***” more probably than not as a result of firefighter McKeown’s employment. *Dr. Siecke depo., page 42, lines 11-22; page 50, lines 20-25; page 51, line 1.*

Dr. Siecke is a renowned cardiologist. He is board certified in three specialty areas: internal medicine, nuclear cardiology, and cardiovascular

disease. *Dr. Siecke depo. May 20, 2009, page 3, lines 15-25; page 4, lines 1-3.* He has an active practice, seeing approximately 20 patients per day, 4 days per week. *Dr. Siecke depo., page 8, line 25; page 9, lines 1-4.* Dr. Siecke testified that firefighter McKeown's infectious "heart problem" is an occupational disease, on the basis of reasonable medical probability. *Dr. Siecke depo., page 11, lines 14-25; page 12, lines 1-6.* This determination was made from his own observations while providing treatment for firefighter McKeown, as well as Dr. Crohn's records, and firefighter McKeown's own statement regarding numerous routine exposures to bodily fluids, viruses and bacteria, and close contact with thousands of members of the public in his EMT work. *Dr. Siecke depo., page 14, lines 14-19; page 56, lines 17-25; page 57, lines 1-2.* The doctor found, on a more probable than not basis, that firefighter McKeown's viral cardiomyopathy developed as a result of his work as a firefighter for the City of *Mountlake Terrace*. *Dr. Siecke depo., page 16, lines 19-23; page 17, lines 11-19.*

Defense witness Dr. John P. Holland is certified in occupational medicine. He is not a cardiologist. *TR page 133, lines 6-7.* He does not have an existing practice. *TR page 178, lines 23-26; page 179, lines 1-9.* He never physically examined firefighter McKeown. *TR page 139, lines 12-13.* He never interviewed firefighter McKeown or saw him in person. *TR page 139, lines 12-13; page 189, lines 6-11.*

Dr. Holland rejects the legislative determination that firefighters are at increased danger to heart and lung conditions, and infectious disease that is embedded in RCW 51.32.185. *TR page 167, lines 17-19; page 228, lines 20-26; page 229, lines 1-22.* Dr. Holland does acknowledge that firefighting can result in heart attack, stroke, or similar “acute” events. *TR page 228, lines 20-26; page 229, line 1.* He refused to acknowledge the statutory presumption, instead giving a speculative opinion that firefighter McKeown’s employment could not have caused his condition.

Dr. Holland was asked to provide his opinion about whether there was a potential link between firefighter McKeown’s job as a firefighter, and the likelihood of developing “heart problems.” *TR page 138, lines 20-26.* The legislature has already made the determination that a presumption exists for firefighters for respiratory disease, any heart problems, infectious diseases, and cancers. The doctor’s personal feelings about the legitimacy of the statute are irrelevant and prejudicial. None of this testimony should be allowed. Alternatively, the testimony does not rebut the presumption.

The doctor could not say where, or how, firefighter McKeown developed his heart problem, he stated it was of “idiopathic, or unknown origin.” *TR page 174, lines 7-8.* His opinion did not accept the diagnosis of infectious viral cardiomyopathy. He could not provide any evidence of origin of firefighter McKeown’s condition, but simply excluded his employment as

a likely cause or aggravating factor. Opinions based upon failure to consider all potential causes, or opinions based upon speculation are insufficient to rebut the presumption. His biased opinion rejected presumptive law, relied on speculation and is not competent testimony. *TR page 192, lines 17-26; page 193, lines 1-6; Dr. Holland redirect, December 7, 2009, page 29, lines 11-26; page 30, lines 1-2.*

RCW 51.32.185 is a legislatively-mandated presumption of occupational disease that works in favor of firefighters diagnosed with respiratory disease, any heart problems, infections and certain cancers. RCW 51.32.185 is central in this case. The employer and the Department had the duty to apply the statute. The Department doctor, Dr. Holland, admitted that cardiomyopathy is a disease of the heart. *TR page 144, lines 9-17.* As a disease of the heart, or a “heart problem,” there is no question that RCW 51.32.185 applied from the time of diagnosis through this appeal.

Firefighter McKeown met that time limit and his claim should have been allowed. However, the department intentionally classified firefighter McKeown’s condition as an “injury” in order to reduce the statute of limitations down to one year in which to perfect a claim. Ms. Devries testified that this determination was made by assuming firefighter McKeown had a one-time exposure. *Devries depo., page 76, lines 24-25; page 77, lines 1-2.* However, she then admitted that any career exposure as a firefighter

would create a presumption of occupational disease that would fall under the presumptions in RCW 51.32.185. *Devries depo., page 78, lines 3-12.* She further admitted the Department did not think that firefighter McKeown, as a career firefighter, had only been exposed to viruses on one occasion. *Devries depo., page 78, lines 8-12.*

Ms. Devries stated, that in the case of a firefighter, even without medical evidence to rebut the presumption, the claim should be accepted. *Devries depo., page 19, lines 21-25; page 20, lines 1-2.* She went on to acknowledge there was no “testimony in the Department’s file from a medical professional that would stand in contrast to the testimony of Dr. Siecke with respect to a diagnosis of an occupational and presumptive occupational presumptive heart problem.” *Devries depo., page 80, lines 9-14.* She further admitted in her role as speaking agent for the Department, that at the time the Department made the decision to deny the claim, there was no medical evidence in the Department file other than the claim form signed by Dr. Siecke that opined firefighter McKeown suffered from the occupational disease of infectious viral cardiomyopathy. *Devries depo., page 68, lines 16-25; page 69, lines 1-25; page 70, lines 1-4.* According to Ms. Devries’ own testimony regarding Department procedure, the presumptive disease statute should have been applied from the time of firefighter McKeown’s application for benefits, and then the employer could have

protested if it had the medical evidence to support such a protest.

Ms. Devries noted that the presumption in RCW 51.32.185 is the “equivalent of the causal relationship” for firefighter heart problems, respiratory problems, infectious diseases and certain cancers. *Devries depo., page 28, lines 7-10.* She went on to admit that the Department never applied RCW 51.32.185 in firefighter McKeown’s situation, even after acknowledging that the Department considers infectious viral cardiomyopathy to be a heart problem. *Devries depo., page 62, lines 23-25; page 65, lines 10-17; page 66, lines 5-8.* Ms. Devries provided the Department standards, and then admitted the Department denied the claim with no supporting evidence, in direct violation of those standards.

Firefighter McKeown has been denied the benefit of the presumptive disease statute as to causation and burden shifting. The proper placement of the burden of proof should have been placed on the employer and the Department from the time of the application of benefits. Firefighter McKeown has been denied the benefit of the presumptive disease law as to both causation and the shifting of the burden of proof.

B. Procedural History.

On February 12, 2008, firefighter McKeown filed an Application for Benefits with the Department of Labor and Industries for his July 15, 2000 heart, infectious disease and respiratory problems. The Department rejected

the claim on February 19, 2008 finding firefighter McKeown did not comply with the industrial insurance one-year statute of limitations on injury claims. McKeown filed a Protest and Request for Reconsideration on March 3, 2008.

The Department issued a new order on May 6, 2008, correcting its earlier February 19, 2008 order. The new order rejected the claim for the reason originally given, as well as finding the infectious viral cardiomyopathy was not covered under the presumptive occupational disease statute. Firefighter McKeown filed a Notice of Appeal with the Board of Industrial Insurance Appeals on June 9, 2009, but on June 13, 2008, the Department reassumed jurisdiction and held its May 6, 2008 order in abeyance. The Board issued an order on July 7, 2007 returning the case to the Department.

On September 2, 2008, the Department issued yet another order, correcting its earlier order of May 6, 2008, for the same reasons originally given, as well as again adding a new reason to justify its decision. The reasons given in the September 2, 2008 order were that firefighter McKeown did not have a presumptive occupational disease, firefighter McKeown did not have an occupational disease, firefighter McKeown's condition was not the result of an industrial injury due to lack of proof of a specific injury at a definite time and place in the course of employment, and firefighter McKeown did not file his claim within one year from the date of the alleged injury.

Firefighter McKeown filed a Notice of Appeal with the Board of Industrial Insurance Appeals on October 3, 2008, and appeal was granted under Docket No. 08 19275 on October 14, 2008.

Claims handling is critical to setting up the presumption and the burden of proof on the employer. In order to avoid complying with claims handling discovery requests, on August 26, 2009, the Department of Labor and Industries moved for a CR 26(c) protective order on claim file information. The parties appeared before Judge Kirkendoll at a telephonic motion hearing on September 11, 2009. Judge Kirkendoll granted the Department's request for protective order on October 23, 2009.

The Department of Labor and Industries filed a CR 12(b)(1) motion to bar presumptive occupational disease and industrial injury as grounds for relief. Judge Kirkendoll heard oral argument on the motion on September 30, 2009. On October 16, 2009, the industrial appeals judge issued her decision, granting the Department's motion.

The Board did not issue a decision on that appeal until March 22, 2010. The Board held in its Proposed Decision and Order that (1) Firefighter McKeown failed to file a claim for industrial injury within the time limitation of one year for filing an application or enforcing a claim for injury, pursuant to RCW 51.28.050, (2) Firefighter McKeown failed to file a claim for firefighters' presumptive occupational disease within the time limitation of

60 months following his last date of employment with the City of Mount Lake Terrace Fire Department pursuant to RCW 51.32.185, (3) As of September 2, 2008, McKeown did not have an occupational disease that arose naturally and proximately from distinctive conditions of his employment, within the meaning of RCW 51.08.140, and (4) the September 2, 2008 order of the Department of Labor and Industries was affirmed. No mention was made by the judge about firefighter McKeown's many inquiries to the City of Mountlake Terrace regarding application of the presumptive occupational disease statute to McKeown's diagnosis of infectious viral cardiomyopathy.

Firefighter McKeown filed a Petition for Review of all issues determined by the industrial appeals judge with the Board of Industrial Insurance Appeals on April 13, 2010. The Board denied the Petition for Review on April 30, 2010, and finalized the Proposed Decision and Order of March 22, 2010.

Firefighter McKeown appealed to Snohomish County Superior Court all prior rulings and all matters of the Decision And Order of the Board of Industrial Insurance Appeals of the State of Washington dated March 22, 2010, and the Order Denying firefighter McKeown's Petition for Review being denied by the Board of Industrial Insurance Appeals' decision dated April 30, 2010. Firefighter McKeown also noted in his appeal, as he did at

the Board of Industrial Insurance Appeals, that in addition to all injury and disease benefits provided by law, firefighter McKeown was also entitled to attorney fees, expert witness fees, and other costs pursuant to RCW 51.32.185.

Firefighter McKeown filed a motion for summary judgment on January 14, 2011 seeking correction of the Department of Labor and Industries' refusal to accept firefighter McKeown's timely occupational disease and presumptive occupational disease claims, and the Department's refusal to correctly apply the RCW 51.32.185 mandatory presumption of occupational disease in favor of professional firefighters like firefighter McKeown, and seeking to have the speculative testimony of Dr. Holland stricken from the record. Firefighter McKeown also preserved his right to bring a motion for attorney fees and costs pursuant to RCW 51.32.185(7).

The Department of Labor and Industries filed a cross motion for partial summary judgment. Snohomish County Superior Court Judge Thomas J. Wynne granted the Department's motion for partial summary judgment on March 9, 2011; and at the same time denied McKeown's motion for summary judgment. Specifically, Judge Thomas Wynne ordered (1) that the Department was entitled to judgment as a matter of law affirming the Board's decision that firefighter McKeown was time-barred from eligibility for the occupational disease presumption, (2) that Dr. Holland's testimony

was proper, (3) that the foreign cases cited by firefighter McKeown were not applicable, and (4) that Firefighter McKeown was not entitled to an award for fees or costs.

Firefighter McKeown filed a Notice of Appeal to the Washington State Court of Appeals Division I of all the Snohomish County Superior Court's and the Board of Industrial Insurance Appeals' decisions and orders.

IV. ARGUMENT

A. The standard of review.

The standards for appellate court review in workers' compensation cases are the same as in ordinary civil cases. RCW 51.52.140; *Rogers v. Department of Labor & Indus.*, 151 Wash. App. 174, 179-81, 210 P.3d 355 (2009). Statutory interpretation, as at issue here, is a question of law that this Court also reviews *de novo*. *In re: Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006).

The standard of review for the denial of a summary judgment order is *de novo*, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). When reviewing a summary judgment order, the appellate court only considers the evidence and issues raised below. *Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997), *rev. denied*, 134 Wn.2d 1026, 958 P.2d 313

(1998).

Issues regarding statutory interpretation are issues of law to be determined *de novo* by an appellate court. *Sheehan v. Central Puget Sound Regional Transis Authority*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005).

Summary judgment is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56; Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993).

B. The purpose of the Industrial Insurance Act is to provide relief to all injured workers.

The purpose of the Industrial Insurance Act is to make certain an employee's relief, and to provide for recovery regardless of fault or due care on the part of either the employee or employer. *Monloya v. Greenway Aluminum Co., Inc.*, 10 Wash. App. 630, 519 P.2d 22 (1974).

“The guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.” *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470 (1987), *Messer v. Department of Labor & Indus.*, 118 Wash. App. 635, 77 P.3d 1184 (2003), *Simpson Timber Co. v. Wentworth*, 96 Wash. App. 731, 981 P.2d 878

(1999), *Taylor v. Nalley's Fine Foods*, 83 P.3d 1018 (2004). Since 1987, the same year RCW 51.32.185 was enacted by the legislature, our Supreme Court has mandated all doubts be resolved in favor of the injured worker.

Where reasonable minds can differ over what provisions in the Industrial Insurance Act mean, the benefit of the doubt belongs to the injured worker in every case. *Gallo v. Department of Labor & Indus.*, 119 Wash. App. 49, 81 P.3d 869 (2003).

Our own courts have clearly followed the legislative intent in resolving doubts in favor of the worker. In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011, 56 P.3d 565 (2002), involving a much weaker claimant's case, and without the benefit of the statutory presumption, the Court ruled that the claimant's Hepatitis C from a single needle stick incident was an occupational viral disease (not an injury) and that the evidence was sufficient to support an inference on a more-probable-than-not basis that the claimant acquired hepatitis while working at the hospital, even though the claimant had a history of drug use, had numerous body piercings, numerous tattoos, and had worked as an emergency medical technician in the Navy prior to her employment at the hospital.

C. RCW 51.28.055 requires written notice.

Written notice from a physician to the worker that (1) an occupational

disease exists and (2) that a claim for disability may be filed, is required to start the limitation period set forth in RCW 51.32.055.

RCW 51.28.055 Time limitation for filing claim for occupational disease

(1) Except as provided in subsection (2) of this section for claims filed for occupational hearing loss, *claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed. [bold italic emphasis added]*

As soon as firefighter McKeown received the required written notice, he filed his occupational disease claim one week later. The claim is timely as an occupational disease claim.

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18 Q. Is this the application of benefits that you filed
19 with respect to this claim that we're talking about here
20 today, Mr. McKeown?

21 A. Yep. That looks like it pretty good. It looks
22 like it.

23 Q. How was it that you came to file this application
24 for benefits?

25 A. Okay. Basically, what happened in the beginning

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1 when I had the event, I turned around and asked whether when
2 we were doing all this time out -- no, I had no human
3 resources.

4 Questions were asked at the time, am I covered by
5 L&I?

6 At that time basically we were told no, and the
7 heart is not presumptive in the State of Washington. So at
8 that time I have an answer from people of authority. We

9 have to accept that.

10 And so later on down the road I still asked like,
11 I'm thinking maybe at that time, a little later I asked
12 Paul Hepler who worked with the Edmonds Fire Department if
13 anything had been come down through the Washington State
14 Council of Firefighters about anything presumptive.

15 And he said at that time no, and periodically I
16 would check back.

17 Well, recently when this came about I talked with,
18 and I don't remember who, but it would have been someone in
19 the fire department, and along with the Washington State
20 Council, and they said yes. There is something now that is,
21 if it's medical, not heart disease, then it can be L&I.

22 So that's when I started. I filled this out. And
23 they gave me that little form saying that you had so many
24 days to do this and so many days to do that. Have a nice
25 day.

April 3, 2009 Deposition of Patrick McKeown.

The Department acknowledges firefighter McKeown has a timely claim. "It has always been undisputed that Mr. McKeown's occupational disease claim under RCW 51.08.140 was timely filed per RCW 51.28.055." *Department Reply Brief, page 3, lines 14-15.* However, the Department attempts to twist the purpose of the workers' compensation system, and the clear legislative intent of RCW 51.32.185, by suggesting firefighter McKeown did not make a timely presumptive occupational disease claim under RCW 51.32.185. This is a bastardization of the intent of the firefighters' presumptive disease statute. RCW 51.32.185 was intended to provide *extra* protection to firefighters, not less. The Department is

attempting to argue that the statute precludes the firefighter from the same rights as others have when they file an occupational disease claim.

The five year limitation in RCW 51.32.185 applies to a time when a retired firefighter is informed in writing by a physician that a presumptive occupation disease claim or a potential claim exists. At that point, if the firefighter waits more than 60 months beyond the last date of employment, the claim will not be timely. However, if he did not know, and had not received notice of a claim or potential claim, clearly the time limitation would not apply. The legislature did not intend to deny firefighters the benefits granted to all Washington workers under the occupational disease statute. RCW 51.32.185 provides additional basis for causation benefits that are “stacked” on top of, and in addition to, the benefits given to all other workers. The occupational disease statute of limitations is applicable to all firefighter claims. The Department should not be allowed to manipulate the statute to take benefits away from firefighters when such benefits apply to every other worker covered under the Industrial Insurance Act.

Firefighter McKeown’s occupational disease claim was timely filed within days of receiving notice of such a claim from his physician. If his occupational disease claim was timely filed, his presumptive occupational disease claim must have been timely filed as well. If he knew of an

occupational disease and chose not to file, waiting until more than 60 months after his last day of employment, then he would be barred by the statute of limitations provided in RCW 51.32.185. However, since he did not know of the occupational disease claim or presumptive occupational disease claim, he can not be barred by a twisting of the statute to work in the Department's favor, rather than in the firefighter's favor, as intended.

Under a standard occupational disease claim, the injured party must first have notice from a physician that they have an occupational disease claim. This notice is required before any deadline for filing can be imposed. However, according to the Department, firefighters do not have this benefit that is granted to every other worker under the Washington workers' compensation act. Using the Department's favored interpretation, *only* firefighters have only 60 months from the date they were last employed in which to file an occupational disease claim; whether they received notice from a physician or not. If the firefighter was not fortunate enough to get such written notice, the Department is able to avoid providing any benefits to the injured firefighter.

The Department's interpretation provides less protection to a firefighter than to other workers. This interpretation requires a firefighter to be able to diagnose himself, even if he has no symptoms, or risk losing the

benefits to which the legislature intended he have access. The claim is also timely as a presumptive occupational disease claim. Contrary to the claims of the Department, RCW 51.32.185 provides firefighters with additional time to file claims, once they are fully advised that a viable claim exists.

Notice provisions of two-year statute of limitations on claims for occupational disease or infection apply to *all claims* for occupational disease, whether filed by worker or beneficiary. *Department of Labor and Industries v. Estate of MacMillan*, 117 Wn.2d 222, 814 P.2d 194 (1991).

In a proceeding brought by a claimant suffering breathing problems from a lung condition caused by the claimant's work environment between 1964 and 1968, the appellate court found that there was not sufficient evidence to support a finding that the claimant had proper notice prior to 1974 that his lung condition was occupational in nature. The court overturned the superior court finding that the statute of limitations had commenced to run prior to claimant receiving notice in 1974. *Gilbertson v. Department of Labor and Indus*, 22 Wash. App. 813, 592 P.2d 665 (1979).

Even if a firefighter is given a diagnosis by his doctor, that is not sufficient. The statute of limitations against claims does not begin to run until the worker is given notice by his doctor that the disabling condition is occupational in nature and it is not enough that the worker is given the name

or diagnosis for his condition, without a written statement from his doctor of its causal relationship to his occupation. *Williams v. Department of Labor and Industries*, 45 Wn.2d 574, 277 P.2d 338 (1954).

D. Discovery rule applies.

Courts have applied the discovery rule to postpone accrual in several types of tort claims: “In certain torts . . . injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action.” *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687(1985).

In *In re Estates of Hibbard*, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992), our Supreme Court limited application of the discovery rule to “claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant[,]”but extended its application to include claims in which plaintiffs could not immediately know of the cause of their injuries.

In certain cases where injured parties do not, or cannot, know they have been injured, the cause of action accrues at the time the claimant knew or should have known of the essential elements of the cause of action. *White*

v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985). This exception is known as the “discovery rule.” *White*, 103 Wn.2d at 348.

Firefighter McKeown’s presumptive occupational disease claim is not subject to a time limit until all relevant facts are known. The presumptive disease statute was designed in the aftermath of 9/11 to provide additional protection to firefighters, not less. The public policy of providing more and better occupational disease protection to firefighters is simply not subject to a timeliness argument until all elements of the underlying claim are present. Subsection 2 of RCW 51.32.185 is intended to extend coverage to all firefighters, including retired firefighters who were aware of all elements of their claim but were no longer active firefighters. Firefighter McKeown is not limited under Subsection 2 because he did not receive notice from a physician until Dr. Siecke filed the application.

The statute of limitations cannot begin to run until the injured worker has received written notice, regardless of whether the worker was actively working or retired. Until receiving notice, no worker with an occupational disease is subject to a statute of limitations under the Industrial Insurance Act.

E. The Department’s reliance on RCW 51.32.180 is misplaced.

The Department uses several excuses for failing to approve firefighter McKeown’s application for benefits. Its reliance on RCW 51.32.180 as a

basis for denial is misplaced. This statute only addresses compensation of claimants and is not a basis for dismissal of an occupational disease claim.

The statute does not contravene RCW 51.28.055 or RCW 51.32.185.

RCW 51.32.180 Occupational diseases - Limitation.

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive *the same compensation benefits and medical, surgical and hospital care and treatment* as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) This section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937; and (b) for claims filed on or after July 1, 1988, *the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.* [bold italic emphasis added]

F. The Department's reliance on the one year injury time limit is misplaced.

Another attempt by the Department to avoid providing firefighter McKeown the benefits to which he was entitled is to apply the one year injury time limit even though many presumptive occupational diseases come from only one exposure. The Washington Supreme Court has held that occupational disease claims are not governed by the one year injury limit. *Leschner v. Department of Labor & Indus.*, 27 Wn.2d 911, 185 P.2d 113

(1947); *Henson v. Department of Labor and Indus.*, 15 Wn.2d 384, 130 P.2d 885 (1947).

This is not an injury claim in spite of the Department's attempts to force it into that category. This is an occupational disease claim, evidenced by the Department's own expert witness testifying that cardiomyopathy is a heart disease. The Department spokesperson stated in her deposition that the Department considers cardiomyopathy to be a heart disease.

The distinct difference between the meaning of the words "injury" and "disease" is clear. The word "injury" is one of notoriety, a happening which can be fixed at a point in time; while "disease," especially presumptive occupational disease, has a slow and insidious approach and often does not manifest itself until after the lapse of a considerable length of time.

The Washington Supreme Court has held that occupational disease claims are not governed by the one year injury limit. *Leschner v. Department of Labor & Indus.*, 27 Wn.2d 911, 185 P.2d 113 (1947); *Henson v. Department of Labor & Indus.*, 15 Wn.2d 384, 130 P.2d 885 (1947). Clearly this attempt by the Department to avoid allowance of the claim is invalid, and does not eliminate the responsibility to provide occupational disease and presumptive occupational disease benefits to this career firefighter.

Viral cardiomyopathy is an RCW 51.32.185 occupational infectious

presumptive disease that *targets* the heart. Furthermore, by the clear language of the statute, the infectious disease presumption has retroactive application: the “presumption in subsection 1(d) of this section ***shall be extended*** to any firefighter ***who has contracted*** any of the following infectious diseases:...” [bold italics emphasis added.] Particularly through the use of the verb form “has contracted,” the legislature indicated a retroactive application. Even if this was an injury claim, firefighter McKeown filed a claim within one week of discovering the “injury”.

G. RCW 51.32.185 was created to provide additional benefits to firefighters beyond those already provided by the Industrial Insurance Act.

From the time of his application for benefits, the employer and the Department of Labor and Industries refused to provide firefighter McKeown with the benefit of the mandatory presumption and burden shifting required in RCW 51.32.185. The Board also failed to apply the RCW 51.32.185 presumption and burden of proof in favor of firefighter McKeown from the time of claim application. If the law had been correctly applied, the claim would have been allowed and the burden of proof going forward would have been correctly placed on the employer and the Department. The policy set forth in the presumptive disease statute is not meant to be used as a shield by

an employer trying to avoid paying benefits in violation of the public policies set forth in the Act and the statute.

The presumptive disease statute gives firefighters an additional level of benefits and protection, over the traditional benefits of the workers' compensation system. Therefore, the Department's interpretation must fail.

The presumptive occupational disease statute RCW 51.32.185 is an extra layer of benefits and protection on top of the occupational disease statute RCW 51.08.140. If the firefighter did not know he had an occupational disease, he would receive the benefits of RCW 51.08.140 if his claim was filed within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner that he had an occupational disease claim.

Under RCW 51.32.185, the firefighter receives the benefits of the occupational disease statute RCW 51.08.140 with *additional* benefits under RCW 51.32.185. The Department is attempting to use the wording of RCW 51.32.185 to take benefits away from the firefighter. The legislature did not intend RCW 51.32.185 to be used as a way for the Department to deny benefits to firefighters that are routinely granted to all others suffering occupational disease.

H. The legislature need not incorporate a reference to other statutes when drafting new legislation.

The Department alleges in their motion for summary judgment that in order for RCW 51.28.055 to apply to firefighters, RCW 51.32.185 should have referenced RCW 51.28.055 or vice versa. *Department's Summary Judgment Reply page 13, lines 1-3*. This argument is without merit. If, when writing the statute RCW 51.32.185, the Legislature was required to reference every other statute that applied, each statute would be painfully long. RCW 51.32.185 is an addition to every other statutory benefit available under the Washington workers' compensation system.

The fact that the occupational disease statute of limitations is not mentioned in the firefighter's presumption has no bearing on whether or not it applies to firefighters. Since the legislature intended RCW 51.32.185 to be an additional protection for firefighters, it must not be used by the Department to strip the firefighter of benefits contrary to its express purpose.

"The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance

purposes for firefighters." *Legislative findings -- [1987 c 515 § 1.]*

I. Proximate Cause

In *Wendt v. Department of Labor and Indus.*, 18 Wash. App. 674, 571 P.2d 229 (1977), the court held that it is error not to give an instruction on multiple proximate causes when there is evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions.

The court in *City of Bremerton v. Shreeve*, 55 Wash. App. 334, 777 P.2d 568 (1989), held that the trial court did not err in giving an instruction adapted from WPI 155.06 that set forth a “multiple proximate cause theory” in an occupational disease case. The worker is to be taken as he or she is, and a preexisting condition should not be considered a ‘cause’ of the injury, but merely a condition upon which the ‘proximate cause’ operated.” *City of Bremerton v. Shreeve*, 55 Wash. App. at 341, 342, 777 P.2d at 572.

J. The strong public policy of Washington State is violated when the employer and the Department deny claims, or discriminate against employees filing occupational disease claims involving presumptive occupational diseases.

The purpose of the Industrial Insurance Act is to make certain an employee’s relief, and to provide for recovery regardless of fault or due care

on the part of either the employee or employer. *Monloya v. Greenway Aluminum Co., Inc.*, 10 Wash. App. 630, 519 P.2d 22 (1974).

Our Industrial Insurance Act is remedial in nature, and therefore, must be liberally construed with all doubts resolved in favor of the worker. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470 (1987), *Messer v. Department of Labor & Indus.*, 118 Wash. App. 635, 77 P.3d 1184 (2003), *Simpson Timber Co. v. Wentworth*, 96 Wash. App. 731, 981 P.2d 878 (1999), *Taylor v. Nalley's Fine Foods*, 119 Wash. App. 919, 83 P.3d 1018 (2004). Where reasonable minds can differ over what provisions in the Workers' Compensation Act mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker in every case. *Gallo v. Department of Labor & Indus.*, 119 Wash. App. 49, 81 P.3d 869 (2003).

K. Other jurisdictions have entered strong, well-reasoned presumptive disease rulings in similar cases by correctly applying the presumption in favor of public servants like Appellant Patrick McKeown.

The growing case law of several other states with public safety officer occupational disease presumptions is invaluable in analyzing the unsupported refusal of the Department to apply the presumption to Washington

firefighters as it has been directed by the legislature.

In *Fairfax County Fire & Rescue Dept. v. Mitchell*, 14 Va App 1033, 421 SE2d 668 (1992), the court upheld the application of Virginia Code § 65.1-47.1, which provides a rebuttable presumption that, absent a preponderance of competent evidence to the contrary, a causal connection exists between an individual's employment as a salaried firefighter and certain diseases. The court determined the presumption acted to "eliminate the need for a fire fighter to prove a causal connection between his disease and his employment." The burden was put on the employer to prove otherwise.

In *Robertson v. North Dakota Workers Compensation Bureau*, 2000 ND 167, 616 NW.2d 844 (ND 2000), it was held that the statutory presumption that a law enforcement officer's heart disease occurred in the line of duty ***shifts the burden of going forward with the evidence and the burden of persuasion from the injured worker to the North Dakota Workers' Compensation Bureau.*** This required the Bureau to prove the heart disease was not suffered in the line of duty.

In *Montgomery County v Pirrone*, 109 Md App 201, 674 A2d 98 (1996), a retired firefighter was entitled to the statutory presumption that his heart attack resulted from his employment for purposes of workers'

compensation, even though the heart attack occurred after his retirement. The statutory reference to “paid” firefighter did not preclude coverage because the legislature's intention appeared to be to cover retired firefighters. *Id.* ***The jury was properly instructed that it must only find that the firefighter's occupation was a factor in causing the heart disease, not the predominant factor.***

In *McCoy v. City of Shreveport Fire Dept.* 649 So.2d 103 (1995, La. App. 2d Cir), the ***court found medical evidence regarding a fireman's heart disability was legally insufficient to overcome or rebut the work-related causation presumption*** of Louisiana Revised Statute § 33.2581. The statute provides that the nature of a firefighter's work caused, contributed to, accelerated or aggravated heart disease or infirmity manifested after the first five years of employment. ***In order to rebut the statutory presumption, the defendant had to prove the negative - that the firefighter's heart infirmity could not have resulted from his service as a fireman.***

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

L. Testimony from experts that is confusing to the finder of fact, that is prejudicial, that has no foundation, or is speculative should receive no weight or should be stricken by the court.

The Department chose to hire an expert witness to provide an opinion based upon speculation. The opinion was outside the law. An opinion based upon speculation and conjecture is insufficient as a matter of law. An opinion that refuses to acknowledge legislative mandate is also inadmissible as a matter of law. Speculation by the Department or its medical expert is not competent testimony as a matter of law. Speculation, conjecture or conclusory opinions can never rebut the statutory presumption set forth in RCW 51.32.185. The presumption cannot be rebutted absent specific medical testimony on causation. *TR page 195, line 26; page 196, lines 1-3.* Conclusory, conjectural or speculative opinions are not admissible. ER 702; ER 703; *Miller v. Likins*, 109 Wash. App. 140, 34 P.3d 835 (2001).

It is also insufficient as a matter of law that there are other possible explanations for Firefighter McKeown's infectious "heart problems." The Department is unable to establish when the exposure occurred. *TR page 174, lines 1-8.* The Department is unable to establish where the exposure occurred. *TR page 174, lines 1-8.* The Department is unable to establish how the exposure occurred. *TR page 174, lines 1-8.* The Department is

attempting to evade the burden of proof requirement in RCW 51.32.185, rather than apply it. The Department has not provided a preponderance of objective medical evidence that firefighter McKeown's infectious disease and "heart problem" are unrelated to the thousands of occupational exposures arising from firefighter McKeown's employment. *Dr. Holland re-cross, December 7, 2009, page 32, lines 24-26; page 33, lines 1-4.* The Department cannot do so.

Wendy Devries testified during her September 25, 2009 deposition as a speaking agent for the Department of Labor and Industries. She admitted in the Department's deposition that for occupational disease claims, it is statutorily mandated that there is a two year period to file a claim. The two year period begins only after the worker is told in writing by a medical professional that they have an occupational disease *and* told in writing that they have a right to file a claim for the occupational disease. *Devries depo., page 25, lines 5-10.*

Dr. Holland never saw firefighter McKeown. Dr. Holland is not a cardiologist. Dr. Holland does not have an existing practice. Dr. Holland could not determine how, when, or where firefighter McKeown was when he developed his infectious viral cardiomyopathy. He could not provide any evidence of origin of firefighter McKeown's condition, but simply excluded

his employment. This is insufficient as a matter of law. Speculation, conjecture or conclusory opinions can never rebut the statutory presumption set forth in RCW 51.32.185. The presumption cannot be rebutted absent specific medical testimony on causation. The testimony must also preclude employment as a proximate cause. The law is clear that there may be more than one proximate cause of an occupational disease condition.

It is insufficient as a matter of law that there are other possible explanations for firefighter McKeown's infectious "heart problems." The Department is unable to establish when the exposure occurred. The Department is unable to establish where the exposure occurred. The Department is unable to establish how the exposure occurred. The Department has not provided any evidence, and has failed to provide a preponderance of objective medical evidence to show firefighter McKeown's infectious disease and "heart problems" are unrelated to his employment as a firefighter.

Dr. Holland acknowledged that firefighting could result in heart attack, stroke, or similar "acute" events. Dr. Holland admitted that cardiomyopathy is a disease of the heart. However, he refused to acknowledge the presumption in the statute, and instead gave his own opinion that firefighter McKeown's employment could not have caused his condition.

The legislature has made the determination that a presumption exists for firefighters for respiratory disease, heart problems, cancers, and infectious diseases. The doctor's personal feelings about presumption causation are irrelevant and prejudicial at best.

Conclusory, conjectural or speculative opinions are not admissible. ER 702; ER 703; *Miller v. Liking*, 109 Wash. App. 140, 34 P.3d 835 (2001); *Tennant v. Roys*, 44 Wash. App. 305, 722 P.2d 848 (1986). It is well-developed black letter law that in determining whether an expert's testimony is admissible, the Court should consider whether the issue is of such a nature that the expert could express an opinion as to "reasonable probability rather than conjecture or speculation." *Davidson v. Municipality of Metropolitan Seattle*, 43 Wash. App. 569 (1986), *quoting*, 5A K. Tegland, Wash. Prac. § 291 at 36; *see also* ER 702. An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show competency to testify to the matters stated therein. *Lilly v. Lynch*, 88 Wash. App. 306, 320, 945 P.2d 727 (1997).

Dr. Holland's testimony is conclusory, conjectural and speculative. Worse still, he clearly disagrees with the statute and sides with the Department in refusing to apply Washington law in favor of Appellant firefighter McKeown. This is prejudicial and could not serve any purpose

other than to confuse the trier of fact, and create an inherently flawed basis for the Department to avoid paying benefits due to Firefighter McKeown under the Washington workers' compensation system.

M. Even if the testimony of Dr. Holland is not stricken, Respondents have failed to meet their burden.

The presumptive statute applies. As a presumptive occupational disease, firefighter McKeown needed notice that he had a compensable claim. Upon receiving notice, he immediately filed a claim. Firefighter McKeown is entitled to the presumption. He has a diagnosed "heart problem" and filed a timely claim. The employer or Department then has the burden of proof; a burden they have not met. The presumption must be applied. The employer can then present their evidence. However, the evidence they have is insufficient and summary judgment should have been granted to firefighter McKeown. The Department must apply the presumption and the claim must be allowed as a matter of law.

Firefighter McKeown should have received the benefit of the statute from the time of filing a claim through the appeal process until final determination. The Department should never be allowed to deny the presumption by failing to follow the law or its own policies. The Department should never be allowed to ignore the presumption by using speculative

testimony from a doctor; attempting to substitute the doctor's opinion for legislative edict.

“Each courtroom comes equipped with a legal expert, called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.” *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997). By allowing a doctor to testify that a statute, in his opinion or interpretation, is invalid, this removes the authority from the judge to determine appropriate legal standards.

Expert testimony is admissible under ER 702 and 703 if the testimony is, among other things, helpful in deciding an issue in the case. *Tennant v. Roys*,⁴⁴ Wash. App. 305, 722 P.2d 848 (1986). However, if the expert testimony is fundamentally flawed by rejecting accepted law, it cannot be helpful, and could in fact confuse the finder of fact and create injustice, prejudice or other basis for appeal.

N. The Department does not have sufficient evidence to overcome the presumption of occupational disease, especially in light of firefighter McKeown's thousands of occupational exposures.

In *Robertson v. North Dakota Workers Comp. Bureau*, 2000 ND 167, 616 N.W.2d 844, the court found Robertson, a policeman, was entitled to the presumption his heart disease occurred in the line of duty. The Workers

Compensation Bureau presented expert testimony that stress from the workplace was not a risk factor for heart disease. ***The court held that the expert medical opinion that rejected the legislatively determined premise of the presumption was insufficient to rebut the presumption.*** See also *Swanson v. City of St. Paul*, 526 N.W.2d 366, 368 (Minn.1995). In dealing with a comparable California statute, the court in *Stephens v. Workmen's Comp Appeals Bd.*, 20 Cal. App. 3d 461, 467 (1971) determined that an ***employer could not "repeal" the legislation and wipe out the statutory presumption by "seeking out a doctor whose beliefs preclude its possible application."*** This is what the Department has done in the claim at issue by hiring Dr. Holland and having him testify to his beliefs that preclude application of the presumptive statute in firefighter McKeown's case.

The effect of the presumption in RCW 51.32.185 would be defeated if it could be rebutted by expert medical opinion testimony that denies the validity of the legislatively mandated finding that work as a firefighter causes "heart problems." RCW 51.32.185 constitutes a legislative determination that there is a correlation between employment as a firefighter, and "infectious diseases" and "heart problems." The statute creates a presumption of compensability for a firefighter who suffers an "infectious disease" and/or "heart problem." Given the clear legislative intent of RCW

51.32.185, employers should not be allowed to circumvent the statute by the simple task of producing an expert who testifies that the legislative premise underlying the statute was wrong. Any such testimony should be stricken.

Furthermore, Dr. Holland is not qualified to give a legal opinion, or any opinions, regarding his interpretation of Washington law. Dr. Holland's testimony regarding his interpretation of RCW 51.32.185 should be stricken. Dr. Holland does not believe that occupational exposures cause "heart problems," a position in stark contrast with existing Washington presumptive disease law. His remaining testimony should be stricken in its entirety.

The Maryland Court of Appeals addressed this situation in *City of Frederick, et al. v. Donald Shankle*, 367 Md. 5 (2001). The employer in that case had only one medical witness. That medical witness testified that there was no medical basis for the presumption to be applied. ***The trial judge struck the expert opinion based on his incorrect interpretation of Maryland law. Since the testimony of their only medical witness was stricken, the employer had no evidence to rebut the statutory presumption*** of compensability. The trial court granted summary judgment for the appellant. The employer appealed and the Court of Special Appeals affirmed. The employer appealed again and the Court of Appeals affirmed.

In the case at issue, the employer/Department has only one medical

witness, Dr. Holland. Dr. Holland testified that there was no medical basis for the presumption to be applied. His testimony should be stricken based on his incorrect interpretation of Washington law. Since the testimony of the Department's only medical witness is not competent and should be stricken, the Department has no evidence to rebut the evidence of causation and has no evidence to rebut the statutory presumption of causation.

O. The Department has not overcome their burdens of production and persuasion created by RCW 51.32.185 or the evidence.

In order to overcome the presumption established in RCW 51.32.185, the Department must prove by a preponderance of the evidence that firefighter McKeown's occupational disease was acquired outside his almost 20 years of employment as a firefighter with the City of Mountlake Terrace Fire Department. The Department is unable to meet its burdens.

In *Jackson v. Workers' Compensation Appeals Bd.*, 133 Cal. App. 45h 965, 969, 35 Cal. Rptr. 3d 256 (3d Dist. 2005) the Court found that a *physician's testimony that there was nothing specific to the deceased correctional officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack was not sufficient to rebut the statutory presumption* that the correctional officer's heart problems arose out of, and in, the course of his employment.

The Court in *Meche v. City of Crowley Fire Dep't.*, 688 So 2d 697 (1997, La App 3d Cir), cert. denied, 692 So 2d 1088 (La), found that ***testimony of cardiologists that the firefighter's employment had not contributed to his condition, but that the condition had some other cause was not affirmative evidence that would sustain the employer's burden*** of proving that the firefighter's employment could not have contributed to his condition.

Many other cases agree that a presumptive statute cannot be overcome by expert testimony which simply challenges the premise of the presumption. To overcome the presumption, the Department must produce clear medical evidence of causation, outside of firefighter McKeown's employment. ***Idiopathic, or unknown causes are not sufficient.*** See the following as cited in *Frederick v. Shankle*, 136 Md. App. 339, 765 A.2d 1008 (2001); *Worden v. County of Houston*, 356 N.W.2d 693, 695-96 (Minn. 1984); *Cook v. City of Waynesboro*, 300 S.E.2d 746, 748 (Va. 1983); *Superior v. Dep't of Indus. Labor & Human Relations*, 267 N.W.2d 637, 641 (Wis. 1978); *Cunningham v. City of Manchester Fire Dep't.*, 525 A.2d 714, 718 (N.H. 1987).

Specifically in *Cunningham*, the court addressed a situation where a doctor attacked the premise of the presumption. The medical expert stated that the worker's heart disease was not related to employment, pointing to

the uncertainty in the medical community regarding the causation of heart disease. The doctor referenced studies that showed a lack of a correlation between firefighting and heart problems. The doctor opined there was no medical evidence that firefighting played any role in the development of his heart disease. The court in *Cunningham* determined that although the medical community might disagree as to the role of firefighting in the development of heart problems, the legislature had made a decision. Therefore, medical experts testimony which simply questions the wisdom of the legislature is insufficient to rebut the presumption.

P. Reasonable attorney fees and costs.

Firefighter McKeown is due reasonable attorney fees and costs pursuant to RCW 51.32.185 and RCW 51.52.130.

RCW 51.52.130 Attorney and witness fees in court appeal.

(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... and the fees of medical and other witnesses and the costs shall be payable....

(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. [bold italic emphasis added]

RCW 51.32.185(7)(a) provides that

“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.***” ***[bold italic emphasis added]***

Brand v. Dept. of Labor & Indus., 139 Wn.2d 659, 989 P.2d 1111

(1999):

This court has previously applied the lodestar method when the fee shifting statute at issue fails to indicate how the attorney fees award should be calculated. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983). A court arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 149-50, 859 P.2d 1210 (1993). The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wash.2d at 597, 675 P.2d 193. See also Rules of Professional Conduct (RPC) 1.5(a).

The amount of recovery may be a relevant consideration in determining the reasonableness of a fee award, but is not conclusive. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998); *Travis v. Washington Horse Breeders Ass'n Inc.*, 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988). “We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Mahler*,

135 Wn.2d at 433, 957 P.2d 632.

Firefighter McKeown by separate motion will request attorney fees and costs.

V. CONCLUSION

The Court should grant firefighter McKeown's appeal for the reasons set forth above. Firefighter McKeown's employer instructed him that he did not have a presumptive claim and could not file. The same employer, and the Department of Labor and Industries, then used a statute of limitations argument to claim firefighter McKeown is not entitled to his presumptive claim benefits because he did not timely file. The employer and the Department are using their own bad behavior to deny firefighter McKeown benefits. Firefighter McKeown filed a timely presumptive disease claim only one week after receiving written notice from a physician **as is required**.

The presumptive disease claim was timely filed, therefore Firefighter McKeown is entitled to the benefits of the presumption. The presumption establishes his condition is an occupational disease. The presumption stands in the place of a preponderance of medical testimony. The Respondents must present sufficient objective medical evidence to overcome the preponderance provided by RCW 51.32.185. It takes more than a single doctor's speculation to overcome the equivalent of a preponderance of objective medical

testimony. The Respondents have provided nothing but a single doctor's speculation, and have fallen far short of rebutting the strong statutory presumption mandated by the legislature in favor of Washington firefighters.

The bad behavior and misrepresentation by the employer and the Department should not be used as a basis to deny a claim. This bad behavior should not be supported or rewarded by the courts. The ongoing refusal of the Department and Board to apply the presumption should not be tolerated.

Firefighter McKeown respectfully requests that the Court of Appeals reverse all Board decisions and orders, all Superior Court decisions and orders, and the Superior Court's order denying firefighter McKeown's Motion for Summary Judgment and granting the Department's Cross Motion for Partial Summary Judgment. These decisions are contradicted by the purpose of the Industrial Insurance Act, and the plain language and legislative intent of RCW 51.32.185. Furthermore, basing a claim denial on a statute of limitations argument when the employer instructed the injured worker not to file a claim must not be tolerated. Finally, the presumption, which was improperly denied to firefighter McKeown, should be applied, resulting in all available workers' compensation benefits being granted to firefighter McKeown from the time of injury through this appeal. Reasonable attorney fees and costs from the time of the application for benefits to the present

should be awarded pursuant to RCW 51.32.185(7).

DATED: August 12, 2011

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

PATRICK E. MCKEOWN,

Appellant,

v.

CITY OF MOUNTLAKE TERRACE AND WASHINGTON STATE
LABOR & INDUSTRIES,

Respondents.

DECLARATION OF SERVICE

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STATE OF WASHINGTON
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DECLARATION OF SERVICE

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

DOCUMENTS: 1. APPELLANT’S OPENING BRIEF; and
 2. DECLARATION OF SERVICE.

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DATED this 12th day of August, 2011, at Lacey, Washington.



Connie G. Wall, Paralegal