IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PATRICK E. MCKEOWN, Appellant, v. CITY OF MOUNTLAKE TERRACE and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	)	NO. 66974-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2012

Lau, J. — RCW 51.32.185 establishes a rebuttable evidentiary presumption that certain diseases suffered by fire fighters are "occupational diseases" under the Industrial Insurance Act, chapter 51 RCW. The presumption "may not extend more than sixty months following the last date of employment." RCW 51.32.185(2). Former City of Mountlake Terrace fire fighter Patrick McKeown filed a workers' compensation claim more than seven years after he retired from fire fighting, claiming he developed a heart condition as a result of an occupational exposure to a respiratory virus. He appeals a superior court order (1) denying his motion for summary judgment and (2)

granting the Department of Labor and Industries (DLI)'s cross motion for partial summary judgment affirming the Board of Industrial Insurance Appeals' determination that McKeown was time barred from asserting RCW 51.32.185's rebuttable evidentiary presumption. McKeown argues that RCW 51.32.185's statute of limitations begins to run only after a claimant receives notice from a physician regarding the alleged disease or condition. Because (1) the statute's plain language links the time bar to "the last date of employment," (2) nothing in the statute establishes a notice or discovery rule for the presumption's application, and (3) McKeown's remaining arguments lack merit, we affirm.

FACTS

The City of Mountlake Terrace hired Patrick McKeown as a professional fire fighter in 1983. McKeown retired on July 16, 2000, but remained on the payroll until January 12, 2001. On February 12, 2008, he filed an application for benefits with the DLI, alleging industrial injury or occupational disease.[1] McKeown claimed he had a heart condition—cardiomyopathy—caused by exposure to a respiratory virus in the course of his employment as a fire fighter. He alleged that the occupational exposure occurred sometime in 2000.

The DLI initially rejected McKeown's claim as an industrial injury for failure to comply with the one-year statutory deadline for such claims.[2] McKeown filed a protest

[1] We refer to the defendants as "the DLI" because the City incorporated by reference and joined in the DLI's arguments and submittals.

[2] An industrial injury claim must be filed "within one year after the day upon which the injury occurred . . . ." RCW 51.28.050.

and request for reconsideration. After a series of orders correcting and superseding prior orders, the DLI rejected McKeown's claim because (1) the condition was not a presumptive occupational disease under RCW 51.32.185,[3] (2) the condition was not an occupational disease under RCW 51.08.140, (3) the condition was not the result of an industrial injury as defined in the Industrial Insurance Act, (4) McKeown failed to prove a specific injury occurred at a definite time and place in the course of employment, and (5) McKeown failed to file an injury claim within one year of the alleged injury's occurrence.

McKeown appealed to the Board of Industrial Insurance Appeals ("Board"). The DLI successfully moved under CR 12(b)(1) to exclude application of RCW 51.32.185's evidentiary presumption, arguing that McKeown was time barred from claiming the presumption because he filed his occupational disease claim more than 60 months after his last date of employment. The appeal hearing then addressed whether McKeown's cardiomyopathy was an occupational disease, without the benefit of the evidentiary presumption.[4]

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[3] As discussed below, this statute creates a rebuttable evidentiary presumption that certain diseases suffered by fire fighters are occupational diseases under the Industrial Insurance Act. The statute establishes a 60-month (5-year) time limit beyond which a fire fighter is not entitled to the presumption. See RCW 51.32.185(1), (2).

[4] It is undisputed that unlike his occupational injury claim, McKeown's occupational disease claim was timely under RCW 51.28.055, which provides that occupational disease claims must be filed within two years following the date the worker discovers or receives notice of the disease from a physician. McKeown received notice of the condition from his treating physician on February 5, 2008 and filed his claim on February 12, 2008.

Two expert witnesses testified on the issue of causation. McKeown presented his treating physician Neil W. Siecke's deposition testimony. CP 203-18. Dr. Siecke testified that he first saw McKeown in 2006. Dr. Siecke testified from medical records that McKeown's alleged respiratory virus infection occurred in January 2000. He explained that fire fighters are generally more susceptible to infectious illnesses affecting the lungs due to chronic smoke exposure and are more likely to be exposed to such infectious diseases because they frequently come into contact with sick and injured people. He also testified that McKeown's medical history "would be consistent with the natural history of a viral cardiomyopathy," but he could not say with certainty where McKeown contracted the virus.

Dr. John P. Holland testified for the DLI. Based exclusively on a medical records review, he concluded, "[T]here is not adequate evidence that [McKeown's] cardiac disease . . . or cardiomyopathy was caused or contributed to by workplace exposures or activities." Report of Proceedings (RP) (Oct. 28, 2009) at 139. From this records review and the scientific literature, Dr. Holland's diagnostic opinion was "idiopathic, or unknown origin" cardiomyopathy rather than viral cardiomyopathy. RP (Oct. 28, 2009) at 174. He explained that cardiomyopathy has multiple causes and concluded there was "no objective evidence that [McKeown] did have a viral infection or that it [was] viral cardiomyopathy." RP (Oct. 28, 2009) at 144-45, 154, 163-64, 169, 174, 196.

The industrial appeals judge issued a proposed decision and order affirming the DLI's decision, concluding that McKeown (1) "failed to file a claim for industrial injury within the time limitation of one year for filing an application or enforcing a claim for

injury, pursuant to RCW 51.28.050," (2) "failed to file a claim for fire fighters' presumptive occupational disease within the time limitation of 60 months following his last date of employment with the City of Mount Lake Terrace Fire Department pursuant to RCW 51.32.185," and (3) "did not have an occupational disease that arose naturally and proximately from distinctive conditions of his employment, within the meaning of RCW 51.08.140." Certified Appeal Board Record (CABR) at 38. McKeown petitioned for review. The Board denied review and adopted the proposed decision and order as its own.

McKeown appealed to superior court and moved for summary judgment, arguing he was entitled to RCW 51.32.185's evidentiary presumption and that the Board erred in failing to apply it. He also argued that Dr. Holland's testimony was insufficient to rebut the presumption and should be stricken. The DLI filed a cross motion for partial summary judgment requesting that the superior court affirm the Board's determination that McKeown's eligibility for RCW 51.32.185's rebuttable evidentiary presumption was time barred. The DLI did not seek to terminate review in the superior court of the Board's finding that McKeown's cardiomyopathy was not an occupational disease.

The superior court granted the DLI's cross motion for partial summary judgment, ruling that McKeown's eligibility for the rebuttable evidentiary presumption was time barred. The court denied McKeown's motion, concluding:

> 3.3 Dr. Holland's testimony is properly before this Court. First, the foreign cases cited by Mr. McKeown are not applicable because they all arise in the context of occupational disease claims where the occupational disease evidentiary presumption applied and Mr. McKeown is not eligible for that presumption here. Second, Mr. McKeown waived the issue of the legal sufficiency of Dr. Holland's testimony when he failed to raise the

issue in his petition for review to the Board.

3.4 Whether Mr. McKeown did sustain an occupational disease, under RCW 51.08.140 in the course of his employment as a fire fighter with the City of Montlake Terrace, or did not, is a matter of factual dispute based on the arguably conflicting testimony of Drs. Holland and Siecke.

3.5 or Mr. McKeown is not entitled to an award of attorneys fees, litigation costs, expert witness fees.

This appeal followed.

ANALYSIS

Standard of Review

A superior court reviews decisions under the Industrial Insurance Act ("the Act") de novo, relying on the certified board record. RCW 51.52.115; Elliott v. Dep't of Labor & Indus., 151 Wn. App. 442, 445, 213 P.3d 44 (2009). "Only issues of law or fact that were included in the notice of appeal to the Board or in the proceedings before the Board may be raised in the superior court." Elliott, 151 Wn. App. at 446. We review the superior court's decision on summary judgment de novo. Elliott, 151 Wn. App. at 446. Our review is the same as the superior court's and is based solely on the evidence presented to the Board. Dep't of Labor & Indus. v. Avundes, 95 Wn. App. 265, 269-70, 976 P.2d 637 (1999). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

Neither party disputes the facts here. Thus, the sole legal question for our determination is one of statutory interpretation. We review questions regarding statutory interpretation de novo. Advanced Silicon Materials, LLC v. Grant County, 156 Wn.2d 84, 89, 124 P.3d 294 (2005). "Our chief goal in analyzing and applying a

statute is to give effect to the legislature's intent, 'and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" Advanced Silicon, 156 Wn. 2d at 89 (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We examine each statutory provision as it relates to other provisions and seek a consistent construction of the whole. Shafer v. Dep't of Labor & Indus., 140 Wn. App. 1, 7, 159 P.3d 473 (2007). The Act is "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. We resolve all doubts as to the meaning of the Act in favor of the injured employee. Shafer, 140 Wn. App. at 7. Courts have the ultimate authority to interpret a statute, but we give "substantial weight" to the interpretation of the agency charged with administering the statute. Rose v. Dep't of Labor & Indus., 57 Wn. App. 751, 757, 790 P.2d 201 (1990).

Applicability of RCW 51.32.185's Rebuttable Evidentiary Presumption

McKeown argues that RCW 51.32.185's statute of limitations begins to run only after the physician notice specified in RCW 51.28.055 occurs. Thus, he claims the evidentiary presumption applies for 60 months (five years) after receiving such notice. The DLI argues that RCW 51.32.185 clearly and unambiguously limits the presumption's applicability based on a fire fighter's last date of employment without any reference to RCW 51.28.055's notice/discovery rule.

RCW 51.32.185 contains a burden-shifting provision for fire fighters asserting occupational disease claims. The statute provides in relevant part:

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

RCW 51.32.185(1). The statute also establishes a time limit for the rebuttable evidentiary presumption:

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

RCW 51.32.185(2) (emphasis added).

The statute's scheme addresses the evidentiary presumption and the general time limit for filing occupational disease claims in two distinct provisions. RCW 51.28.055(1) provides that occupational disease claims must be filed "within two years following the date the worker had written notice from a physician or a licensed advanced nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed." Generally, a worker claiming entitlement to benefits for an occupational disease carries the burden of proving that the disabling condition arose naturally and proximately out of employment. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 6, 977 P.2d 570 (1999). But if RCW 51.32.185's rebuttable evidentiary presumption for fire fighters applies, that burden shifts to the employer. See comments to RCW 51.32.185 (1987 ch. 515 § 1).

The DLI argues that RCW 51.32.185's plain language allows a fire fighter

claiming occupational disease to use the rebuttable evidentiary presumption for up to 60 months following his or her last date of employment. Because McKeown's last day on the City payroll was in January 2001 and he filed his occupational disease claim in February 2008, the DLI argues that the plain language of the statute precludes McKeown from asserting the presumption despite the fact that his general occupational disease claim was timely filed. Thus, the superior court may consider McKeown's occupational disease claim, but may not apply the rebuttable evidentiary presumption. We agree.

We discern plain meaning from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). RCW 51.32.185(2) specifically provides a time period for the presumption based on three calendar months for each year of service, not to exceed 60 months "following the last date of employment" (emphasis added). Unlike the time limit for filing general occupational disease claims, the time limit for applying the evidentiary presumption is not based on the date the fire fighter discovers or receives notice of the condition. Compare RCW 51.32.185 with RCW 51.28.055. RCW 51.32.185's plain language clearly expresses the legislature's intent to impose strict time limits on the evidentiary presumption.

McKeown provides no response to the DLI's plain meaning argument. Instead, he argues that RCW 51.28.055(1)—the provision establishing a two-year time limit for filing general occupational disease claims—extends the time period in RCW 51.32.185

and, thus, the time limit for the evidentiary presumption only begins to run when a fire fighter is "fully advised that a viable claim exists." Appellant's Br. at 24. He argues that RCW 51.32.185 is "extra" protection, "'stacked on top'" and "additional" to RCW 51.28.055. Appellant's Br. at 21, 22, 30. Because his occupational disease claim was undisputedly timely under RCW 51.28.055, he argues that he is entitled to the evidentiary presumption in RCW 51.32.185.

We agree that RCW 51.32.185 establishes an additional benefit for fire fighters that is unavailable to non-firefighters. But McKeown ignores the statute's plain language, which imposes a strict time limit on this benefit. Every occupational disease claimant is entitled to file a claim within two years of receiving notice of the condition under RCW 51.28.055's notice/discovery rule. McKeown's occupational disease claim is undisputedly timely under that provision. Under RCW 51.32.185(2), fire fighters who allege certain diseases and file occupational disease claims within a maximum of 60 months "following the last date of employment" are entitled to a rebuttable evidentiary presumption that those diseases are occupational diseases. Nothing in RCW 51.32.185 suggests that the time limit for application of the evidentiary presumption only begins to run when a fire fighter receives notice of the condition. And nothing in RCW 51.29.055 suggests that it was intended to extend the time limit for application of RCW 51.32.185's evidentiary presumption.

The legislature enacted RCW 51.32.185 in 1987. The time limits it established for the rebuttable evidentiary presumption have remained unchanged through legislative amendments in 2002 and 2007. See Laws of 2002, ch. 337, § 2; Laws of

2007,

ch. 490, § 2. In enacting RCW 51.32.185, the legislature specifically referenced RCW 51.08.140 (the general definition of "occupational disease") but did not incorporate or reference RCW 51.28.055's two-year notice/discovery rule for occupational disease claims. Nor did the legislature mention RCW 51.32.185 in either of the two amendments to RCW 51.28.055 made after RCW 51.32.185's enactment. See Laws of 2003, 2d Spec. Sess. ch. 2, § 1; Laws of 2004, ch. 65, § 7. RCW 51.28.055 was enacted in 1951—36 years before RCW 51.32.185's rebuttable evidentiary presumption was enacted. The legislature is presumed to be familiar with its own prior legislation relating to the subject of the legislation. Ashenbrenner v. Dep't of Labor & Indus., 62 Wn.2d 22, 27, 380 P.2d 730 (1963). The legislature could have written a rule similar to RCW 51.28.055's notice/discovery rule into RCW 51.32.185 but did not.[5]

Throughout his brief, McKeown refers to a "presumptive occupational disease claim" and seems to argue that RCW 51.32.185 created an occupational disease claim somehow different than that defined in RCW 51.08.140.[6] We disagree. RCW 51.32.185(1) did not create a new cause of action—it created a "presumption" that applies to certain fire fighter occupational disease claims. The Engrossed

[5] McKeown argues that the legislature is not required to explicitly mention RCW 51.28.055 in RCW 51.32.185 or vice versa. Even assuming that is true, here nothing in either statute even suggests the legislature intended that they cross-reference each other.

[6] RCW 51.08.140 defines "occupational disease" as "such disease or infection as arises naturally and proximately out of employment . . . ."

Substitute S.B. 5801 Fact Sheet (1987) explained, "[The] Bill does nothing more than shift the burden of proof for duty related heart disease for LEOFF II law enforcement, and heart/lung diseases for fire fighters to L&I or self-insured employers." (Emphasis added.) The House Bill Report, Senate Bill Report, and Final Legislative Report all contain language repeating the statutory language: "The presumptions . . . may not extend more than 60 months following the last date of employment." Engrossed Second Substitute SB 5801 H.B. Report (1987); SB 5801 Senate Bill Report (1987); SSB 5801 Final Legislative Report (1987) (emphasis added). RCW 51.32.185 did nothing more than create a time limited rebuttable evidentiary presumption.

McKeown claims that the DLI is attempting to (1) preclude him "from the same rights as others have when they file an occupational disease claim" and (2) "deny benefits to fire fighters that are routinely granted to all others suffering occupational disease." Appellant's Br. at 22, 30. He claims, "Using the [DLI's] favored interpretation, only fire fighters have only 60 months from the date they were last employed in which to file an occupational disease claim; whether they received notice from a physician or not." Appellant's Br. at 23. McKeown misstates the DLI's position and the law. As discussed above, McKeown is not precluded from any of the rights all occupational disease claimants possess under RCW 51.28.055's 2-year notice/discovery rule. He timely filed his occupational disease claim over 7 years after his employment ended. That claim survives. But because he filed his claim over 60 months after his last date of employment, he is not entitled to RCW 51.32.185's rebuttable evidentiary presumption.

McKeown argues throughout his brief that the Act is remedial in nature and must be liberally construed with all doubts resolved in favor of the worker. He seems to argue that RCW 51.28.055 delays the 60-month limit for application of RCW 51.32.185 under the doctrine of liberal interpretation. It is true that we resolve doubts in favor of the worker when construing the Act. Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). "'But it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.'" Elliott, 151 Wn. App. at 450 (quoting Johnson v. Dep't of Labor & Indus., 33 Wn.2d 399, 402, 205 P.2d 896 (1949). See also Lowry v. Dep't of Labor & Indus., 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (declining to apply the liberal construction rule in a workers' compensation case where statutory language was unambiguous and noting that such "so-called construction would, in fact, be legislation."). Here the statutory language unambiguously provides that the rebuttable evidentiary presumption applies "for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment." RCW 51.32.185(2) (emphasis added). "[W]e cannot, under the guise of construction, substitute our view for that of the Legislature." Allan v. Dep't of Labor & Indus., 66 Wn. App. 415, 420-21, 832 P.2d 489 (1992). The liberal construction doctrine does not apply under the circumstances here.

McKeown also argues that the common law "discovery rule" applies to extend RCW 51.32.185's time limit for application of the rebuttable evidentiary presumption. Appellant's Br. at 25. He cites tort cases for this principle. But McKeown fails to

acknowledge that "[a]n industrial insurance claim is 'governed by explicit statutory directives and not by the common law.'" Elliott, 151 Wn. App. at 447 (quoting Rector v. Dep't of Labor & Indus., 61 Wn. App. 385, 390, 810 P.2d 1363 (1991)). The Act provides an exclusive remedy for occupational injuries and explicitly abolishes the courts' common law jurisdiction over causes of action arising from such injuries. RCW 51.04.010.

Our courts have declined to apply discovery rules to industrial insurance cases where not specifically provided by the Act. See Elliott, 151 Wn. App. at 447 ("This court may not relax the one-year statute of limitations [for occupational injury claims] where the legislature has clearly expressed its intent to allow a 'time of manifestation' or 'discovery' rule only for occupational diseases, not for injuries."); Rector, 61 Wn. App. at 390-91 (emphasizing that "[a]n industrial insurance claim . . . is governed by explicit statutory directives and not by the common law" and rejecting claimant's argument that the common law discovery rule should apply to his industrial injury claim). McKeown cites no authority for the proposition that a discovery rule postpones the effect of a statutorily time limited evidentiary presumption. Because his claim falls under the Act, the common law discovery rule is inapplicable.[7]

[7] In his reply brief, McKeown claims that in Funkhouser v. Wilson, 89 Wn. App. 644, 666, 950 P.2d 501 (1998), aff'd in part on other grounds, C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999), "the court determined that the discovery rule applies to all statutes of limitations." Appellant's Reply Br. at 2. McKeown mischaracterizes the court's holding. Funkhouser addressed a negligence claim and the court actually held, "the judicially developed common-law discovery rule applies to all statutes of limitation, in the absence of legislation limiting the application of the rule." Funkhouser, 89 Wn. App. at 666 (emphasis added). As discussed above, the Act supplants common law remedies for industrial injury cases.

Finally, McKeown cites to several non-Washington cases to argue that he is entitled to the benefit of RCW 51.32.185's rebuttable evidentiary presumption. These cases are unpersuasive because none addresses time limits on the applicability of a presumption.[8]

RCW 51.32.185's time limited rebuttable evidentiary presumption is clear. As a matter of law, McKeown is not entitled to the benefit of the presumption because he filed his occupational disease claim more than 60 months after his last date of employment as a fire fighter. The superior court correctly determined that McKeown's eligibility for the presumption is time barred.

See RCW 51.04.010. McKeown also argues that in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), "[t]he United States Supreme Court . . . held that the statute of limitations for an occupational condition caused by continuous exposure to harmful elements will be tolled until the 'accumulated effects of the deleterious substance manifest themselves.'" Appellant's Reply Br. at 1 (quoting Urie, 337 U.S. at 170). McKeown's reliance on Urie is misplaced. Urie involved a different statute (the Federal Employers' Liability Act) containing a statute of limitations that would have barred a worker from bringing a claim at all, even if the worker did not learn of his occupational disease until after the statute of limitations ran. To the contrary, here McKeown's occupational disease claim is undisputedly timely under RCW 51.28.055. He was allowed to bring his claim. Urie does not stand for the idea that clear statutory language establishing a time limit for an evidentiary presumption may be judicially extended if the claimant did not know of his condition before the time limit expired.

[8] See Robertson v. N. Dakota Workers Comp. Bureau, 616 N.W. 2d 844, 851 (N.D. 2000) (issue was whether the amended or the older version of the presumption statute applied); Montgomery County v. Pirrone, 109 Md. App. 201, 209-10, 674 A.2d 98 (1996) (issue was whether statutory language establishing a presumption for "paid" fire fighters precluded application of the presumption to a fire fighter who suffered a heart attack after retiring); McCoy v. City of Shreveport Fire Dep't, 649 So.2d 103 (La. App. 1995) (issue was whether evidence was sufficient to rebut the presumption); Fairfax County Fire & Rescue Dep't v. Mitchell, 14 Va. App. 1033, 1036, 421 S.E.2d 668 (1992) (issue was whether evidence was sufficient to rebut the presumption).

Dr. Holland's Testimony

McKeown argues that Dr. Holland's testimony should be stricken either because it is speculative and conclusory or because Dr. Holland "refused to acknowledge the presumption in the statute" and thus "refus[ed] to apply Washington law in favor of [McKeown]." Appellant's Br. at 38, 39. The DLI responds that (1) McKeown waived his right to challenge the testimony by failing to raise this issue in his petition for review to the Board and (2) even if we review his argument, it fails on the merits.

"Only issues of law or fact that were included in the notice of appeal to the Board or in the proceedings before the Board may be raised in the superior court." Elliott, 151 Wn. App. at 446; RCW 51.52.115. A claimant petitioning the Board for review "shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." RCW 51.52.104 (emphasis added).[9]

McKeown failed to object to Dr. Holland's opinion testimony at the hearing, on the ground that either it was speculative or conclusory or it was otherwise insufficient.[10]

[9] To the extent McKeown argues he petitioned for review of "all issues" determined by the industrial appeals judge, this is insufficient. Appellant's Br. at 15. Objections and issues must be set forth with specificity. RCW 51.52.104; Kustura v. Dep't of Labor & Indus., 142 Wn. App. 655, 690, 175 P.3d 1117 (2008) (claimant waived issues not specifically raised in his petition for review to the board); Allan, 66 Wn. App. at 422 (same). Moreover, as discussed below, McKeown failed to object to the testimony at the hearing and, thus, no evidence indicates the industrial appeals judge considered the issue.

[10] At the beginning of Dr. Holland's testimony, the DLI asked Dr. Holland for his opinion as to whether McKeown's cardiomyopathy was an occupational disease. Before Dr. Holland could answer, McKeown objected based on "foundation, speculation." RP (Oct. 28, 2009) at 139. The DLI explained that the foundation was

He similarly failed to raise the issue when he petitioned the Board for review of the proposed decision and order. He cites to no evidence indicating that either the industrial appeals judge or the Board considered this issue. McKeown waived his right to raise the argument in the trial court, and we decline to consider it on appeal. RCW 51.52.104; RCW 51.52.115; Kustura v. Dep't of Labor & Indus., 142 Wn. App. 655, 690, 175 P.3d 1117 (2008) ("Kustura did not raise this issue before the Board nor does he cite to any testimony or other evidence before the Board on this issue or indicate that the Board considered this issue. Thus, this claim is not properly before us and we cannot consider it."). The superior court properly determined that McKeown waived his challenge to the legal sufficiency of Dr. Holland's testimony.[11]

Remaining Assignments of Error

CR 26 Order

McKeown assigns error to the Board's grant of a CR 26(c) protective order in the DLI's favor.[12] McKeown raised this issue in his petition for review to the Board. ("The

coming and the industrial appeals judge allowed testimony to continue. McKeown objected again on foundation and speculation grounds when Dr. Holland discussed a "work relatedness" test, which the industrial appeals judge overruled. RP (Oct. 28, 2009) at 142-43. McKeown did not object to the remainder of Dr. Holland's testimony on any of the bases he now raises.

[11] We further note that to the extent McKeown argues (1) Dr. Holland rejected or refused to acknowledge RCW 51.32.185's rebuttable evidentiary presumption or (2) Dr. Holland's testimony is insufficient to rebut the presumption, these arguments are irrelevant given our above conclusion that McKeown is not entitled to the benefit of the presumption. The cases McKeown cites for his arguments concern claims in which the evidentiary presumption applied. Those cases are inapposite here.

protective order issued by Judge Kirkendall on October 23, 2009 was arbitrary, capricious, and an invalid reversal of a previously issued order by a senior judge." (Boldface and capitalization omitted.)). But he failed to raise it in his notice of appeal to superior court. Instead, he appealed "all prior rulings and all matters of [the Board's] Decision and Order." McKeown failed to request relief on this specific basis in his motion for summary judgment and in his "response in support of motion for summary judgment and reply to cross motion." The trial court did not address this claimed error in granting the DLI's motion for partial summary judgment or denying McKeown's motion for summary judgment. For these reasons we decline to address it here. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." (Emphasis added.)). In addition, despite assigning error to the Board's grant of the protective order, McKeown offers no argument or citation to the record on this issue in his opening or reply brief. He thus abandons this claimed error. See RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

CR 12(b)(1) Order

[12] In August 2009 the DLI moved under CR 26(c) for a protective order precluding production of 7,000 to 8,000 documents. The industrial appeals judge granted the motion in an interlocutory order "[b]ased upon the Board's lack of subject matter jurisdiction over the issue of presumptive occupational disease in this matter, and the private and confidential nature of the information being sought . . . ." CABR at 432.

McKeown assigns error to the Board's order granting the DLI's CR 12(b)(1) motion to bar presumptive occupational disease and industrial injury as grounds for relief.[13] As discussed above, McKeown is not entitled to RCW 51.32.185's rebuttable evidentiary presumption, and his industrial injury claim is time barred under RCW 51.28.055's one-year statute of limitations. He demonstrates no error.

Board's Occupational Injury Ruling

McKeown assigns error to the Board's determination that he failed to file an occupational injury claim within RCW 51.28.050's one-year statute of limitations. But he acknowledges this is an occupational disease claim, not an injury claim. And he affirmatively stated in his motion for summary judgment in superior court that his claim was for occupational disease, not injury. Whether he is truly challenging the Board's determination is unclear.[14] To the extent McKeown argues that the DLI attempted to

[13] The DLI filed this motion in May 2009. The industrial appeals judge granted the motion in an interlocutory order.

[14] Even if we construe McKeown's argument to challenge the Board's ruling on this issue, it is clear that any injury claim he might have had was untimely filed. Under RCW 51.08.100, an injury is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.28.050 provides that injury claims are not valid "unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued . . . ." See also Elliott v. Dep't of Labor & Indus., 151 Wn. App. 442, 444, 213 P.3d 44 (2009) ("A worker injured on the job must file a claim within one year after the day upon which the injury occurred."). Unlike occupational disease claims, "there is no discovery rule extending the deadline for filing an injury claim . . . ." Elliott, 151 Wn. App. at 444. McKeown stopped working on July 16, 2000. Thus, he was required to file any industrial injury claim by July 16, 2001. McKeown's 2008 claim could never have been a timely injury claim.

"force" his occupational disease claim into the injury category to shorten the statute of limitations to one year, this assertion is unsupported in the record.

Moreover, McKeown did not contest the occupational injury ruling in his petition for review to the Board—instead, he stated that his occupational disease claim was "not governed by the one year injury limit," which is undisputed. In his motion for summary judgment on appeal to superior court, he similarly failed to challenge the Board's injury ruling, arguing instead that "the [DLI] intentionally classified claimant's condition as an 'injury' in order to reduce the statute of limitations down to one year in which to perfect a claim." But as the DLI points out, "[i]t has always been undisputed that Mr. McKeown's occupational disease claim under RCW 51.08.140 was timely filed per RCW 51.28.055." Resp't's Br. at 5. The DLI's position is that (1) any injury claim was filed outside the statute of limitations, but the occupational disease claim was timely and (2) McKeown did not file his disease claim in time to benefit from RCW 51.32.185's evidentiary presumption.[15] We addressed that argument above. And as discussed below, nothing in the superior court's order prevents McKeown from arguing the merits of his timely occupational disease claim on remand. McKeown demonstrates no error.

[15] The DLI also took this position in the proceedings before the Board. See RP (Sept. 30, 2009) at 18 ("Mr. McKeown . . . did not file a timely claim for an injury or a presumptive fire fighter claim. Those two claims should be dismissed. And his occupational disease claim survives and proceeds to trial.").

Board's Occupational Disease Ruling

McKeown challenges the Board's conclusion that he did not have an occupational disease arising from his employment within the meaning of RCW 51.08.140. But the superior court did not reach this issue, specifically noting that whether McKeown sustained an occupational disease as defined in RCW 51.08.140 "is a matter of factual dispute based on the arguably conflicting testimony of Drs. Holland and Siecke." The DLI's partial summary judgment motion was intended to resolve discrete legal issues, not to eliminate trial altogether. The superior court decided only issues of law—applicability of RCW 51.32.185's rebuttable evidentiary presumption and admissibility of Dr. Holland's opinion testimony. Nothing in the court's order precludes further superior court review of the factual dispute regarding whether McKeown had an occupational disease. We decline to review this prematurely raised issue. Samuelson v. Cmty. Coll. Dist. No. 2, 75 Wn. App. 340, 347, 877 P.2d 734 (1994) ("the appellate court is not the fact finder").[16]

Attorney Fees and Costs

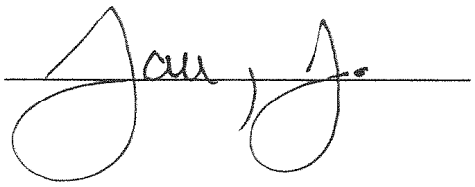
McKeown requests attorney fees and costs under RCW 51.32.185(7), which provides that a fire fighter successfully appealing a determination regarding the evidentiary presumption shall have his reasonable attorney fees and costs paid by the opposing party. Because McKeown has not successfully appealed the DLI's

[16] Accordingly, McKeown's argument that "the worker's treating medical practitioners are to be given special consideration by the trier of fact in all industrial insurance cases" is more properly made on remand when the court considers the merits of his occupational disease claim. Appellant's Reply Br. at 15-16.

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

CONCLUSION

Because (1) McKeown is not entitled to RCW 51.32.185's evidentiary presumption under the statute's plain language, (2) McKeown waived his challenge to Dr. Holland's testimony and the superior court nevertheless properly found the testimony admissible, and (3) McKeown failed to properly preserve other claimed errors and his challenge to the Board's occupational disease ruling is not ripe for review, we affirm the superior court order granting the DLI's partial summary judgment motion and denying McKeown's summary judgment motion.



WE CONCUR: