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NO. 66974-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PATRICK E. MCKEOWN,

Appellant,

v.

CIYT OF MOUNTLAKE TERRACE AND WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a workers' compensation occupational disease case governed by the Industrial Insurance Act. Some firefighters with occupational disease claims enjoy the benefit of a statutory rebuttable evidentiary presumption found in RCW 51.32.185. If such a claimant sustains a specific class of disease, that disease is presumed to be caused by the occupational exposure. The burden then shifts to the firefighter's employer and the Department of Labor and Industries (Department) to prove that the disease condition was not caused by a work exposure. Under the plain language of RCW 51.32.185 this rebuttable evidentiary presumption, however, attaches to a firefighter's occupational disease claim for only up to five years from the date of last employment as a firefighter.

Patrick McKeown last worked as firefighter on July 16, 2000 but remained on the City of Mountlake Terrace payroll until January 12, 2001. He applied for workers' compensation benefits on February 12, 2008, claiming that he had a heart condition as the result of an occupational exposure to a respiratory virus while he was a firefighter. The trial court correctly decided that the presumption did not apply to his claim as it was not filed within five years, whether Mr. McKeown's date of last employment was July 16, 2000 or January 12, 2001. The trial court also correctly decided

that RCW 51.28.055, the statute of limitations for occupational disease claims, did not extend the time period in RCW 51.32.185.

II. STATEMENT OF THE ISSUES¹

1. More than seven years after he retired from firefighting Mr. McKeown applied for workers' compensation benefits claiming that he had a heart condition as the result of an occupational exposure as a firefighter. Does the RCW 51.32.185 evidentiary presumption, which only attaches to a firefighter's claim for up to five years from the date of last employment as a firefighter, apply in Mr. McKeown's claim when it was filed more than seven years after his last employment as a firefighter?²
2. Mr. McKeown challenged the admissibility of the Department's expert witness testimony at the trial court on two grounds: 1) that the RCW 51.32.185 evidentiary presumption bars testimony rebutting the presumption, based on foreign cases where the rebuttable evidentiary presumption did apply; and 2) that the expert's opinion was speculative, conjectural, and conclusory. Mr. McKeown did not, however, challenge the admissibility of this testimony in his petition for review at the Board of Industrial Insurance Appeals (Board) as required by RCW 51.52.104. Did the trial court correctly decide that this testimony was properly admitted because Mr. McKeown waived the issue of the legal sufficiency of this testimony when he failed to raise it in his petition for review; and 2) the foreign cases cited all arise in the context of occupational disease claims where the rebuttable evidentiary presumption did apply and the rebuttable evidentiary presumption does not apply to Mr. McKeown's claim?
3. Mr. McKeown assigns error to the *Board's* determination that he did not have an occupational disease as defined by RCW 51.08.140, "such disease or infection that arises naturally and proximately out of distinctive conditions of employment." The trial court specifically concluded that conflicting expert witness

¹ Mr. McKeown has not stated any "issues pertaining to the assignments or error" (RAP 10.3(a)(4)). He has also assigned some errors to the Board's, not the superior court's decision, which is addressed in Respondent's Brief Part VI. D.

² Three of Mr. McKeown's assignments of error relate to this issue.

testimony raised a factual dispute and declined to rule on this issue. The issue of whether Mr. McKeown has an occupational disease will be decided at the trial court upon completion of this appeal.³ Did Mr. McKeown prematurely raise the occupational disease issue when the trial court decided a material issue of fact existed on the issue?

4. Mr. McKeown also assigns error to *Board* rulings on matters which he did not raise in the trial court, which were not ruled on by the trial court, or on which he presents no argument: 1) that Mr. McKeown failed to file a claim for industrial injury within the RCW 51.28.050 one-year limitation for injury claims; and 2) that the Board erred in granting the Department's CR 26(c) motion for a protective order. Should the Court deny review of these issues per RAP 2.5(a) which states that arguments or theories not presented to the trial court will generally not be considered on appeal, and because they were not ruled on by the trial court as required by RAP 9.12?

III. COUNTERSTATEMENT OF THE CASE

A. Mr. McKeown Did Not Apply For Benefits within Five Years of His Employment Ending

Mr. McKeown is a retired City of Mountlake Terrace firefighter. He stopped working in July, 2000, but remained on the payroll until January, 2001. BR 25, 157-58; BR McKeown 86.⁴ More than seven years later, on February 12, 2008, Mr. McKeown applied for workers' compensation

³ Mr. McKeown appeals from an order that did not completely decide the case. CP at 8. The Department agrees that the Court should take discretionary review on the issue of the applicability of the RCW 51.32.185 rebuttable evidentiary presumption in this case, under RAP 2.3(b)(4), because the trial court order on that issue involves "a controlling question of law so that immediate review may materially advance the ultimate termination of the litigation." See also *Johnson v. Rothstein*, 52 Wn. App. 303, 305 n. 4, 759 P.2d 471 (1988).

⁴ Documents in the Certified Appeal Board Record (BR) are not separately numbered in the Clerk's Papers (CP). The Certified Appeal Board Record is cited as BR. Witness testimony is cited as BR followed by the witness name. The Department will refer to the Brief of Appellant as AB.

benefits. BR 36. Mr. McKeown claimed that he had a heart condition, cardiomyopathy, as the result of an occupational infectious disease (respiratory virus) exposure as a firefighter.⁵ BR McKeown 75-76.

The Department rejected Mr. McKeown's claim. BR 40.⁶ The Department order also determined that RCW 51.32.185 did not apply to Mr. McKeown's claim for occupational disease benefits. BR 40. Mr. McKeown appealed the Department's September 2, 2008 order to the Board. BR 44-58.

At the Board the Department moved to exclude, as time barred, application of the RCW 51.32.185 rebuttable evidentiary presumption from the Board's consideration of Mr. McKeown's occupational disease claim. The Board granted the Department's motion. BR 387-90. Mr. McKeown's

⁵ Mr. McKeown's condition is variously referred to as cardiomyopathy, myocarditis, or cardiac myositis. Cardiac myositis or myocarditis is inflammation of the heart muscle which in turn leads to an enlargement of the heart – cardiomyopathy. BR Holland 165.

⁶ In his Statement of Facts, Mr. McKeown asserts that the Department's decision-making violated some apparently dispositive standard when it "classified [his] condition as an 'injury'" (AB 10), and "denied the claim with no supporting evidence" (AB 12) so he was "denied the benefit" of the burden-shifting provisions of RCW 51.32.185. AB 12. The Department determined that the RCW 51.32.185 rebuttable evidentiary presumption did not apply but investigated the claim that a work exposure to a respiratory virus caused Mr. McKeown's cardiomyopathy. BR Devries 68-78. Exercising its adjudicative authority, the Department found insufficient evidence of such an exposure. BR Devries, 33, 46, 68-69. Any testimony regarding the Department's internal decision-making process, however, is irrelevant on the question of whether the order is correct. *United States. v. Morgan*, 313 U.S. 409, 421-422, 85 L.Ed. 1429, 61 S.Ct. 999 (1941); *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963). The Board's review of Department orders is de novo. RCW 51.52.100. The Department's deliberative process has no bearing on the Board's adjudication of an appeal from a Department order and has no bearing here. *McDonald v. Dept. of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001).

appeal then went forward to hearing on the question of whether his cardiomyopathy was an occupational disease, without the benefit of the rebuttable evidentiary presumption. It has always been undisputed that Mr. McKeown's occupational disease claim was timely under RCW 51.28.055.

B. Medical Testimony Is In Dispute Regarding Whether Mr. McKeown Has an Occupational Disease

At hearing Mr. McKeown and lay witnesses testified. The substance of their testimony is adequately summarized in the proposed decision and order. BR 25-35. None of this testimony, however, whether summarized in the proposed decision and order, or in the Appellant's brief (AB 3-8), is relevant to the question of whether Mr. McKeown is time barred, as a matter of law, from eligibility for the benefit of the RCW 51.32.185 rebuttable evidentiary presumption.

Two expert medical witnesses were called to testify on the issue of causation. Mr. McKeown presented the testimony of Neil W. Siecke, M.D. The Department presented the testimony of John P. Holland, M.D.⁷

Dr. Siecke first saw Mr. McKeown in 2006, but the alleged viral infection occurred in January, 2000, according to history given by Mr. McKeown to a Dr. Crohn in October, 2000. In that history Mr. McKeown

⁷ This expert witness testimony is also not relevant to the question of whether Mr. McKeown is time barred from eligibility for RCW 51.32.185. It is included solely because Mr. McKeown assigns error to the trial court's determination that Dr. Holland's testimony should not be stricken. AB 3.

said he had been on vacation in Las Vegas after which he began having breathing problems. BR Siecke 9-12, 40. Nor did Dr. Crohn's note make any mention of Mr. McKeown's work. BR Siecke 44. There was no testing done in 2000 that showed that Mr. McKeown in fact contracted a virus. BR Siecke 24; BR Holland 147-48. Dr. Siecke knew of no records from 2000. BR Siecke 40. According to Dr. Siecke there are close to 100 viruses that can cause a respiratory illness, all of which can be contracted anywhere there is someone with a virus. BR Siecke 27. Dr. Siecke provided a list of 21 viruses that can cause myocarditis, most of which are airborne viruses. BR Siecke 33-34.

Dr. Siecke also testified that there are many possible causes of the kind of cardiomyopathy Mr. McKeown had, diabetes being one, and Mr. McKeown did develop diabetes after the summer of 2000. BR Holland 150; BR Siecke 31-32. Often physicians do not know what causes it. Dr. Siecke testified "[I]n most cases the cause cannot be established with [sic] high degree of certainty." BR Siecke 32-33. It can even be inherited, and Mr. McKeown's mother had congestive heart failure. BR Siecke 33, 39; BR Holland 145-46. Dr. Siecke agreed that his records make no mention of Mr. McKeown having viral cardiomyopathy from the first time he saw him in October 2006, through January, 2008. BR Siecke 34-36. He refers to Mr. McKeown's condition as "idiopathic dilated cardiomyopathy"

meaning “we can’t definitively identify the trigger point.” BR Siecke 36. Dr Siecke acknowledged “[we] can rarely identify the source of the person’s illness.” BR Siecke 41.

On direct examination Dr. Siecke was asked: “On the basis of reasonable medical probability, do you have an opinion as to whether Pat McKeown’s heart problem was an occupational disease?” BR Siecke 11. Dr. Siecke responded that based on Mr. McKeown’s history “that would be consistent with the natural history of a viral cardiomyopathy” and that based on an exposure to smoke “you would expect firefighters in general to be more susceptible to pneumonia-type illnesses.” BR Siecke 12, 17. But Dr. Siecke also testified: “From what I’ve seen, no, I can’t establish that [Mr. McKeown] was exposed to - - received his virus from a certain person or a certain location.” BR Siecke 28-29. Nor could Dr. Siecke say whether transmission of any such virus was airborne or through contact with bodily fluids or stool. BR Siecke 29.

Dr. Holland used a nationally-recognized five-step National Institute of Safety and Health methodology for determining whether Mr. McKeown’s cardiomyopathy was, on a more probable than not basis, related to his work as a firefighter. BR Holland 142-43.

First, Dr. Holland reviewed Mr. McKeown’s medical records dating from before he sought treatment for the condition at issue here, in

the summer of 2000, to the present. BR Holland 140. He reviewed Mr. McKeown's medical records from his primary care provider, Dr. Zend, and the cardiology records from Drs. Smith, Siecke and Crohn, as well as Stevens Hospital records and diagnostic test results including heart tests, and records from internist Dr. Runson. BR Holland 140-41. Dr. Holland reviewed lab tests done in the summer of 2000, none of which established the presence of an infection. BR Holland 148. Before the summer of 2000 Mr. McKeown's primary care provider records documented treatment primarily for chronic musculoskeletal back pain, with pain medication, for a number of years. BR Holland 150. Mr. McKeown did develop diabetes after the summer of 2000. BR Holland 150.

As the second step in determining work-relatedness Dr. Holland looked for "epidemiological evidence, or scientific evidence that links alleged exposure and disease." BR Holland 152. Dr. Holland did a literature search through the National Library of Medicine database for 1) causes of cardiomyopathy, and 2) diseases, particularly infectious diseases, known to be related to firefighters and emergency medical personnel. BR Holland 152, 157. The studies that met these criteria showed that cardiomyopathy has multiple etiologies or causes. BR Holland 162. It is sometimes caused by "immunologic mechanisms that can be induced by viral infection or can occur spontaneously, so not by

viral infection . . . there can be a genetic component to autoimmune cardiomyopathy . . . genetic markers and familial predisposition.” BR Holland 159. It can also be caused by bacterial and parasitic infectious agents, medications, systemic diseases such as colitis or lupus, i.e. autoimmune-type diseases most of which have no known environmental trigger, hypersensitivity to some medications, and there may be no known etiology. BR Holland 160-62.

Studies relating to occupation risks for firefighter and emergency services personnel showed an increased risk only for infectious hepatitis – as a blood-borne pathogen for paramedics. BR Holland 163-64. Dr. Holland could find no studies related to an increased risk of other infectious disease exposures among firefighters in general, even respiratory disease or common influenza. BR Holland 164. Nor did he find any studies showing an increased risk of cardiomyopathy in firefighters or emergency services personnel. BR Holland 164.

For the third step is determining work-relatedness Dr. Holland looked at the individual’s specific exposures. BR Holland 165. This involves asking whether there is evidence of a specific exposure incident, or a reliable estimate of types of exposures implicit in the job, and the magnitude, frequency, duration, and repetitiveness of any such exposure to such agents. BR Holland 165. Based on what is known about Mr.

McKeown, Dr. Holland testified that the only epidemiological evidence linking exposure to disease is evidence of increased risk of hepatitis which can cause myocarditis. BR Holland 166. Mr. McKeown was apparently tested for a suspected hepatitis exposure in 1999, but the test results were negative, based on the medical records, there was no evidence that he developed hepatitis. BR Holland 151-52, 190-95. Nor did Dr. Holland's review of medical records, including Mr. McKeown's prior workers' compensation claims, reveal any evidence of toxic exposures. BR Holland 168-69, 194; BR Holland (12/7/09) 28.⁸

The fourth step required Dr. Holland to determine whether there is an explanation, other than the claimed exposure, for the cause of Mr. McKeown's cardiomyopathy. Both Drs. Siecke and Holland identified the likelihood of exposure to a virus anywhere one may encounter other people – that there are exposures to viruses other than the claimed viral exposure at work. BR Siecke 27; BR Holland 170-71.

The fifth and last step required Dr. Holland to consider the opinions of treating physicians and the bases for those opinions. BR Holland 172. But since there was no documentation of a respiratory infection in January, 2000, Dr. Holland testified that any opinion that Mr. McKeown had a viral infection which caused his cardiomyopathy

⁸ Dr. Holland first testified on 10/28/09 BR Holland 133-231. His testimony resumed on 12/07/09 BR Holland (12/7/09) 3-43.

connected to his work duties would have to be speculative. BR Holland 173.

Using the five-step method then, Dr. Holland determined that one could only diagnose cardiomyopathy of unknown origin and could not establish work-relatedness because:

- 1) There is no documentation of a viral infection;
- 2) There are multiple other causes;
- 3) There are no studies showing that firefighters or emergency services personnel are at increased risk for any infectious disease other than hepatitis;
- 4) Exposures to viruses take place in both work and non-work settings; and
- 5) There is no evidence of a work exposure.

BR Holland 174-75.

Mr. McKeown asserts that Dr. Holland “refused to acknowledge the statutory presumption” that “firefighters are at [sic] increased danger to heart and lung conditions, and infectious disease.” AB 9. First, the Board had previously ruled that the statutory presumption was not applicable in Mr. McKeown’s claim. BR 387-90. When Mr. McKeown’s counsel attempted to cross-examine Dr. Holland regarding the evidentiary presumption, the Department’s objections to such questions were sustained. BR Holland 223-24; BR Holland (12/7/09) 9-12. Dr. Holland’s testimony at 167, that “there isn’t any evidence of an exposure . . . that is unique to firefighters” is not a rejection of any legislative determination.

AB 9. Dr. Holland was explaining the third step in his evaluation: are there studies showing that firefighters or emergency services personnel are at increased risk for any infectious disease? Dr. Holland responded:

So the one virus that we know does have an increased exposure rate, or increased infection rate in paramedics or EMS workers, he does not have evidence of, that's Hepatitis C.

So my conclusion is there isn't evidence of an exposure that . . . is unique to firefighters or [sic] sufficiently increased prevalence in firefighters.

BR Holland 165-67.

C. The Board and Superior Court Appeals

An industrial appeals judge issued a proposed decision and order affirming the Department's rejection of Mr. McKeown's claim. BR 23-38. Mr. McKeown petitioned for review. BR 3-16. Mr. McKeown did not, however, object to the propriety of Dr. Holland's opinion testimony in his petition for review, or at any time during Dr. Holland's testimony. BR 3-26. Mr. McKeown also did not petition for review of the determination that he did not timely file an industrial injury claim. BR 3-16. The Board denied review, adopting the proposed decision and order as the Board's decision and order. BR 2.

Mr. McKeown appealed to superior court. There he filed a motion for summary judgment asking the court to find that the RCW 51.32.185 rebuttable evidentiary presumption did apply to his occupational disease

claim, and that Dr. Holland's testimony was insufficient to rebut the presumption and should be stricken. CP at 122. The Department brought a cross motion for partial summary judgment. CP at 40. The Department asked the trial court to affirm the Board's decision that Mr. McKeown was time barred, as a matter of law, from eligibility for the RCW 51.32.185 rebuttable evidentiary presumption. The Department's motion did not seek to terminate review, in the trial court, of the Board's finding that Mr. McKeown's cardiomyopathy did not arise naturally and proximately out his employment as a firefighter, i.e., was not an occupational disease. The trial court denied Mr. McKeown's motion and granted the Department's motion. This appeal followed.

IV. SUMMARY OF ARGUMENT

The rebuttable evidentiary presumption of RCW 51.32.185 does not apply to Mr. McKeown's occupational disease claim. This evidentiary presumption only attaches to a firefighter's claim for up to five years from the date of last employment as a firefighter. Mr. McKeown's claim was filed more than seven years after he left employment as a firefighter with the City of Mountlake Terrace. As a matter of law, the RCW 51.32.185 evidentiary presumption does not apply to him. Nor, by the plain language of RCW 51.32.185, does the statute of limitations for filing

occupational disease claims, RCW 51.28.055, extend the time RCW 51.32.185 time limits.

Mr. McKeown's challenge to the admissibility of Dr. Holland's expert witness testimony fails on two grounds. The issue was waived when he failed to raise it in his petition for review at the Board, as required by RCW 51.52.104. (Nor did he object to it at hearing.) Dr. Holland's testimony was not conclusory. It was based on his opinion, after reviewing Mr. McKeown's medical records and scientific literature, that there was no evidence of an occupational exposure. To the extent that Mr. McKeown's challenge to Dr. Holland's testimony is predicated on the applicability of the RCW 51.32.185 rebuttable evidentiary presumption to his claim it also fails because the presumption does not apply.

Mr. McKeown's assignments of error to Board findings, 1) that he failed to file a claim for industrial injury within the RCW 51.28.050 one-year limitation for injury claims, and 2) error in granting the Department's CR 26(c) motion for a protective order, were likewise not preserved for appeal here. He waived them by failing to raise them in his petition for review at the Board, and in his motion for summary judgment in the superior court. The Board's determination that Mr. McKeown did not have an occupational disease is not ripe for review here because the trial

court specifically declined to rule on that issue, as a matter of law, finding that there were material disputed issues of fact still to be heard.

V. STANDARD OF REVIEW

On review of an order granting or denying summary judgment, the appellate court's inquiry is the same as the trial court's. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The appellate court will only consider issues and evidence called to the attention of the trial court. *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 801, n. 5, 65 P.3d 16 (2003), RAP 9.12. This case involves the application of statutes to facts that are undisputed. That decision is reviewed de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001).

Mr. McKeown has assigned error to Board determinations. AB 2-3. However, in an industrial insurance case, it is the decision of the trial court that the appellate court reviews, not the Board decision. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The trial court reviews the Board decision de novo. RCW 51.52.115. The Court of Appeals in turn reviews the trial court decision. *Rogers*, 151 Wn. App. at 180.

VI. ARGUMENT

A. **The RCW 51.32.185 Rebuttable Evidentiary Presumption Does Not Apply In Mr. McKeown's Claim**

Mr. McKeown argues that RCW 51.32.185 only applies after the physician notice specified in RCW 51.28.055 occurs. AB 22. Then the rebuttable evidentiary presumption would apply for five years and only be barred if the firefighter did not file a claim within five years. AB 22-23.

RCW 51.32.185 clearly and unambiguously limits application of its burden-shifting provisions based on a firefighter's date of last employment without any reference to RCW 51.28.055. The trial court correctly determined that Mr. McKeown is time-barred from eligibility for the rebuttable evidentiary presumption in his occupational disease claim.

1. **RCW 51.32.185 Provides an Evidentiary Presumption That Applies Up To Five Years after Employment Is Terminated**

RCW 51.32.185 contains a burden shifting provision for fire fighters with occupational disease claims that is limited in application. It only applies for up to five years after employment as a firefighter comes to an end. Under RCW 51.32.185, if a firefighter sustains a specific class of disease, that disease is presumed to be caused by a work exposure. The burden then shifts to the firefighter's employer and the Department to prove that the disease condition was not caused by a work exposure. The statute provides:

In the case of firefighters . . . , there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence⁹

RCW 51.32.185(1).

This rebuttable evidentiary presumption, however, attaches to a firefighter's occupational disease claim for only up to five years from the last date of employment as a firefighter:

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.

RCW 51.28.185(2).

When interpreting a statute, the court's goal is to effectuate the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is plain, the court gives effect to that plain meaning as the expression of the legislature's intent. *Id.* Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. *Id.* Per

⁹ See Appendix A for full text of RCW 51.32.185.

Bostain v. Food Express, Inc., 159 Wn.2d 700, 708-09,153 P.3d 846

(2007):

If, however, the statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and we resolve the ambiguity by resort to other indicia of legislative intent, including legislative history, and, if necessary, we then apply principles of statutory construction to resolve any remaining ambiguity.

Here the language of RCW 51.32.185 is plain that a firefighter occupational disease claimant has up to five years to use the rebuttable evidentiary presumption. The statute specifically provides an operational time period for the presumption based on three calendar months for each year of requisite service up to five years only. The presumptions “may not extend more than sixty months following the last date of employment.” RCW 51.32.185(2). This careful formula, linked to months of service and the use of the term “last date of employment,” shows that the legislature intended its application to be strictly time-limited. The subsection two language could not be more clear. No statutory construction is warranted. Moreover, Mr. McKeown’s interpretation would render it meaningless.

2. RCW 51.28.055 Does Not Extend the RCW 51.32.185 Time Period

Mr. McKeown argues that RCW 51.28.055(1) extends the time period in RCW 51.32.185. AB 21-22. RCW 51.28.055(1) provides the

statute of limitations for occupational disease claims, setting it for two years after a physician provides written notice of the disease:

[C]laims 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

Every occupational disease claimant is entitled to the RCW 51.28.055 two-year notice/discovery rule. Mr. McKeown's occupational disease claim is indisputably timely under it. It does not, however, extend the time limits in RCW 51.32.185(2) as Mr. McKeown contends.

The legislature enacted the highly specific, burden-shifting evidentiary scheme for occupational disease claims filed by firefighters in 1987.¹⁰ Laws 1987, ch. 515, § 1. The five-year time limit for application of the rebuttable evidentiary presumption was contained in subsection 2 of the original 1987 enactment. Laws of 1987, ch. 515 § 2. Nothing in this statute remotely suggests that the time limit for this industry-specific evidentiary scheme only begins to run once a firefighter is "fully advised that a viable claim exists." AB 24. Similarly nothing in the language of RCW 51.28.055 suggests that it was intended to extend the time limits in RCW 51.32.185.

¹⁰ It was not "created in the aftermath of 9/11" as Mr. McKeown asserts. AB 26.

Mr. McKeown argues that RCW 51.32.185 is “extra” protection, “stacked on top” and “additional” to RCW 51.28.055. AB 21, 22, 30. It is correct that firefighters receive an additional benefit, not available to non-firefighters. However, this benefit is subject to the plain terms of the statute, which limit the time that it applies.

Throughout his appellant’s brief Mr. McKeown refers to a “presumptive occupational disease claim.” *E.g.* AB 1, 22, 23, 26. He seems to assert that RCW 51.32.185 created an occupational disease claim somehow different than that defined in RCW 51.08.140. AB 21. Mr. McKeown impermissibly, and without citation to any authority, conflates the RCW 51.28.055 two-year notice/discovery rule for occupational disease claim filing, with the five-year time limit for application of the RCW 51.32.185 rebuttable evidentiary presumption, in an attempt to create a non-existent “presumptive occupational disease claim” in which a retired firefighter has up to five years to file a claim for occupational disease once he or she is advised by a physician that they have an occupational disease, and to which the rebuttable evidentiary presumption automatically attaches.¹¹ AB 22-23. A discovery rule postpones the

¹¹ Based on this flawed concept of a “presumptive occupational disease claim” Mr. McKeown also misrepresents the Department’s argument when he states that the Department’s analysis would strip the (non-existent) notice provision out of RCW 51.32.185 and make the statute of limitations for filing the (non-existent) “presumptive occupational disease claim” a strict five-year one. AB 23.

accrual of a cause of action. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 79-80, 847 P.2d 440 (1993). The Department can find no authority for the proposition that a discovery rule can postpone the effect of a statutorily time-limited evidentiary presumption and Mr. McKeown cites to none.

RCW 51.32.185 did not create a new cause of action. As the ESSB 5801 Fact sheet makes clear:

[The] [b]ill does nothing more than shift the burden of proof for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for firefighters to L&I or self-insured employers.

See Appendix B.¹²

Mr. McKeown asserts that the Department is attempting to preclude him “from the same rights as other have when they file an occupational disease claim,” claiming firefighters only have five years to file an occupational disease claim. AB 21-23. He is incorrect. Mr. McKeown is not precluded from any of the rights of all occupational disease claimants under the RCW 51.28.055 two-year notice/discovery

¹² Although not relevant where, as here, a statute is unambiguous, legislative history also clearly acknowledges the creation of a time-limited rebuttable evidentiary presumption, not a new occupational disease claim. Thus the ESSB 5801 Floor Synopsis states: “*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.” The House Bill Report, the Senate Bill Report, and the Final Legislative Report all echo the statutory language: “*The presumption . . .* may not extend more than sixty months following the last date of employment.” See Appendix C.

rule. He was able to file his claim nearly eight years after his employment ended. The legislature chose, however, to place a five year time limit on the application RCW 51.32.185 to firefighter occupational disease claims. This may indeed prevent some firefighters who do not file a claim for nearly eight years from getting the benefit of the presumption. But it is within the legislature's purview to limit the application of statutory rights.

3. The Legislature Has Had Many Opportunities to Extend the Time Limits in RCW 51.32.185 or To Apply RCW 51.28.055 to It and Has Not Done So

The RCW 51.32.185(2) time limits have remained unchanged through legislative amendments in 2002 and 2007. *See* Laws of 2002, ch 337 § 2; Laws of 2007, ch. 490 § 2. Moreover, in enacting RCW 51.32.185, the Legislature expressly referenced the RCW 51.08.140 occupational disease definition, without incorporating or even mentioning the RCW 51.28.055 occupational disease notice/discovery rule. The Legislature's three-time omission of any reference to the long-standing RCW 51.28.055 notice requirement/discovery rule in the 1987 enactment of RCW 51.32.185, and in its subsequent 2002 and 2007 amendments, thus implies its exclusion. Laws of 2002, ch. 337, § 2; Laws of 2007, ch. 490, § 2; *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (under the doctrine of *unius est exclusio alterius*, to express one

thing in a statute implies the exclusion of the other, omissions are deemed to be exclusions).

The Legislature is also presumed to be familiar with its own prior legislation relating to the subject of the legislation. *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 27, 380 P.2d 730 (1963). Not only has the Legislature never made any reference to RCW 51.28.055 in RCW 51.32.185, the Legislature has also made no mention of RCW 51.32.185 in either of the two amendments to RCW 51.28.055, made subsequent to the enactment of RCW 51.32.185. Laws of 2003, 2d Spec. Sess, ch. 2 § 1; Laws of 2004, ch. 65, § 7.¹³ RCW 51.28.055 existed 36 years before the firefighter rebuttable evidentiary presumption statute appeared in 1987. And the change in the RCW 51.28.055 notice/discovery rule from one year to two was made only three years before the enactment of RCW 51.32.185. Laws of 1984, ch. 159, § 2. The Legislature could have written a provision similar to the RCW 51.28.055 discovery rule into RCW 51.32.185 but did not. Despite turning its attention specifically to occupational disease claims filed by firefighters in the 1987, 2002 and 2007 sessions, the Legislature stayed with its strict years-of-employment-

¹³ The 2003 amendment provided a statute of limitations period for occupational hearing loss, the 2004 amendment added a reference to nurse practitioners.

based time limits for application of the rebuttable evidentiary presumption, not a notice/discovery-based time limit.¹⁴

Mr. McKeown argues that the legislature did not have to mention RCW 51.28.055 in RCW 51.32.185 or vice versa. AB 31. The legislature, however, would have to manifest its intent in the language of these statutes that they cross reference each other and nothing in either statute does this.

The legislature's policy choices benefit the system in general. The three-month to 60-month sliding window for application of the rebuttable evidentiary presumption in a firefighter's occupational disease claim acknowledges that firefighters may have work place exposures to hazardous chemicals and infectious diseases that do not immediately manifest in some specific disease conditions. But the legislature unambiguously linked the time limit for applicability to the firefighter's length of employment only, not an individual's discovery, or a physician's notice. The clear legislative intent is to provide a time limit for use of the presumption. That legislative decision must be upheld here.

¹⁴ The 1987 version of RCW 51.32.185 limited the occupational disease presumption to respiratory diseases. The 2002 amendments expanded the occupational disease presumption to include heart problems experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, some types of cancer and infectious diseases. The 2007 amendments expanded the types of cancers covered, further defined "firefighting activities" and added a fee-shifting section for firefighters successfully appealing denial of a workers' compensation claim.

4. The Doctrine of Liberal Construction Does Not Apply As the Statute Is Not Ambiguous

Mr. McKeown appears to argue that RCW 51.28.055 impliedly delays the five-year time limit for application of RCW 51.32.185 under the doctrine of liberal construction. AB 33. It is “fundamental” that the doctrine of liberal construction does not apply when the intent of the legislature is clear from the plain reading of the statute. *Elliott v. Dep’t of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009) (citing *Johnson v. Dep’t of Labor and Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949)); *Lowry v. Dep’t of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (declining to apply the liberal construction doctrine in a workers’ compensation case where the statute is unambiguous, “the so-called construction would in fact be legislation”).

Mr. McKeown cites to *Gallo v. Dep’t of Labor & Indus.*, 119 Wn. App. 49, 81 P.3d 869 (2003) *aff’d* 155 Wn.2d 470, 120 P.3d 564 (2005) and *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 40 P.3d 1221 (2002), for the proposition that where reasonable minds can differ about the meaning of a statute “doubts should be resolved in favor of the worker.” AB 18-19. Only *Gallo*, however, invoked the doctrine of liberal

construction, and this was in the context of a statute that the Court specifically noted was ambiguous. *Gallo*, 119 Wn. App. at 57.¹⁵

Here, the statute is not ambiguous. It requires no construction. RCW 51.32.185(2) unambiguously provides that the benefit of the rebuttable evidentiary presumption extends for a “a period of three calendar months for each year of requisite service, but may not extend more than 60 months following the last date of employment.” The only reasonable interpretation of this language is that it embodies legislative imposition of a time limit.

Courts do not read into a statute matters which are not there or modify a statute by construction. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 420-21, 832 P.2d 489 (1992). A court should not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999). Any argument that the RCW 51.28.055 notice/discovery rule tolls application of the RCW 51.32.185(2) rebuttable evidentiary presumption time limits would be nothing more than an improper request for judicial legislation, and should be rejected.

¹⁵ In *Gagnon*, the court engaged in limited statutory interpretation. *Gagnon*, 110 Wn. App. at 485-86.

Here, the time limitation on the applicability of the presumption could not be more clear. As a matter of law, the evidentiary presumption of RCW 51.32.185 does not apply to Mr. McKeown because his claim was filed nearly eight years from the date of his last employment as a firefighter. The statutory directive here is explicit and should be upheld. The trial court's determination that Mr. McKeown is time-barred from eligibility for the rebuttable evidentiary presumption in his occupational disease claim is correct and should be affirmed.

B. Neither the Common Law Tort Discovery Rule, Nor Cases from Other Jurisdictions, Apply Here To Afford Mr. McKeown the Relief He Seeks

Mr. McKeown asserts that the common law "discovery rule" applies to prevent operation of the RCW 51.32.185 rebuttable evidentiary presumption time limits. AB 25-26. He is wrong. The Industrial Insurance Act provides an exclusive remedy for injuries suffered by workers in the course of their employment. RCW 51.04.010. The Act abolishes the common law jurisdiction of the courts over causes of action arising out of such injuries. RCW 51.04.010.

Courts have declined to apply discovery rules to industrial insurance case where not specifically provided by the Industrial Insurance Act. *Elliott*, 151 Wn. App. at 447-48; *Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 391, 810 P.2d 1363 (1991). In *Elliott*, this Court

declined to apply a “time of manifestation” or a “discovery rule” to an injury claim which was not filed within one year of the injury event as required by RCW 51.28.050. *Elliott*, 151 Wn. App. at 447. Mr. Elliott saw a co-worker fall to his death. He became anxious working at heights and was fired. He began drinking heavily; even after he became sober he was depressed and suicidal. Some 14 months after the work incident he was diagnosed with post-traumatic stress disorder and applied for workers’ compensation benefits. His claim was denied as untimely. *Id.* at 444-45. On appeal this Court upheld the denial stating “[t]his court may not relax the one-year statute of limitations where the legislature has clearly expressed its intent to allow a “time of manifestation” or “discovery” rule only for occupational diseases, not for injuries.” *Id.* at 447.

In *Rector*, the claimant argued that the common law discovery rule should apply to his industrial injury. *Rector*, 61 Wn. App. at 390. This Court also rejected that argument, emphasizing that the Industrial Insurance Act’s explicit statutory directives control, not the common law. *Id.*

Mr. McKeown’s claim falls under the Industrial Insurance Act. A common law torts discovery rule is inapplicable to it.

Mr. McKeown cites to a number of cases from other jurisdictions to argue that the rebuttable evidentiary presumption applies here. AB 33-

35. None of the cases cited by Mr. McKeown dealt with time limits on the presumption's applicability. Indeed, of those foreign jurisdictions only North Dakota's statute contains a time limit for applicability. *Robertson v. No. Dakota Workers Comp. Bureau*, 616 N.W.2d 844, 847 n.1 (N.D. 2000). But that time limit was not at issue in the case. The cases cited by Mr. McKeown are simply not relevant to the statutory question at issue here.

C. The Trial Court Properly Denied Mr. McKeown's Motion to Exclude Dr. Holland's Opinion Testimony

Mr. McKeown asserts that Dr. Holland's expert witness testimony should be stricken, either because it is based on speculation and conjecture, or because it insufficiently rebuts the presumption that Mr. McKeown's "infectious 'heart problems'" were caused by a work exposure. AB 36-46. Neither assertion has any merit. The trial court correctly declined to grant Mr. McKeown's motion to exclude Dr. Holland's opinion testimony. CP 10.

1. Mr. McKeown Waived His Right To Challenge The Admissibility Of The Department's Expert Medical Opinion Testimony When He Did Not Raise The Issue In His Board Petition For Review

The trial court correctly determined that Mr. McKeown had failed to preserve his challenge to the legal sufficiency of the opinion testimony of the Department's expert medical witness, Dr. Holland, that there is not

enough evidence that a work exposure to a respiratory virus caused Mr. McKeown's cardiomyopathy, on a more probable than not basis. CP 10. Mr. McKeown did not object to this opinion testimony at hearing, or raise this objection to Dr. Holland's testimony, either on the ground that it was speculative and conjectural, or otherwise insufficient, in his petition for review. BR 3-16. Issues not raised at the Board are deemed waived and may not be heard for the first time on appeal. *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) (superior court cannot consider matters presented for the first time on appeal); *Elliot*, 151 Wn. App. at 446 (only issues of law or fact that were included in proceedings before the Board may be raised in superior court). Under RCW 51.52.104:

[A] petition for review *shall* set forth *in detail* the grounds therefore and the party . . . filing the same *shall* be deemed to have waived *all* objections or irregularities not *specifically* set forth therein.

(Emphasis added). When Mr. McKeown neglected to raise his arguments concerning Dr. Holland's testimony, either at hearing or in his petition for review of the proposed decision and order (BR 3-16), he waived his right to raise it in the trial court. RCW 51.52.104; *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 690, n.78, 175 P.3d 1117 (2008) (issue not raised before Board not proper for consideration on appeal); *Allan*, 66 Wn.

App. at 422 (party waives all objections not set forth in petition); *Rose v. Labor & Indus.*, 57 Wn. App. 751, 756, 790 P.2d 201 (1990) (same); *Upjohn v. Russell*, 33 Wn. App. 777, 782, 658 P.2d 27 (1983) (same). The Court should not consider his objections now. *Sepich*, 75 Wn.2d at 316.

2. Dr. Holland's Testimony Regarding Causation of Mr. McKeown's Cardiomyopathy Is Not Subject To The RCW 51.32.185 Rebuttable Evidentiary Presumption Nor Is It Speculative or Conjectural

Mr. McKeown challenges the admissibility of Dr. Holland's testimony on two grounds: 1) that it is speculative and conjectural, and 2) that it is not, as a matter of law, sufficient to rebut the presumption that Mr. McKeown's cardiomyopathy is an occupational disease. AB 36-40. Since the trial court properly held that Mr. McKeown waived his objections to Dr. Holland's testimony, this Court should not entertain his argument in this regard. The Department will, however, address these arguments.

The appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

Mr. McKeown's argument that Dr. Holland's testimony is legally insufficient to rebut the evidentiary presumption is grounded in cases from other jurisdictions in which an expert witness, in opining that the condition in question is not an occupational disease, appears to ignore the statutory mandate that certain diseases in firefighters are presumed to be proximately caused by exposures in the firefighter's employment. AB 41-46. Mr. McKeown's argument in this regard is without merit because all of the cases Mr. McKeown cites concern claims in which the evidentiary presumption applied. But the rebuttable evidentiary presumption does not apply to Mr. McKeown's claim. The cases are not applicable here.

Mr. McKeown's argument that the Department is not able to establish "when, where, or how" the exposure occurred is likewise grounded in the application of the rebuttable evidentiary presumption. AB 9-10, 36-38. But since Mr. McKeown is ineligible for the presumption the burden of establishing that his alleged exposure occurred in employment falls on him. Claimants always bear the burden of establishing eligibility for benefits. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181(1949) rev'd on other grounds; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987) (worker must establish that occupational disease came about as

a matter of course as a natural consequence or incident of distinctive conditions of particular employment).

Mr. McKeown's allegation that Dr. Holland "rejects" or "refused to acknowledge" the statutory presumption is both incorrect and also irrelevant, since the presumption does not apply to Mr. McKeown's claim. AB 9-10. Furthermore, Mr. McKeown mischaracterizes Dr. Holland's testimony. Dr. Holland's cited testimony merely explains that the scientific literature does not document an increased risk of exposure to infectious diseases other than Hepatitis C (BR Holland 167). The other cited testimony is merely a response to a series of questions about journal articles and heart disease in firefighters that have no relevance given the facts of this case, where a respiratory infection is alleged to have caused cardiomyopathy.¹⁶ BR Holland 228-29.

As previously stated, Mr. McKeown's eligibility for the RCW 51.32.185 evidentiary presumption expired five years after he left employment with the City of Mountlake Terrace. His assertion then, that "[s]peculation, conjecture or conclusory opinions can never rebut the statutory presumption set forth in RCW 51.32.185" has no merit. AB 36.

¹⁶ The rebuttable evidentiary presumption only applies to "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." RCW 51.32.185(1)(b).

The Department was not required to prove what caused Mr. McKeown's cardiomyopathy.

In any event, Dr. Holland's opinion that there is insufficient evidence of a work exposure, on a more probable than not basis, is not speculative, conjecture, or conclusory. BR Holland 139. His opinion is well-founded. As stated above, Dr. Holland used a nationally-recognized methodology for determining whether Mr. McKeown's cardiomyopathy was, on a more probable than not basis, related to his work as a firefighter, and concluded that there was no proof that it was caused by a work exposure to a respiratory virus. BR Holland 142-43; *see* Part III.B. There is no dispute raised here regarding the methodology used by Dr. Holland. Therefore, the sole issue is whether Dr. Holland's testimony was admissible under ER 702.¹⁷ ER 702 allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact. *Anderson v. Akzo Nobel Coatings, Inc.*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 3930205 (Wash. 2011). Dr. Holland's testimony was "specialized knowledge" that "assist[ed] the trier of fact" here. ER 702. He testified that because Mr. McKeown's medical records documented no viral infection, because there are many

¹⁷ It was not objected to on this basis, indeed there were no objections to Dr. Holland's expert opinions raised at the Board in testimony or in the petition for review. BR Holland; BR 3-16.

other causes for cardiomyopathy, because there were no studies showing that firefighters were at increased risk for infectious diseases other than hepatitis, because exposures to viruses take place wherever people congregate, and there was no evidence of an actual work exposure, there was inadequate evidence of work-relatedness. BR Holland 139, 174-75. The Industrial Insurance Act requires medical evidence of causation. *Dennis*, 109 Wn.2d at 481. Furthermore, the determination to admit expert testimony is within the discretion of the tribunal. *State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993). There is no assertion here that the industrial appeals judge abused her discretion in admitting Dr. Holland's testimony. The Court should decline to review/rule on the issue of the admissibility of Dr. Holland's testimony under ER 702.

D. Mr. McKeown Failed To Properly Preserve Other Claimed Errors for Review and the Court Should Decline Review Of Those Matters

Mr. McKeown assigns error to Board rulings on matters which he did not raise in the trial court, which were not ruled on by the trial court, or on which he presents no argument here, having to do with the RCW 51.28.050 one-year limitation for injury claims and the Board's granting of the Department's CR 26(c) motion for a protective order. He also asks for review of the question whether Mr. McKeown's cardiomyopathy arose

naturally and proximately out of distinctive conditions of his employment as a firefighter. AB 2-3. This last issue was specifically not decided by the trial court. CP 10. This Court should decline review of these issues.

1. The Court Should Decline To Review Issues Not Raised In or Ruled On By the Trial Court, or On Which No Argument Is Presented

Mr. McKeown assigns error to the Board's granting of a CR 26(c) protective order. AB 2; BR 431-32. He does not, however, offer any argument on this issue in his appellant's brief. Failure to offer argument on a claimed assignment of error waives the assignment of error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

As with his challenge to the admissibility of Dr. Holland's testimony, Mr. McKeown also neglected to seek review of this ruling in his petition for review of the proposed decision and order. For the reasons cited above in Part VI.C.1, he has waived this issue. Nor did Mr. McKeown raise the propriety of the ruling at superior court. CP 124-25, 131. Under RAP 2.5(a) and RAP 9.12, he may not raise it here. *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729, 175 P.3d 1109 (2008).

Mr. McKeown also assigns error to the Board's determination that he failed to file a claim for injury within the RCW 51.28.050 one

year statute of limitations for filing injury claims.¹⁸ AB 2. It is unclear whether he is really challenging this determination given that he admits that this is not an injury claim, but an occupational disease claim. AB 28.¹⁹

The Board concluded, as a matter of law, that Mr. McKeown did not timely file an injury claim, though the parties agreed at hearing that the claim was one for occupational disease. BR 23-24, 38. Mr. McKeown did not contest this in his petition for review, but rather stated that his occupational disease claim was “not governed by the one year injury time limit,” which is not disputed. BR 9. As with his assignment of error regarding the Board’s ruling on the motion for a protective order, this issue is not properly before this Court. RAP 2.5(a); RAP 9.12.

2. Whether Mr. McKeown’s Occupational Disease Claim Should Be Allowed Is Not Ripe For Review

Mr. McKeown mistakenly assigns error to the Board’s determination that his condition was not an occupational disease, i.e. “did

¹⁸ Mr. McKeown affirmatively stated, in his motion for summary judgment, that his claim is not one for injury. CP 137. It would have been fruitless for Mr. McKeown to have filed an injury claim. An injury claim would have to be based on an exposure event occurring in the course of employment. RCW 51.08.100. Since Mr. McKeown stopped working in July, 2000, an injury claim for a work event would have had to be filed by July, 2001. *Elliott*, 151 Wn. App. at 444. There is no way his 2008 claim could ever have been a timely injury claim.

¹⁹ He argues that the Department is trying to “force” the case into the injury category (AB 28), this is not correct. The Department’s position is that any injury claim was filed outside the statute of limitations, but that the occupational disease claim was filed within the statute of limitations. The Department believes that RCW 51.32.185 does not apply because he filed the claim more than five years after leaving his employment.

not rise naturally and proximately out of the distinctive conditions of this employment” as a firefighter with the City of Mountlake Terrace. AB 2; BR 38. The trial court did not reach this issue. The trial court specifically decided that whether Mr. McKeown sustained an occupational disease, as defined in RCW 51.08.140, is a disputed question of fact based on conflicting expert witness testimony. CP 10. The Department’s partial summary judgment motion was directed at legal issues, thus seeking to simplify the trial, but not eliminating the trial altogether. CR 56(a), (b).

Mr. McKeown can still obtain review of the Board’s finding under RCW 51.52.110 and .115, which govern superior court appeals from Board decisions. *Romo*, 92 Wn. App. at 353, 357 (entitled to jury trial to resolve factual disputes). Neither the trial court’s denial of Mr. McKeown’s summary judgment motion, nor its granting of the Department’s partial summary judgment motion, precludes further trial court review of this factual issue. An order denying summary judgment based on a trial court’s determination that there is a material, disputed fact, is not a final judgment within the meaning of RAP 2.2(a)(1). *Johnson v. Rothstein*, 52 Wn. App. 303, 305-06, 759 P.2d 471 (1988). Therefore, Mr. McKeown cannot obtain review of the trial court’s decision on this issue.

The only issues decided by the trial court here were issues of law, applicability of the RCW 51.32.185 rebuttable evidentiary presumption, and the admissibility of Dr. Holland's opinion testimony. CP 10. The further determination of these issues, will govern the presentation of the disputed factual issues at trial on the merits. RAP 2.3(b)(4). The Board's decision that Mr. McKeown's condition did not arise naturally and proximately from distinctive conditions of his employment is still pending at the trial court and should not be reviewed here.

In any event, Dr. Holland testified that there was not evidence to conclude that Mr. McKeown's condition was the result of an occupational exposure to a respiratory virus. BR Holland 174-75. Viewing this evidence in the light most favorable to the nonmoving party, this testimony supports the Board determination that there was no occupational disease and the trial court correctly denied Mr. McKeown's summary judgment motion on this basis.

E. Mr. McKeown Is Not Entitled To Attorney Fees and Costs

Per RCW 51.32.185(7) a firefighter successfully appealing a Department determination that the rebuttable evidentiary presumption does not apply may have his reasonable costs and attorney fees paid by the opposing party. Because Mr. McKeown has not prevailed in successfully

appealing the Department's determination, at either the Board or the superior court, he is not entitled to an award of fees and costs.

VII. CONCLUSION

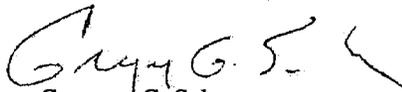
The Department asks that this Court affirm the trial court's March 9, 2011 decision.

RESPECTFULLY SUBMITTED this 13th day of October, 2011.

ROBERT M. MCKENNA
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STATE OF WASHINGTON
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ORIGINAL

Appendix A

RCW 51.32.185

Occupational diseases — Presumption of occupational disease for firefighters — Limitations — Exception — Rules.

(1) In the case of firefighters as defined in *RCW 41.26.030(4) (a), (b), and (c) who are covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. 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 firefighter who has cancer that develops or manifests itself after the firefighter has served at least ten years and who was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. The presumption within subsection (1)(c) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty, primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

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

(5) Beginning July 1, 2003, this section does not apply to a firefighter 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 firefighter 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.

[2007 c 490 § 2; 2002 c 337 § 2; 1987 c 515 § 2.]

Appendix B

ESSB 5801

FACTS

1. Bill pertains only to LEOFF II.
2. Bill is recommendation of the Joint Select Committee on Ind. Ins.
3. Distinction. LEOFF I medical/disability provisions are provided by the retirement act. LEOFF II medical/duty disability provisions are under L&I.
4. Bill does nothing more than shift the burden of proof for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for firefighters to L&I or self-insured employers.
5. Proof of duty related heart disease is now on employee. This is an impossible task. For such a challenge, if made, member must incur costs of an attorney and doctor - at a time that he/she is gravely ill and perhaps hospitalized.
6. In event of a fatal heart attack, surviving spouse/children must initiate the duty caused challenge under prohibitive costs. Failure means survivor absorbs medical and funeral expenses, and sustains loss of future income.
7. LEOFF II members receive duty related medical care from L&I or employer doctors. Accordingly, every heart/lung claim foregoes vigorous testing to validate realness.
8. LEOFF II members receive thorough physical examination prior to service acceptance. Weaknesses or tendencies thereof are noted on medical records and become a ready reference for rebut.
9. Every heart/lung disease claim is rebuttable under the bill. Should the claim not withstand scientific/medical rebut, there is no cost.
10. Logic follows that L&I with attorney and doctor resources, are ideally suited to initiate rebut rather than an ill member or survivor.
11. Bill carries special rebuttable consideration for smokers.
12. L&I administration of LEOFF II past 9½ years so efficient and abuse free that rates for firefighters were dropped by 36% and 28% for law enforcement on January 1, 1987. Percentage difference derives from police having greater employee numbers and thus working more hours with greater overall disability exposure.
13. LEOFF II employees share equally with employers of L&I medical care cost.
14. Thirty-five percent of LEOFF II (law enforcement) are employed by Seattle, Spokane and Tacoma as of one year ago. Figures should be even higher now.
15. Bill's cost. Had the bill been in effect past 9½ years, cost would be zero, for no heart/lung claims were filed.
16. Opponents claim this bill will be costly. Fact is they have no idea whatever what future costs will run.

17. Granted, there will be legitimate heart/lung claims in the future and thus the bill's purpose in shifting the presumptive burden from employee to L&I. However, that future cost should be slight based upon experience of 37 states with same or similar legislation.
18. There can be no cost until a heart/lung claim is rebutted and accepted by L&I or self-insured employer to be duty caused.
19. Heart and lung diseases fall under a distinct L&I category titled Occupational Disease. It's that definition Fire/Police employees must challenge in attempts to get a duty-related ruling when hit with heart /lung diseases. That definition follows:

RCW 51.08.140

"Occupational Disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption of this title.

Example of definition's application:

A police officer or firefighter on duty has a heart attack. Automatically, it's ruled non-duty related per application of the above stated definition, regardless of what employee had endured during shift.

If the attack is not fatal, employee is financially burdened to challenge the L&I definition and most likely on into court, if L&I medical care and monetary income is afforded. Failure to prove gets the employee nothing.

Should the on duty heart attack be fatal, survivor faces same costly challenge in seeking burial costs and some future income. Failure to prove duty-related causes gets survivor/children nothing.

Appendix C

Appropriation: _____
Revenue: _____
Fiscal Note: _____

HOUSE BILL REPORT

ESSB 5801
As Amended by the House

BY Senate Committee on Commerce & Labor (originally sponsored by Senator Warnke)

Relating to industrial insurance.

House Committee on Commerce & Labor

Majority Report: Do pass. (9)

Signed by Representatives Wang, Chair; Cole, Vice Chair; Fisch, Fisher, R. King, O'Brien, Patrick, Sayan and Walker.

Minority Report: Do not pass. (2)

Signed by Representatives Sanders and C. Smith.

House Staff: Chris Cordes (786-7117)

AS PASSED HOUSE APRIL 15, 1987

BACKGROUND:

Some studies indicate that fire fighters have a much higher incidence of respiratory and heart disease than the general population. It has been suggested that this finding may be correlated with the exposure occurring to fire fighters from extreme heat and cold, smoke, fumes, toxic substances, and stress in the course of their work. Likewise, law enforcement officers are often subject to extreme stress because of potential life-threatening situations in which their work places them.

Several states have enacted presumptions that certain illnesses suffered by fire fighters and law enforcement officers are occupational diseases for industrial insurance purposes. The Joint Select Committee on Industrial Insurance recommended that such a presumption be enacted in Washington for law enforcement officers and fire fighters.

Under the Washington industrial insurance system, a work-related heart attack may not be regarded as an industrial injury unless the worker can demonstrate that the exertion precipitating the heart attack was more than a routine activity usual to the worker's occupation. This judicial doctrine of "unusual exertion" often prevents a fire fighter or law enforcement officer from recovering benefits after a heart attack because strenuous exertion is generally considered to be usual in these occupations. The Joint Select Committee on Workers' Compensation in 1984 and

the Joint Select Committee on Industrial Insurance in 1985 recommended abrogation of the unusual exertion doctrine.

SUMMARY:

A rebuttable presumption is established that respiratory disease suffered by fire fighters is an occupational disease for industrial insurance purposes. The presumption only applies to persons who established membership in the Law Enforcement Officers and Fire Fighters' Retirement System after September 30, 1977 (LEOFF II). The presumption may be rebutted by a preponderance of controverting evidence, including use of tobacco products, weight and physical fitness, hereditary factors, and other factors. The presumption is extended to LEOFF II members 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.

For LEOFF II fire fighters and law enforcement officers, the definition of injury for the purposes of determining workers' compensation coverage in heart attack cases is to be construed without regard to whether the member's exertion was usual or unusual.

Fiscal Note: Attached.

House Committee - Testified For Original Measure in Committee: Jim Cason, Washington State Council of Fire Fighters; Dick Warbrouck, Seattle Fire Fighters; Charlie Marsh, Washington State Council of Police Officers.

House Committee - Testified Against Original Measure in Committee: Adne Benestad, Clark County; Kathleen Collins, Association of Washington Cities.

House Committee - Testimony For: Fire fighters and police officers are exposed to toxic and hazardous substances and unusual stresses during the course of their employment. These unusual working conditions result in higher mortality and disability rates compared to other occupations. The workers' compensation system should recognize these work-related hazards.

House Committee - Testimony Against: There is no conclusive proof that the hazards of public safety employees result in higher death or disability rates. These employees should be required to establish that their disability is work-related on the same basis as other employees.

SENATE BILL REPORT

SB 5801

BY Senator Warnke

Relating to industrial insurance.

Senate Committee on Commerce & Labor

Senate Hearing Date(s): March 5, 1987

Majority Report: That Substitute Senate Bill No. **5801** be substituted therefor, and the substitute bill do pass.

Signed by Senators Warnke, Chairman; Smitherman, Vice Chairman; Tanner, Vognild, West, Williams.

Senate Staff: Bill Lynch (786-7427)
March 13, 1987

AS REPORTED BY COMMITTEE ON COMMERCE & LABOR, MARCH 5, 1987

BACKGROUND:

Fire fighters have a much higher incidence of respiratory and heart disease than the general population. Fire fighters are exposed to extreme heat and cold, smoke, fumes, and toxic substances in the course of their work. Likewise, law enforcement officers are often subject to extreme stress because of potential life-threatening situations in which they are placed.

Many states have statutes which create a presumption that certain illnesses suffered by fire fighters and law enforcement officers are occupational diseases for industrial insurance purposes.

The Joint Select Committee on Industrial Insurance recommended that such a presumption be created for law enforcement officers and fire fighters.

SUMMARY:

Senate Bill **5801** was introduced by title only.

EFFECT OF PROPOSED SUBSTITUTE:

There is a rebuttable presumption that heart or respiratory disease suffered by fire fighters is occupationally related for industrial insurance purposes. There is a rebuttable presumption that heart disease suffered by law enforcement officers is occupationally related for industrial insurance purposes. The presumptions only apply to people who established membership in the Law Enforcement Officers and Fire Fighters' Retirement System after September 30, 1977 (LEOFF II) because LEOFF I members have medical benefits covered in their pension system rather than being covered by industrial insurance.

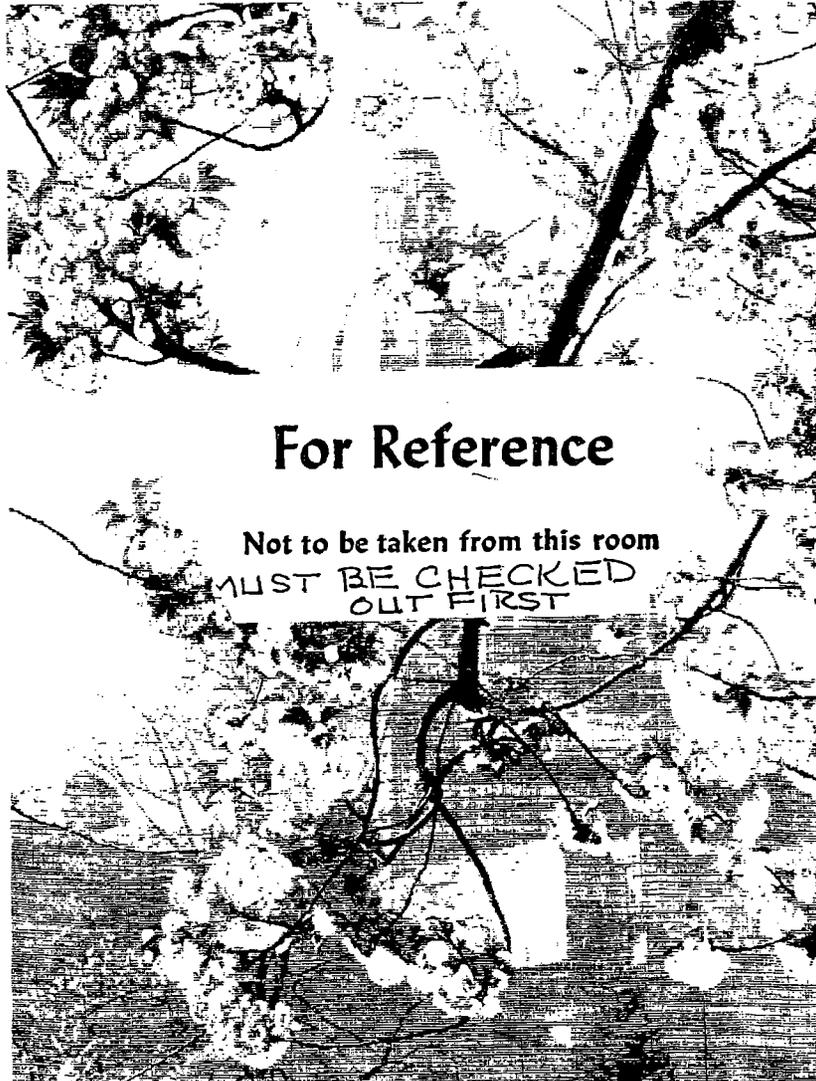
Both presumptions are extended to members following termination of service for a period of three calendar months for each year of requisite service. The presumptions may not extend more than 60 months following the last date of employment.

Fiscal Note: none requested

Senate Committee - Testified: Kathleen Collins, AWC; Jim Cason,
firefighter
SB 5801 6/15/99 []

[REDACTED]

Final Legislative Report



For Reference

Not to be taken from this room
MUST BE CHECKED
OUT FIRST

**Fiftieth Washington State Legislature
1987 Regular and Special Sessions**

House Committee on Financial Institutions & Insurance

Background: It is unlawful to engage in the business of insurance in this state without complying with Washington laws. However, it is often difficult to determine whether a particular transaction constitutes an insurance contract. Currently, vehicle warranties issued by either a manufacturer or a dealer in connection with a specific sale, for parts and workmanship, are not contracts for insurance.

Many dealers offer warranties developed and administered by third parties. So long as these third party administrators do not commingle funds they receive from one dealer with those received from another, they do not qualify as insurers. Therefore, they are not subject to the jurisdiction of the Commissioner and operate uninhibited by Washington's insurance code.

Summary: No motor vehicle service contract may be sold or offered in this state unless the provider of the service contract has a reimbursement insurance policy issued by an authorized insurer.

The service contract must contain a conspicuous statement indicating the obligations of the provider and the existence of the reimbursement policy. Information must be provided to the service contract holder explaining the means by which a claim may be filed under the reimbursement policy.

A specific cause of action under the Consumer Protection Act is established.

Votes on Final Passage:

Senate	44	1	
House	92	0	(House amended)
Senate	46	1	(Senate concurred)

Effective: July 26, 1987

SB 5780

C 268 L 87

By Senators Bottiger and Hayner

Authorizing diversified investment of campaign funds.

Senate Committee on Governmental Operations
House Committee on Constitution, Elections & Ethics

Background: Until 1977, monetary contributions to campaign funds were required to be maintained in depository accounts. In that year, the statute was amended to allow investment of funds on hand in bonds, certificates, savings accounts or other similar instruments in financial institutions. The interest on all of these is subject to federal income tax. It has been

suggested that the investment authority be expanded further, to include tax-exempt accounts.

Summary: Tax-exempt securities and mutual funds are added to the types of investments allowed for funds on hand for campaigns of candidates or political committees.

Votes on Final Passage:

Senate	44	0
House	94	1

Effective: July 26, 1987

SSB 5801**PARTIAL VETO**

C 515 L 87

By Committee on Commerce & Labor
(originally sponsored by Senator Warnke)

Relating to industrial insurance.

Senate Committee on Commerce & Labor
House Committee on Commerce & Labor

Background: Fire fighters have a much higher incidence of respiratory and heart disease than the general population. Fire fighters are exposed to extreme heat and cold, smoke, fumes, and toxic substances in the course of their work. Likewise, law enforcement officers are often subject to extreme stress because of potential life-threatening situations in which they are placed.

Many states have statutes which create a presumption that certain illnesses suffered by fire fighters and law enforcement officers are occupational diseases for industrial insurance purposes. The Joint Select Committee on Industrial Insurance recommended that such a presumption be created for law enforcement officers and fire fighters.

Washington is one of the few states which require a person to demonstrate that there was an unusual exertion in order to recover for a heart injury claim.

Summary: A rebuttable presumption that respiratory disease is an occupational disease is established for fire fighters who established membership in the Law Enforcement Officers and Fire Fighters' Retirement System on or after October 1, 1977 (LEOFF II). The presumption may be rebutted by a preponderance of the evidence. Evidence which may be used to rebut the presumption includes the use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. The presumption is extended to members following termination of service for a period

SSB 5801

of three calendar months for each year of requisite service. The presumption may not extend more than 60 months following the last date of employment.

Fire fighters and law enforcement officers who are members of LEOFF II do not have to demonstrate that there was an unusual exertion on the job in order to have a compensable claim for a heart injury.

Votes on Final Passage:

Senate	27	20	
House	68	30	(House amended)
Senate	30	17	(Senate concurred)

Effective: July 26, 1987

Partial Veto Summary: Language that eliminates the unusual exertion requirement in heart attack cases for fire fighters and law enforcement officers to qualify for a claim is vetoed. (See VETO MESSAGE)

SSB 5814

C 313 L 87

By Committee on Commerce & Labor
(originally sponsored by Senator Warnke)

Relating to mobile homes.

Senate Committee on Commerce & Labor
House Committee on Housing

Background: Currently mobile home owners have no protection under the Contractors Registration Act for installation or repair work on their homes (Chapter 18.27 RCW) because their homes are considered "personal property". Work on personal property is exempt under the Act.

A contractor's bond required under the Act is \$6,000. A licensed mobile home dealer must post a bond of \$30,000.

Summary: The Contractors Registration Act is made applicable for work on mobile homes, with the qualification that mobile home owners or licensed dealers may do set up and installation.

Votes on Final Passage:

Senate	43	1	
House	94	0	(House amended)
Senate			(Senate refused to concur)
House			(House refused to recede)

Conference Committee

House	96	0
Senate	41	0

Effective: July 26, 1987

SB 5822

C 92 L 87

By Senators Garrett, McCaslin and Rasmussen

Revising short plat regulations.

Senate Committee on Governmental Operations
House Committee on Local Government

Background: The division of land for purposes of sale, lease, or transfer of ownership must be reviewed and approved by the county, city or town within which the land is located, if the smallest lot created by the division is less than five acres in area. The size of the smallest lot in a division of land requiring review and approval may be increased to more than five acres by local ordinance.

A subdivision is a division of land that results in five or more lots. A short subdivision is a division of land into four or fewer lots. Cities and towns are allowed to increase the number of lots in a short subdivision to a maximum of nine. The procedure for the approval of subdivisions is lengthier and has more requirements than the procedure for the approval of short subdivisions.

If a short subdivision is further divided within five years of its approval, the division is considered to be a subdivision and a final plat of the area must be filed and approved under the provisions applying to subdivisions.

Summary: An exemption is created to the requirement that a final plat (map) of a subdivision be filed if a short subdivision is to be further divided within five years of its approval. The requirement does not apply if the short subdivision contained fewer than four lots and the owner who filed the short subdivision files an alteration to create up to a total of four lots within the original short subdivision boundaries.

Votes on Final Passage:

Senate	44	1
House	98	0

Effective: July 26, 1987

SSB 5824

C 188 L 87

By Committee on Judiciary (originally sponsored by Senators Halsan, Nelson, Talmadge and Bauer)

Making assault at state corrections facilities and local detention facilities a class C felony.

Senate Committee on Judiciary

NO. 66974-5-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

PATRICK E. MCKEOWN,

Appellant,

v.

CITY OF MOUNTLAKE TERRACE
AND STATE OF WASHINGTON
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on October 13, 2011, she caused to be served the BRIEF OF RESPONDENTS and this DECLARATION OF MAILING as indicated below as follows:

Via ABC Legal Messenger to:

ORIGINAL & COPY TO: Richard D. Johnson
Court Administrator/Clerk
Court of Appeals Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

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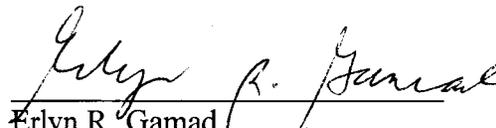
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DATED this 13th day of October, 2011, in Seattle, Washington
by:


Eryln R. Gamad
Legal Assistant