New hoops to jump through in Washington Firefighter Presumption cases

The Washington Court of Appeals recently ruled against the City of Bellevue in a case involving RCW 51.52.185, the firefighter presumption, and the effect of that ruling will likely change the way employers evaluate and litigate firefighter presumption cases going forward.

In *Larson v. City of Bellevue*, the court discussed two rebuttable presumption theories; the Thayer Theory and the Morgan Theory. Generally, when litigating a firefighter presumption case under RCW 51.52.185, employers would frame their argument using the Thayer Theory. Using this methodology, if the trier of fact found that an employer has met the burden of production, the presumption disappears and the firefighter has the burden of persuasion; to establish by a preponderance of the evidence that the condition is an occupational disease, without the benefits of the presumption.

In contrast, under the Morgan Theory, the rebuttable presumption continues throughout the case and does not disappear with the production of contrary evidence. Using this approach, RCW 51.32.185 requires the employer to present a *quality of proof* to rebut the presumption and for the trier of fact to weigh all of the evidence to determine if the evidence achieves the necessary level of persuasiveness. Unlike the Thayer Theory, the Morgan Theory raises a question of fact that requires an evaluation of the credibility of witnesses and the persuasiveness of the evidence presented by both parties.

In *Larson v. City of Bellevue*, the court acknowledged that in Washington both theories have been applied with no general rule about when to apply which theory. However, the court held that when a presumption reflects a strong social policy, such as the firefighter presumption RCW 51.32.185, the Morgan Theory should be followed rather than the Thayer Theory.

As a result of the courts' ruling in *Larson v. City of Bellevue*, the employer can no longer argue that the burden shifted to Claimant and that Claimant is required to prove a link between his/her condition and a distinct condition of employment, just as any other non-firefighter would when bringing an occupational claim.

Instead, the employer is required to rebut the presumption by the quantity of evidence (i.e. preponderance) and quality of evidence, while Claimant maintains the benefit of the firefighter presumption throughout the entirety of the case. Practically speaking, this means the employer must persuade the trier of fact that there is only one, non occupationally related, cause of a claimants condition otherwise a trier of fact could reasonably conclude that there could be more than once cause of claimant's condition, including firefighting, and the claimant would prevail.

The ruling in *Larson v. City of Bellevue* also included an opinion with regard to fees and costs that will undeniably have an effect on new/upcoming cases involving the firefighter presumption. RCW 51.32.185(7)(b) addresses attorney fees in firefighter presumption cases and states that the court shall order that all reasonable costs of the appeal, *including attorney fees and witness fees*, be paid by the opposing party when a claimant successfully appeals at trial court.

The court found that the language in RCW 51.32.185(7)(b) was unambiguous and permitted recovery of all reasonable costs of the appeal including *all costs* required to succeed on a claim for benefits under the Industrial Insurance Act; this includes costs incurred at the Board level.

This ruling will have a major effect on all cases tried under the firefighter presumption. Attorneys will be more than willing to take on firefighter cases given that they can collect all fees and costs incurred trying to succeed on a claim for benefits, especially with how difficult it will be for the self-insured employer to successfully rebut the presumption under RCW 51.32.185. In addition, there will likely be an influx of experts willing to testify for claimants as well. For instance, claimants' and their attorneys' will be able to retain experts that were previously out of reach due to cost at the Board level.

The cost of attorney fees and expert witness fees could be staggering and will need to be taken into consideration when deciding whether or not to litigate a occupational disease claim under RCW 51.32.185. This opinion also gives firefighters the upper hand in negotiating settlements of their occupational disease claims with the self-insured employer.

This ruling is especially troubling in light of the recent appellate decision in *Cooper v. State of Washington Department of Labor and Industries.* In this case, the court reviewed RCW 4.84, which provides that the prevailing party is entitled to costs, including deposition costs, in "any action in the superior court when depositions were used." The court held that the plain language of the statute allowed the trial court to award the cost of depositions taken before the case went to Superior Court to the Department.

These two cases show a trend at the appellate court level to award attorney fees and costs incurred at the Department and/or Board level when a party is successful upon appeal to Superior Court. As attorneys representing employers we will want to watch this trend closely and push the court to award attorney fees and costs to the employer upon our successful appeals to Superior Court as well.