

69125-2

69125-2

No. 69125-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

SCOTT A. CRANE

Appellant,

v.

SNOHOMISH COUNTY FIRE DISTRICT NO. 1 and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondents.

APPELLANT'S REPLY BRIEF

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Scott A. Crane

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR -7 PM 1:18

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The Department/Employer has failed to rebut the presumption that FF Crane’s respiratory disease was more likely than not occupational. 2

 B. The multiple proximate cause doctrine is both on point and applicable. 6

 C. The Superior Court weakened the presumption, making it easier to rebut. 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Dennis v. Dept. of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987)	3
<i>Dept. of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	5
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011)	5
<i>Grimes v. Lakeside Industries</i> , 78 Wn. App. 554, 897 P.2d 431 (1995)	10
<i>McDonald v. Dept. of Labor & Indus.</i> , 104 Wn. App. 617, 17 P.3d 1195 (2001)	10
<i>Potter v. Dept. of Labor & Indus.</i> , 289 P.3d 727 (2012)	3
<i>Raum v. City of Bellevue</i> , 171 Wn. App. 124, 286 P.3d 695 (2012)	10
<i>Simpson Logging Co. v. Dept. of Labor & Indus.</i> , 32 Wn.2d 472, 202 P.2d 448 (1949)	3
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	5
<i>Wendt v. Dept. of Labor & Indus.</i> , 18 Wn. App. 674, 571 P.2d 299 (1977)	10
Statutes	
RCW 51.32.185	1, 4

REPLY TO RESPONDENT'S BRIEF

I. INTRODUCTION

Firefighter Crane suffers from pulmonary embolism. This is undisputed. FF Crane's pulmonary embolism is a respiratory disease. This is undisputed. The law presumes that a firefighter's respiratory disease is occupational, meaning that it arises naturally and proximately out of employment as a firefighter. This is undisputed. No expert testifying in this case could determine a probable non-firefighting cause of FF Crane's respiratory disease. This is undisputed. No expert testifying in this case found the presence of a single rebuttable factor (e.g. smoking, lifestyle, fitness, etc. . .) on which to rebut firefighting as the cause of FF Crane's pulmonary embolism. This is undisputed.

The proximate-cause presumption of RCW 51.32.185 was created in recognition that (a) the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances and (b) firefighters have a higher rate of respiratory disease than the general public. This is undisputed.

The proximate-cause presumption is a burden-shifting mechanism. The purpose and utility of the presumption is rendered meaningless if mere disagreement with the presumption is enough to rebut the presumption.

REPLY TO RESPONDENT'S BRIEF

I. INTRODUCTION

Firefighter Crane suffers from pulmonary embolism. This is undisputed. FF Crane's pulmonary embolism is a respiratory disease. This is undisputed. The law presumes that a firefighter's respiratory disease is occupational, meaning that it arises naturally and proximately out of employment as a firefighter. This is undisputed. No expert testifying in this case could determine a probable non-firefighting cause of FF Crane's respiratory disease. This is undisputed. No expert testifying in this case found the presence of a single rebuttable factor (e.g. smoking, lifestyle, fitness, etc. . .) on which to rebut firefighting as the cause of FF Crane's pulmonary embolism. This is undisputed.

The proximate-cause presumption of RCW 51.32.185 was created in recognition that (a) the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances and (b) firefighters have a higher rate of respiratory disease than the general public. This is undisputed.

The proximate-cause presumption is a burden-shifting mechanism. The purpose and utility of the presumption is rendered meaningless if mere disagreement with the presumption is enough to rebut the presumption.

II. ARGUMENT

A. **The Department/Employer has failed to rebut the presumption that FF Crane's respiratory disease was more likely than not occupational.**

Respectfully, the Department's/Employer's analysis of how the proximate-cause presumption is rebutted is misguided.

To rebut that firefighting more likely than not caused FF Crane's respiratory disease, the Department/Employer must do more than merely disagree that firefighting more likely than not caused FF Crane's respiratory disease. The Department/Employer must prove their conclusion, and do so by a preponderance of evidence. Simply asserting that causation does not exist because of the absence of data or a lack of awareness of causation connecting firefighting and pulmonary embolism is merely a rejection of the legislation.

To rebut the presumption, the Department/Employer must identify an alternative cause that is probable. This is supported by simple analysis of established case law interpreting the two elements of "occupational" injury, which are that the disease "arose naturally" from employment and was "proximately caused" by employment.

For the claimant to prove the disease "arose naturally" out of employment, the claimant must "show her particular work conditions more

probably caused her disability than conditions in everyday life or all employments in general; . . .”. *Potter v. Dept. of Labor & Indus.*, 289 P.3d 727, 734 (2012); *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 482, 745 P.2d 1295 (1987). It follows that for the Department/Employer to rebut this, the Department/Employer must show an alternate cause (i.e. that conditions in everyday life or conditions of non-firefighting employment more probably caused the disease than did particular firefighter-work conditions.)

For the claimant to prove that firefighting “proximately caused” the disease, there must be “no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the extra-hazardous employment.” *Simpson Logging Co. v. Dept. of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448, (1949). It follows that for the Department to rebut this, the Department must show by a preponderance of the evidence the existence of an intervening independent and sufficient cause for the disease, and that the disease would have been contracted regardless of firefighting.

The presumptive-disease statute establishes that FF Crane’s pulmonary embolism was occupational, meaning by statutory definition that it arose naturally out of and was proximately caused by his employment as a

firefighter.

The Department's/Employer's burden is to rebut the presumption in its entirety, and therefore establish by a preponderance of the evidence an alternative cause of FF Crane's respiratory disease.

The requirement to establish a specific non-firefighting cause is consistent with the language of the presumptive-disease statute itself. While not an exhaustive list, RCW 51.32.185(1) provides several distinct ways that the Department/Employer may rebut the presumption. It is not the actual rebuttable factors themselves that are noteworthy, but rather the commonality shared among each factor. Each rebuttable factor enumerated by the legislature is an identifiable non-firefighting cause: use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, exposure from other employment or non employment activities. RCW 51.32.185(1).

The wide-variety and breadth amongst these factors is notable, including attributing the disease to disease-causing products such as tobacco, attributing the disease to disease-causing elements from non-firefighting occupations or activities, attributing the disease to the firefighter's overall health and fitness, attributing the disease to the manner in which the firefighter lives (whether that be lack of sleep, stress, etc.), and even attributing the disease to family genes. Despite the wide variety and breadth

of the types of rebuttable presumptions contemplated by the legislature, notably absent are factors that derive from a lack of etiology or lack of data or awareness of the etiology.

Our fundamental objective when interpreting a statute is “to discern and implement the intent of the legislature.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The surest indication of the legislature's intent is the plain meaning of the statute, which we glean “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-306, 268 P.3d 892 (2011)

The Department/Employer cannot and has not established an alternate non-firefighting cause of FF Crane’s disease. The record is clear that the Department/Employer:

- (a) cannot establish that conditions of everyday life is the cause;
- (b) cannot establish that other employment is the cause;
- (c) cannot establish an intervening independent cause;
- (d) cannot establish any non-firefighting cause; and
- (e) simply and undisputedly does not know the cause.

Dr. Eeulberg testified that people are predisposed to blood clots by the following factors:

- (a) trauma to a vein; or
- (b) lack of activity. CP 287 (5-13).

Dr. Eulberg concedes that the known cause of “trauma” was not the cause of FF Crane’s pulmonary embolism when he testified that the cause of FF Crane’s pulmonary embolism are unknown. He also conceded that the known cause of inactivity was not the cause in this case, when he testified not only that he does not know the cause, but also that he “can’t see that level of inactivity in a firefighter.” CP 286 (19-23), CP 287 (14-21).

Dr. Stumpp testified that the known causes of pulmonary embolism are as follows:

- (a) being bedbound with an illness;
- (b) infection like sepsis;
- (c) genetic clotting abnormalities;
- (d) lower extremity injuries; and
- (e) abdominal injuries. CP 340 (3-15).

Dr. Stumpp conceded that none of these known causes apply to FF Crane. CP 335 (1-4); CP 333 (21-25); CP 334(1-9); CP365 (20-23); CP 366 (2-4).

Stated otherwise, Drs. Stumpp and Eulberg conceded that all of the known causes and precipitating factors of pulmonary embolism do not apply to FF Crane. Therefore, the remaining causes are either:

- (a) firefighting, or
- (b) a mystery cause completely unknown to all.

Firefighting is statutorily presumed a cause as a matter of law. The presumption is not without reason, but rather based on legislative findings

that firefighters are exposed to smoke, fumes, and toxic or chemical substances and that firefighters as a class have a higher rate or respiratory disease than the general public.

The Department/Employer nonetheless asserts that it has established a “more likely than not” proposition that rebuts the reasoned-statutory presumption. However, when analyzed, the Department’s/Employer’s “more likely than not” proposition is a fallacy, as outlined as follows:

It is agreed that the pulmonary embolism is real - something caused it. The pulmonary embolism was not caused by a known cause. Based on a lack of data and awareness, the Department/Employer asserts that FF Crane’s pulmonary embolism was not caused by firefighting.

Therefore, since FF Crane’s pulmonary embolism was caused by something, and if it was not caused by a known cause or by firefighting, then the Department’s/Employer’s proposition is that it was caused by some completely unknown cause (i.e. something for which the experts “lack data” or “lack awareness of causation” - the exact bases for the Department’s/Employer’s dismissal of firefighting as the cause).

A summary of the Department’s/Employer’s proposition is therefore that firefighting is not the cause due to a lack of medical data and awareness on causation, but that something unknown outside of firefighting -- due to a

lack of data and awareness on causation, is the cause. This is a logical fallacy. It does not and should not defeat, on a more likely than not basis, the statutory presumption that exists in the absence of a known etiology.

The Department/Employer would have the Court believe that the analysis on whether it has rebutted the presumption ends if they simply produce opinions that firefighting is not the cause. This surface-level analysis is insufficient because the burden is not simply to produce an expert opinion, the burden is to produce evidence and craft an argument that on a more likely than not basis rebuts the legislative proximate-cause presumption by a preponderance of admissible evidence.

The Department's/Employer's position asks the Court to believe that firefighting is not the cause because of a lack of medical data and awareness, but that a cause unknown (because of lack of data and awareness) is the cause. And the Department/Employer contends that this mystery cause, which the experts do not know about, and which no data or knowledge exists, prevails on a more likely than not basis against the statutory presumption of respiratory disease in firefighters.

The Department's/Employer's position is built on speculation and fueled by inconsistency. Regarding the former, the Department's/Employer's position is that something else besides firefighting, which it cannot identify

and for which there is no basis to make a causal connection, caused FF Crane's condition. Such a position is not admissible evidence rebutting the presumption, it is speculation and conjecture.

Regarding the latter, the Department/Employer uses "lack of data and awareness on causation" as a sword to disprove firefighting as the cause while at the same time asserting that a cause unknown (i.e. lacking data and awareness) – but somehow identified as a cause outside of firefighting -- is the actual cause. This is illogical and inconsistent.

In this case, the record contains FF Crane's own testimony describing the various types of smoke, fumes and toxic substances to which he and other firefighters are repeatedly exposed including exhaust, car battery acids, carbon monoxide, cyanide gas, burning plastics and other toxins, and that he is involved in roughly 20 fire suppression calls a month. CP 241(12-24). The statutory presumption was a creature of the legislature's findings of firefighters' exposures to smoke, fumes and toxic substances that increased – individually or cumulatively -- their risk of respiratory disease. The Department/Employer has failed to rebut the presumption that FF Crane's respiratory disease was more likely than not occupational.

B. The multiple proximate cause doctrine is both on point and applicable.

The Department/Employer argue that no authority exists for FF

Crane's position that rebutting the presumption also requires extinguishing firefighting as a cause and that FF Crane is adding language to the presumptive disease statute in that regard.

The Department's/Employer's argument ignores the well established law that there can be more than one proximate cause of an injury and that the industrial injury is not required to be the sole proximate cause of a condition. SEE WPI 155.06.01; *McDonald v. Dept. of Labor & Indus.*, 104 Wn. App. 617, 17 P.3d 1195 (2001); *Wendt v. Dept. of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 299 (1977); *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995).

As a matter of law, FF Crane's pulmonary embolism is presumed to be an occupational injury, i.e., it is a cause that exists even if the Department/Employer could establish by competent, admissible and non-speculative evidence a specific non-firefighting cause. The statutory presumption is an evidentiary presumption of occupational-causation. *Raum v. City of Bellevue*, 171 Wn. App. 124, 144, 286 P.3d 695, 706 (2012).

FF Crane is not "adding words" to the presumptive-disease statute by simply employing a doctrine (the multiple proximate cause doctrine) that is both on point and applicable.

Proving an alternate cause alone, still does not rebut that firefighting

is also a proximate cause. Nonetheless, the Department/Employer has not and cannot prove a particular cause outside of firefighting.

C. The Superior Court weakened the presumption, making it easier to rebut.

The Judge's order reflected the outcome at Superior Court. The outcome, however, was arrived at by Judge Kurtz' impermissible injection of limiting language into the presumptive-disease statute that does not exist. Judge Kurtz reasoned that the particular nature of the respiratory disease is relevant and the type of respiratory disease has significance in applying the presumption. Contrary to the Judge's rewriting of the statute, there is no such limiting language in the statute. The presumption applies to respiratory diseases – without such limitations. The presumption is not to be lessened or more easily rebutted if the respiratory disease is, as the Judge put it, “the type of breathing problem that I think folks generally associate with being a respiratory disease.”

The Judge unequivocally displayed a personal belief that bilateral pulmonary embolism is not a breathing problem that people generally associate with being a respiratory disease. As a result, Judge Kurtz made a result-oriented ruling by weakening the presumption and inflating the rebuttal to comport with his incorrect belief that the presumptive disease statute discriminates against respiratory diseases based on their “type” or “nature.”

This is not to be confused with FF Crane citing additional existing legal doctrines (such as the well accepted doctrine of multiple proximate causes) as law applicable to the presumptive disease statute.

The Department/Employer recognizes the restriction on statutory construction. The Department's/Employer's own Response Brief specifically asks the Court to decline a statutory construction that reads additional language into the statute, and cites *Densley v. Dep't of Ret. Sys.*, for the proposition that "[s]tatutory construction cannot be used to read additional words into the statute."

III. CONCLUSION

Based on the foregoing, read in conjunction with FF Crane's Appellant Brief, the previous rulings should be reversed as a matter of law.

DATED: March 6, 2013

RON MEYERS & ASSOCIATES PLLC

By: 

Ron Meyers, WSBA No. 13169

Ken Gorton, WSBA No. 37597

Tim Friedman, WSBA No. 37983

Attorneys for Appellant

No. 69125-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

SCOTT A. CRANE

Appellant,

v.

SNOHOMISH COUNTY FIRE DISTRICT NO. 1 and
THE DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR -7 PM 1:19

DECLARATION OF SERVICE

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Scott A. Crane

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

ORIGINAL

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on March 6, 2013, 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.

ORIGINAL AND ONE COPY TO:

Richard D. Johnson, Court Administrator/Clerk
Washington State Court of Appeals
Division I
600 University St
One Union Square
Seattle, WA 98101-1176

Via U.S. Postal Service
 Via Facsimile:
 Via Hand Delivery / courtesy of ABC Legal Messenger Service
 Via Email:

COPIES TO:

Attorneys for Respondent Department of Labor and Industries:
Bonnie Kim, AAG
Office of the Attorney General
7141 Cleanwater Dr SW
Tumwater, WA 98504

Via U.S. Postal Service
 Via Facsimile:
 Via Hand Delivery / courtesy of ABC Legal Messenger Service
 Via Email:

Pro se Respondent Snohomish County Fire District #1:

Snohomish County Fire District #1

12425 Meridian Ave S

Everett, WA 98208

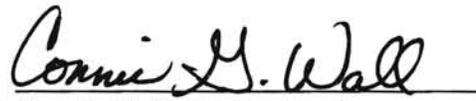
Via U.S. Postal Service

Via Facsimile:

Via Hand Delivery / courtesy of ABC Legal Messenger Service

Via Email:

DATED this 6th day of March, 2013, at Lacey, Washington.

A handwritten signature in black ink that reads "Connie G. Wall". The signature is written in a cursive style and is positioned above a horizontal line.

Connie G. Wall, Paralegal