

No. 90620-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD O. GORRE,

Respondent,

v.

CITY OF TACOMA,

Petitioner,

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Defendant.

**MEMORANDUM OF AMICUS CURIAE
WASHINGTON SELF-INSURERS ASSOCIATION
SUPPORTING THE PETITION FOR REVIEW**

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I. INTRODUCTION

The Court of Appeals, in a published decision, has misapprehended the plain meaning and legislative intent of the presumption of occupational disease enjoyed by firefighters in Washington's workers' compensation system. In a confused and confusing exercise in statutory interpretation, the court held in essence that anything affecting breathing is a presumptive respiratory disease for firefighters, and that all infectious diseases are presumed occupational diseases, despite the Legislature's clear and unambiguous limitation of this presumption. The effect of the court's decision is to stretch the bounds of the presumption for both respiratory and infectious diseases well beyond the Legislature's intent in providing them. Particularly in the context of a fee-shifting statute, this will predictably lead to further litigation and appeals in firefighter occupational disease claims, and will increase the administrative and claims costs of public agencies such as cities and counties, as well as some private employers, who employ firefighters. These increased costs pinch the operating budgets of local governments, especially smaller towns and fire districts, and in the end are passed on to taxpayers. Accordingly, this is a matter of substantial public interest that merits review under RAP 13.4(b)(4).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSIA is a statewide membership organization representing the workplace safety and workers' compensation interests of major Washington employers who choose to self-insure their risk of workplace accidents, injuries, and illnesses. Founded in 1972 after the Legislature authorized workers' compensation self-insurance as the alternative to Washington's monopoly Industrial Insurance State Fund, WSIA speaks for the nearly four hundred employers who are self-insured, and the many companies that provide them professional workers' compensation and safety related services.

WSIA members are major public and private sector employers, such as cities, counties, schools, hospitals, non-profit charities, and many of our state's most visible and iconic companies and brands. One in three workers in Washington is covered by a self-insured program, and self-insured employers account for \$53 billion, or 60 percent, of the state's total payroll annually. Self-insured employers pay workers' compensation benefits directly out of company funds, subject to the regulatory and audit oversight of the Department of Labor & Industries, and according to the same laws and regulations as the Department. WSIA often appears as amicus curiae in cases of substantial interest to the association's membership.

III. ISSUE OF CONCERN TO AMICUS CURIAE

In granting a presumption of occupational disease to firefighters for certain enumerated conditions, did the Legislature intend that any respiratory problem and any infectious disease be subject to the presumption? *Cf. Pet. for Review* at 2 (Issues 1, 5).

IV. STATEMENT OF THE CASE

WSIA adopts the statement of the case set forth by petitioner City of Tacoma, *Pet. for Review* at 2-4.

V. REASONS TO GRANT REVIEW

Despite the contrary determinations of the Department of Labor & Industries, Board of Industrial Insurance Appeals, and the trial court, the Court of Appeals determined that Gorre's Valley Fever is both a respiratory disease and an infectious disease covered by RCW 51.32.185's presumption of occupational disease for firefighters. *Gorre v. City of Tacoma*, No. 43621-3-II, Apr. 23, 2014, slip op. at 36. The court was not clear whether it thinks section .185 is ambiguous or not – its confusing interpretive methodology treats the statute simultaneously as both. Either way, its interpretation is erroneous, published, and needs to be corrected.

A. Valley Fever is not a respiratory disease under RCW 51.32.185.

With respect to its holding that Valley Fever is a “respiratory disease” under section .185(1), the court consulted a general purpose dictionary, determining that “respiratory” means “of or relating to respiration” and “disease” means “a cause of discomfort or harm,” to decide that “respiratory disease,” as a matter of law, is “a discomfort or condition of an organism or part that impairs normal physiological functioning relating, affecting, or used in the physical act of breathing.” *Gorre*, slip op. at 32.

This is entirely too simplistic. Section .185 is a statute explicitly dealing with medical conditions, and “respiratory disease” is a medical term, so a factual medical determination of what constitutes a respiratory disease, taking into account medical literature and expertise, should govern whether the statute applies. Under the Court of Appeals general dictionary definition approach, anything affecting breathing could be a presumed occupational disease of a firefighter. Thus, mere shortness of breath from normal exertion could be a presumed occupational disease because it may cause “discomfort . . . in the physical act of breathing.” The Legislature did not enact a presumption of occupational disease for

respiratory diseases thinking any and all discomforts or problems would automatically qualify.

That the Legislature intended section .185(1) to apply solely to respiratory *disease* and not merely all respiratory symptoms can be shown by the difference between subsections (1)(a) and (1)(b). Whereas the former covers respiratory *disease*, the latter covers “any heart problems...”. Had the Legislature wanted to cover respiratory symptoms as broadly as the Court of Appeals, it could have written “any respiratory problems” just as it wrote “any heart problems.” It did not.

B. Valley Fever is not an infectious disease under RCW 51.32.185.

It is undisputed that Valley Fever is an infectious disease. The issue is whether the four infectious diseases enumerated in RCW 51.32.185(4) define and delimit the coverage of “infectious disease” in subsection (1)(d), or whether subsection (1)(d) covers all infectious diseases and subsection (4) is merely illustrative. Again consulting a general dictionary, but also canons of statutory construction,¹ the Court of Appeals interpreted RCW 51.32.185(4) “as reflecting the legislature’s

¹ By resorting to dictionary definitions and making numerous references to applying the statute’s “plain language,” slip op. at 34-35, the court appears to treat the statute as unambiguous. At the same time, the court resorts to principles of statutory construction applicable to ambiguous statutes, such as liberal construction (slip op. at 31) and construing against absurd results (slip op. at 35). The court doesn’t say whether it thinks section .185 is ambiguous or not. Its interpretive method is confusing, and is a poor guide for future courts and litigants.

intent to include ‘infectious diseases’ in general, not to limit them to only the four specified diseases to which it ‘extended’ coverage for firefighters who contract these four named diseases.” *Gorre*, slip op. at 35. The Court of Appeals interpretation is erroneous and should be reviewed.

1. RCW 51.32.185’s plain language.

Section .185 is unambiguous with respect to infectious diseases. Subsection (1)(d) includes infectious diseases as a category of presumed occupational disease for firefighters. Subsection (4) lists the infectious diseases subsection (1)(d) covers: human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis. It is difficult to read this statutory structure as intending anything other than that. The use of the word “extends” in subsection (4) caused the Court of Appeals confusion, causing it to speculate that “it *appears* the legislature included this statutory list so that firefighters could benefit from the statutory presumption of a benefit-qualifying occupational disease if they contracted one of four specified serious infectious diseases *perhaps* not otherwise readily recognized as occupational diseases.” *Gorre*, slip op. at 34 (emphasis added). However, “extend,” as Tacoma points out, means in this context “to reach in scope or application,” *see Pet. for Rev.* at 16-17,

and it is fully consistent with the plain language of subsection (4) to read it as defining “infectious disease” in subsection (1)(d).

2. RCW 51.32.185’s legislative history.

Even if it were ambiguous whether subsection .185(4) was intended merely as an illustrative list, the legislative history removes any doubt. It is clear from the successive drafts and contemporaneous bill reports that the 2003 amendments to section .185 were not intended to include a presumption for every infectious disease.²

Infectious diseases were added to section .185’s presumption in 2003. Laws of 2003, ch. 337, § 2. As introduced, House Bill 2663 would have amended section .185 with a generic reference to infectious diseases. House Bill 2663, 58th Leg., Reg. Sess. (Wash. 2003) (HB 2663) (Appendix A). However, before HB 2663 was reported out of the House Commerce & Labor Committee, it was amended and subsection 4 was added, stating “[f]or the purposes of this act, ‘infectious disease’ means acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.” Substitute House Bill 2663, 58th Leg., Reg. Sess. (Wash. 2003) (SHB 2663), § 4

² Courts routinely look to successive bill drafts and bill reports as aids in determining legislative intent. *See, e.g., State v. Komok*, 113 Wn.2d 810, 816 n. 7, 783 P.2d 1061 (1989) (successive drafts); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 350, 804 P.2d 24 (1991) (bill reports). For ease of reference, the successive drafts and corresponding bill reports for the underlying bill are appended to this brief at appendices A-F.

(Appendix B). SHB 2663 was then referred to the House Appropriations Committee where it was again amended before being reported out for consideration by the full House. The primary purpose of the Appropriations Committee amendment was to add an exception for tobacco users. But in the Appropriations Committee draft, the committee also worked subsection (4) into its current wording, “[t]he 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.” Second Substitute House Bill 2663, 58th Leg., Reg. Sess. (Wash. 2003) (2SHB 2663), § 4 (Appendix C).

The contemporaneous bill reports provide context for the committee activity. The House Bill Report shows that in the Commerce & Trade Committee, on the basis of public concerns that the bill as introduced is too broad in the conditions it covers, “[t]he substitute bill adds a definition of ‘infectious disease’ ...”. H. B. Rep. on H.B. 2663, 58th Leg., Reg. Sess. (Wash. 2003) at 3 (Appendix D). Further, in the Appropriations Committee, the bill report points out that the second substitute of the bill meant to amend the intent section, add the tobacco users provision, and make “[t]echnical corrections” to “clarify the

references to private sector firefighters and to HIV/AIDS.” *Id* at 4.

Summaries of the testimony for and against the bill before the Appropriations Committee show that the successive drafts of subsection (4) reflected agreements by stakeholders to “work[] on the list of infectious diseases,” that “[t]here has been progress made on infectious diseases,” and that “work . . . has been done to narrow the list of infectious diseases.” *Id*.

Subsection (4) of the bill was not further amended as it worked its way through the Senate toward final passage. The Senate Bill Report summarizes the bill’s heart problems and cancer provisions, and then concludes “HIV/AIDS, hepatitis, meningitis, and tuberculosis are also presumed to be occupational diseases.” S. B. Rep. on 2S.H.B. 2663, 58th Leg., Reg. Sess. (Wash. 2003) at 2 (Appendix E). The final report on the bill as it passed the Legislature states, with respect to infectious disease: “Infectious disease means HIV/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, and mycobacterium tuberculosis.” Final B. Rep. on 2S.H.B. 2663, 58th Leg., Reg. Sess. (Wash. 2003) at 2 (Appendix F). There is nothing in the legislative history of 2SHB 2663 that suggests subsection (4) was intended as anything other than a definition, or list, of the infectious diseases referenced in subsection (1)(d).

Even though one should reach that conclusion from just the plain language, the legislative history demonstrates conclusively that subsection (4) was meant as the exclusive list of infectious diseases entitled to the presumption, and represented a carefully crafted compromise among competing stakeholders to that effect. The Court of Appeals' re-write of this section subverts the intent of the Legislature, creates an unlimited presumption, and if left intact, will create unintended cost and hardship for municipalities and public agencies across the state. These concerns are especially vivid insofar as RCW 51.32.185(7) provides for fee-shifting, inviting new appeals and litigation under a newly expansive presumption.

VI. CONCLUSION

The court should grant review under RAP 13.4(b)(4).

Respectfully submitted this 20th day of October, 2014.



Kristopher I. Tefft, WSBA #29366
Attorney for Amicus Curiae

APPENDIX A

HOUSE BILL 2663

State of Washington

57th Legislature

2002 Regular Session

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

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

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

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

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

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

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

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

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

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

--- END ---

APPENDIX B

SUBSTITUTE HOUSE BILL 2663

State of Washington

57th Legislature

2002 Regular Session

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

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

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

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

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

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

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

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

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

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

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

--- END ---

APPENDIX C

CERTIFICATION OF ENROLLMENT
SECOND SUBSTITUTE HOUSE BILL 2663

Chapter 337, Laws of 2002
(partial veto)

57th Legislature
2002 Regular Session

FIRE FIGHTERS--OCCUPATIONAL DISEASES

EFFECTIVE DATE: 6/13/02

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

FRANK CHOPP
Speaker of the House of Representatives

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

BRAD OWEN
President of the Senate

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

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

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

CYNTHIA ZEHNDER
Chief Clerk

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

Secretary of State
State of Washington

SECOND SUBSTITUTE HOUSE BILL 2663

AS AMENDED BY THE SENATE

Passed Legislature - 2002 Regular Session

State of Washington 57th Legislature 2002 Regular Session

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Passed the House March 11, 2002.

Passed the Senate March 7, 2002.

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

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

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

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

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

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

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

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

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

APPENDIX D

HOUSE BILL REPORT

HB 2663

As Reported by House Committee On:
Commerce & Labor
Appropriations

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

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

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

Brief History:

Committee Activity:

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

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

Brief Summary of Second Substitute Bill

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

HOUSE COMMITTEE ON COMMERCE & LABOR

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

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

Staff: Chris Cordes (786-7103).

Background:

A worker who, in the course of employment, is injured or suffers disability from an occupational disease is entitled to benefits under Washington's industrial insurance law.

To prove an occupational disease, the injured worker must show that the disease arose "naturally and proximately" out of employment.

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

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

Summary of Substitute Bill:

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

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

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

These new presumptions apply to supervisory and active full-time fire fighters in public employment who are covered by industrial insurance. In addition, the existing presumption for respiratory disease and the new presumptions apply to full-time, fully

compensated fire fighters, including supervisors, employed by a private sector employer's fire department that has more than 50 fire fighters.

Substitute Bill Compared to Original Bill:

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

Appropriation: None.

Fiscal Note: Available.

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

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

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

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

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

HOUSE COMMITTEE ON APPROPRIATIONS

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

Staff: Linda Brooks (786-7153).

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

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

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

Appropriation: None.

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

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

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

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

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

governments.

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

(Concerns) Ryan Spiller, Washington Fire Commissioners Association.

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

APPENDIX E

SENATE BILL REPORT

2SHB 2663

As Reported By Senate Committee On:
Labor, Commerce & Financial Institutions, February 28, 2002
Ways & Means, March 4, 2002

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

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

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

Brief History:

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

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

SENATE COMMITTEE ON LABOR, COMMERCE & FINANCIAL INSTITUTIONS

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

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

Minority Report: Do not pass.

Signed by Senator Hochstatter.

Staff: Jack Brummel (786-7428)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

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

Staff: Brian Sims (786-7431)

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

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

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

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

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

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

Appropriation: None.

Fiscal Note: Requested on February 21, 2002.

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

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

Testimony Against: None.

Testified: PRO: Representative Conway; Kelly Fox, WA State Council of Fire Fighters.
NEUTRAL: Jim Justin, Assoc. of WA Cities.

APPENDIX F

FINAL BILL REPORT

2SHB 2663

PARTIAL VETO

C 337 L 02

Synopsis as Enacted

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

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

House Committee on Commerce & Labor

House Committee on Appropriations

Senate Committee on Labor, Commerce & Financial Institutions

Senate Committee on Ways & Means

Background:

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

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

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

Summary:

Legislative findings are made concerning the exposure of fire fighters to hazardous

substances in fire environments and the increased risk of developing various conditions.

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

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

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

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

Votes on Final Passage:

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

Effective: June 13, 2002

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