

No. 67213-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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MICHAEL RAUM and  
THE DEPARTMENT OF LABOR AND INDUSTRIES  
FOR THE STATE OF WASHINGTON

Appellants,

v.

CITY OF BELLEVUE,

Respondent.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## I. RCW 51.32.185 REQUIREMENTS

Statutes must be interpreted and construed so that all the language is given effect with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wash. 2d 806, 810, 756 P.2d 735 (1988); *Tommy P. v. Bd. of County Comm'rs*, 97 Wash.2d 385, 645 P.2d 697 (1982). Every part of RCW 51.32.185 must be interpreted so no part is rendered meaningless. The legislature had a clear purpose when providing the presumptive coverage for "any heart problem experienced" within seventy-two hours of exposure to smoke, fumes or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting activities. This is neither a meaningless or superfluous requirement. However, it is a requirement met by Appellant Raum in the case at issue.

The purpose of this limitation is not to exclude conditions that develop over time or that do not present with acute symptoms. The purpose of this portion of the statute is to exclude acute and obvious heart problems, such as a heart attack, that are very clearly not related to work. Under RCW 51.32.185, if a firefighter is in the middle of a two week ski vacation in Switzerland and has a heart attack on a black diamond run, that heart attack might not be considered a presumptive occupational disease under RCW 51.32.185, even though it might be an occupational disease under other existing law. The heart attack would merely have occurred outside the time

limit required by the presumptive disease statute.

If a firefighter had a heart attack within seventy-two hours of exposure to smoke, fumes or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting activities, such condition would be covered under the presumptive statute. Any other acute heart problems would also have to occur within seventy-two hours of exposure to smoke, fumes or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting activities for the presumption to apply.

Appellant Michael Raum is a full-time firefighter who developed his “heart problem” either suddenly from firefighting activities, or slowly from multiple occupational exposures as a firefighter. His “heart problem” is presumed to be caused by or aggravated by his employment as a firefighter. Even if the condition pre-existed his diagnosis, Respondents own experts admit that this condition took years to develop. Appellant Raum has been employed as a firefighter for decades and it is impossible to specifically identify the date that the condition began to develop. Regardless, Appellant Raum passed all the physical testing required by his employer, Respondent City of Bellevue, prior to his employment. He was considered physically fit and capable of the strenuous duties of a firefighter without restriction.

Any condition covered by RCW 51.32.185, which developed during the course of his employment as a firefighter under the relevant provision, is

presumed to have been caused by his employment. Even if a condition was pre-existing, or acquired outside his employment, RCW 51.32.185 entitles the firefighter to the presumption that his employment contributed to his condition.

Either way, Appellant Raum is entitled to the full benefits of the Washington workers' compensation system. The condition is presumed to be covered under the statute unless clear evidence proves otherwise. Not only have Respondent's own experts testified it is unknown when the condition first developed, they offer only speculation as to possible causes of the condition. Far-reaching speculation includes pointing fingers at Appellant's father in spite of a complete lack of any medical records for Appellant's father.

The City's hired experts would rather point fingers even in the absence of medical justification or basis, than admit that multiple exposures to extreme stress, disruption of the circadian rhythm, smoke, fumes, toxic substances and strenuous physical activity inherent in firefighting have any sort of negative impact on Appellant Raum. While firefighters are certainly heroic, Respondents argument requires firefighters to have superhero powers in that their extreme and unique employment conditions have absolutely no impact or negative effect on their health by repeated exposures to these dangerous work conditions.

## II. EXPERIENCED

### Dictionary Definition

RCW Title 51 does not provide a definition for the word “experienced.” Absent a contrary definition within the statute, words must be given their plain meaning. “Experienced” is defined in Merriam Webster as “1: to learn by experience; 2: to have experience of: undergo.” Under these definitions it is clear that Appellant Raum “experienced” his “heart problem” when it occurred on three separate occasions, within the time-frames mandated by RCW 51.32.185.

Under any reasonable analysis, Appellant Raum experienced his “heart problem” as defined by the presumptive statute. His body underwent the process of developing the heart problem during his career that manifested itself repeatedly at work. The condition cannot be parsed out so that the firefighter can only receive workers’ compensation benefits for his covered condition if each time he seeks treatment it is within 24 hours or 72 hours of a shift.

The experience of the “heart problem” through symptoms such as chest pain is sufficient to invoke the strong legislatively mandated presumption for firefighters. If a firefighter had to take time off work due to a presumptive health condition, and then received treatment while he was off work, any further treatment would not be covered under the City’s strained

and absurd analysis.

The firefighter is not required to know or understand what his symptoms are. He is not required to self-diagnose. He does not have to appreciate injury at a cellular level and seek care for his developing condition before any tests have diagnosed any such condition. He is not a doctor and does not need to say “I am experiencing a ‘heart problem’” in order for the statute to apply. The legislature very clearly did not intend that a firefighter must self-diagnose or even die of the “heart problem” in order to receive workers’ compensation benefits.

Each time Appellant Raum experiences his “heart problem”, it does not result in a separate claim for workers’ compensation benefits. A worker with occupational asthma might experience the asthma multiple times. However, each time is not a separate claim. Each experience is not subject to analysis or potential denial by the Department. The worker has occupational asthma and the symptoms are treated and covered under the claim. Appellant Raum has a diagnosed condition that falls within both the presumptive occupational disease and occupational disease statutes. He is entitled to full and ongoing benefits for any conditions that manifest themselves within the applicable time frames.

### **Cancer Comparison**

Certain cancers are also covered by RCW 51.32.185. Cancer, much

like many “heart problems” does not occur spontaneously except perhaps at the cellular level. If a firefighter developed cancer over a period of weeks or months without symptoms, and was diagnosed with the cancer by a doctor seeing him for an unrelated condition, that certainly would not exclude his cancer from coverage under RCW 51.32.185. The firefighter does not have to diagnose his own cancer to be entitled to the benefits. He does not have to even know he has cancer until he is told by a health care provider in writing. He may experience symptoms and not be aware of the meaning of the symptoms or understand their significance. However, his body is certainly experiencing cancer, whether he is aware of it or not.

The cancer diagnosis does not create the cancer. The cancer was present and a part of the firefighter’s life prior to the condition actually being diagnosed. The experience is not contingent on a diagnosis, rather the diagnosis simply confirms the ongoing experience.

This is true of any presumptive condition, including a “heart problem”. Appellant Raum’s “heart problem” existed and was experienced within seventy-two hours of exposure to smoke, fumes or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting activities on at least three separate occasions. Any one of those occasions is sufficient to trigger coverage under the presumptive disease statute.

It is unclear how Respondent City of Bellevue expects Appellant

Raum to “experience” his “heart problem” other than experiencing chest pain with twenty-four hours of strenuous physical exertion due to firefighting activities. The City admits Appellant Raum experienced such pain within the statutory time limitation. *See footnote 11 to Brief of Respondent City of Bellevue.* The pain is caused by the “heart problem” and is therefore the experience of the heart problem as required by statute. The statute does not require the firefighter die in order to truly “experience” a heart problem. While the City claims Appellant Raum did not experience the condition, but rather experienced a symptom of the condition, it fails to explain what would, in it’s opinion, constitute an “experience” of a “heart problem”. The symptom would not happen without the existence of the condition. The condition revealed its presence in the form of symptoms which were experienced by Appellant Raum under the requirements of RCW 51.32.185.

**Purpose of RCW 51.32.185**

The City makes the strained argument that if RCW 51.32.185 applied, the jury would still have needed to find that Raum’s condition arose naturally and proximately from the distinctive conditions of Raum’s employment as a firefighter. Under the City’s desired interpretation of the statute, the statute is completely useless. The statute presumes the covered condition arises from the distinctive conditions of firefighting. The jury does not need to make that determination; the legislature has done it for them.

However, under a proper application of the statute and instruction to the jury, if Raum was entitled to the benefits of RCW 51.32.185, then the jury need not find that his “heart problem” arose naturally and proximately from his employment. In that event, the jury would then find for Raum under RCW 51.32.185 which presumes the “heart problem” is an occupational disease. If the City could present objective medical evidence sufficient to overcome the strong statutory presumption in favor of the firefighter, then and only then, would Raum have to present evidence showing that his “heart problem” arose naturally and proximately from his duties as a firefighter.

#### **Comparison of RCW 51.32.185 and RCW 51.08.140**

Under RCW 51.32.185 a firefighter can be entitled to benefits that he might not be entitled to under RCW 51.08.140. This is due to the fact that RCW 51.32.185 provides a presumption of occupational disease without the need for the firefighter to prove the condition arose naturally and proximately from employment. This is the very reason that the presumptive disease statute was enacted. It is often difficult to prove the exact cause, or time of onset of many of the presumptive diseases.

Under the standard occupational disease claim, if medical evidence does not objectively prove causation, the injured worker is not entitled to protection. However, RCW 51.32.185 allows a firefighter additional protection by standing in the place of objective medical evidence, particularly

in cases, such as this, where expert testimony cannot provide a time or an activity when the disease process actually began. The statute preempts speculation and conjecture by the City's experts. Therefore, it is possible for a firefighter to be entitled to benefits under RCW 51.32.185, when he may not be entitled to benefits under a standard RCW 51.08.140 occupational disease claim. It is the clear legislative intent that a firefighter under RCW 51.32.185 be entitled to benefits that he might not be able to prove under the causation requirements of RCW 51.08.140. It is possible for a firefighter to have both a presumptive occupational disease and an occupational disease. It is likewise possible for a firefighter to have one without the other. If a firefighter has an RCW 51.32.185 claim, he is presumed by statute to have an RCW 51.08.140 claim, whether he could actually support such a claim with objective medical evidence or not.

Raum proved his right to receive the benefits of the Act by presenting medical evidence proving he "experienced" a "heart problem" on three separate occasions – all within the statutory time frame. Under RCW 51.32.185 he is not held to the same standard of proof as workers under a traditional RCW 51.08.140 occupational disease claim. The proof is provided by the statute and can only be rebutted by a preponderance of objective medical evidence such as would be sufficient to overcome medical evidence provided by a worker in a traditional RCW 51.08.140 claim. The

testimony provided by the City is far from sufficient to overcome objective medical evidence, consisting only of finger pointing at a variety of transient symptoms, disputed obesity findings, and a father who died of unknown causes but suffered from rheumatic fever as a child. This evidence is not a preponderance of objective medical evidence sufficient to overcome the strong presumption in favor of the firefighter, which is the equivalent of objective medical evidence supporting the connection between firefighting and the “heart problem” of Appellant Raum. Speculation does not triumph over the presumptive disease statute.

### III. CAUSATION

It is unknown what caused Appellant Raum’s “heart problem”. There is a consensus among Appellant Raum’s attending physicians and the Respondent’s hired expert witnesses that the cause and time of onset of Appellant Raum’s “heart problem” cannot be determined. Appellant Raum is a career firefighter and as part of his job has suffered an unknown number of exposures to smoke, fumes and toxic substances, strenuous physical exertion, disruption of the circadian rhythm, extreme temperatures, temperature changes, and unimaginable stresses that likely caused or aggravated his “heart problem” on three separate occasions. According to RCW 51.32.185, these exposures and conditions *are* a cause of firefighter heart problems.

The statute was created for situations such as this where it is impossible to identify which exposure or situation caused or aggravated the covered condition. Under the standard workers' compensation causation requirement, firefighters might not be able to obtain compensation for such conditions. The statute removes that burden from the firefighter and requires the Department to disprove the firefighter's entitlement to benefits for his presumptive occupational disease.

#### **IV. LEGISLATIVE INTENT**

##### **Additional Protection to Firefighters**

Washington courts have indicated that their purpose in analyzing a statute is the implementation of legislative intent as explained in *Knipe v. Austin*, 13 Wash. 189, 193, 44 P.25, 26 (1895). (*The legislative mind may or may not have reasoned correctly on this proposition, but when we concede to it the right to enter upon an investigation of this kind, the results of the investigation expressed in an enactment cannot be called in question by the court.*) See also *C.L. Featherstone v. Dessert*, 173 Wash.364, 268, 22 P.2d 1050, 1052 (1933) (*In the interpretation of a statute, the intent of the legislature is the vital thing, and the primary object is to ascertain and give effect to that intent.*).

In enacting the firefighter presumptive statute, the legislature was not intending to make it more difficult for firefighters to obtain workers'

compensation coverage for their occupational diseases. The clear purpose of the statute is to provide *additional protection* to firefighters due to the inherently dangerous nature of their job, and the difficulty of identifying with specificity an exposure or aspect of firefighting that caused their occupational disease. The statute provides the equivalent of objective medical evidence where none may exist under the traditional workers' compensation guidelines.

RCW 51.32.185 provides additional protection to Appellant Raum. It is the equivalent of objective medical evidence confirming the connection between his "heart problem" and his career employment as a firefighter. Unless the Respondent can overcome this statutory presumption, Appellant Raum should receive the additional statutory protection intended by the legislature.

#### **Inclusive Language**

The statute provides that certain conditions *are* occupational diseases; this includes "any heart problems." The legislature specified "*any* heart problem" which means presumptive disease "heart problems" *are not* limited to those that are experienced in a neat and obvious time frame such as a heart attack. The inclusion of the word "any" makes the legislative intent clear that the "heart problem" does not have to be an acute event. RCW 51.32.185 is intended to cover "any heart problem" experienced within the time lines of

the statute.

An acute condition such as a heart attack at work can be easily identified to fall within the time limits provided in the statute. Other conditions, such as cardiovascular disease are less precise, but this does not exclude them from coverage. If the intent was to exclude asymptomatic or slow developing conditions, the statute would have made such a limitation clear. Rather, the statute made clear that “any heart problem experienced” with certain time lines is a covered presumptive occupational disease. If “experienced” required an acute event such as a heart attack, the statute would not have allowed “any heart problem” and would necessarily have limited coverage only to “acute heart problems”.

## **V. ERRORS OF LAW**

Throughout its brief the City misstates Appellant Raum’s arguments, and attempts to hamstring any and all legislative intent and purpose behind RCW 51.32.185. The City’s brief contains incorrect statements regarding jury instructions and the special verdict form, and Appellant Raum’s arguments related to these incorrect instructions and verdict form.

It is clear from the record that there was an “informal conference in chambers” wherein jury instructions were discussed. *RP 379-380*. In addition, in spite of the City’s claims that Appellant Raum did not argue regarding the jury instructions, these arguments were made at several points,

on and off the record. Several arguments were made regarding Jury Instruction No. 14, in light of the other instructions and the verdict form. *RP 404-408, RP 412.* Additional arguments were made regarding Jury Instructions Nos. 9 and 13. *RP 396-395, and RP 405.*

Arguments were also made by Appellant Raum regarding the special verdict form. *RP 390, RP 408- 409, RP 411-412.* Specifically, at RP 411-412, Appellant Raum argued that due to the incorrect statement of law in the Special Verdict Form, Jury Instruction No. 14 became confusing. Jury Instruction may be a correct statement of law, but with the incorrect statements of law in the verdict form, and failure of the court to make clear that Appellant Raum could have an RCW 51.32.185 claim *and/or* an RCW 51.08.140 claim, Jury Instruction No. 14 was rendered inappropriate.

Only one theory of recovery was allowed to be determined by the jury where both statutes were found to provide coverage at the Board. The fact that the jury was only allowed one theory of recovery rendered the verdict form and the instructions incorrect and prejudicial. The incorrect statement of law in the Special Verdict Form and the incorrect statements of law in the instructions created confusion and prejudice. These arguments were made on the record.

The verdict form submitted by Appellant Raum properly allowed the jury to make the determination whether or not Appellant Raum suffered from

an RCW 51.32.185 presumptive occupational disease, an RCW 51.08.140 occupational disease, neither or both.

## **VI. CONCLUSION**

In a traditional workers' compensation claim, when the injured firefighter has provided objective medical evidence showing his occupational disease was caused or aggravated by his employment, the employer or the Department of Labor and Industries would have to provide objective medical evidence sufficient to overcome the claimant's medical evidence. Department or employer hired medical experts could not simply claim that they did not agree with the objective medical causation testimony provided by the claimant's medical care providers. The employer or Department hired medical experts would need to overcome the firefighter's objective medical evidence with a preponderance of objective medical evidence showing not only that the claimant's condition was not caused or aggravated by his employment, but they must also show what did cause the condition. In order to meet the burden, the Employer or Department would need to overcome the claimant's objective medical evidence showing a connection, and then provide sufficient objective medical evidence to support their alternative theory.

RCW 51.32.185 is the equivalent of objective medical evidence supporting the connection between firefighting and "any heart problem".

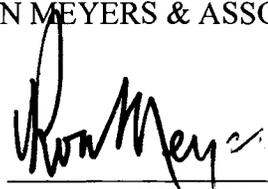
Because of the presumptive statute, Appellant Raum stands in as good a position as an injured worker who has provided objective medical evidence supporting the connection between his condition and his employment. The Respondent must overcome the statute in the same way it would need to overcome objective medical evidence.

In this case, the Respondent has not overcome Appellant Raum's objective medical evidence equivalent supplied by RCW 51.32.185. The Respondent has pointed fingers at numerous speculative causes, going so far as to diagnose Appellant Raum's deceased father without the benefit of any medical records, diagnostic records, or relevant history other than rheumatic fever.

Additionally, none of the City's experts' speculation overcomes the special consideration due the testimony of Appellant Raum's attending physicians.

DATED: January 27, 2012.

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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 REPLY BRIEF; and  
                      2.     DECLARATION OF SERVICE.

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