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DIVISION II
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No. 52908-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

For over thirty years, Andrew Leitner (“Lt. Leitner”) was a fire fighter for the City of Tacoma. This is a worker’s compensation case governed by the Industrial Insurance Act, Title 51 RCW. Under RCW 51.32.185(1)(a)(ii), any “heart problems” experienced by Lt. Leitner within seventy-two hours of exposure to smoke, fumes, or toxic substances or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities, are presumed to be occupational diseases under RCW 51.08.140.

This presumption is not limited to myocardial infarction (heart attack) or myocardial infarction as a singular event. Rather, it pertains to “any heart problems”. The presumption is not confined to exposure to only “diesel fumes”. Rather, it applies to the more broad categories of “smoke, fumes or toxic substances” exposure. *See RCW 51.32.185(1)(a)(ii)*.

RCW 51.32.185, reflects a strong social policy, for which the Courts must accord it the strength intended by the legislature. *See Spivey v. City of Bellevue*, 187 Wash. 2d 716, 731, 389 P.3d 504 (2017). This presumption does not vanish on the production of contrary evidence; rather, it shifts both the burden of production and persuasion to the employer. *id.*

As a matter of law, the employer fails to meet its burden to rebut the presumption if: (1) the cause of the disease cannot be identified by a

preponderance of the evidence; or (2) if there is no known association between the disease and firefighting, or (3) if the employer fails to provide evidence from which a reasonable trier of fact could conclude that the disease was, more probably than not, **caused by non-occupational** factors. See *Gorre v. City of Tacoma*, 180 Wash. App. 729, 758, 324 P.3d 716 (2014), as amended on reconsideration in part (July 8, 2014), as amended (July 15, 2014), rev'd, 184 Wash. 2d 30, 357 P.3d 625 (2015), reversed on other grounds. and See *Spivey v. City of Bellevue*, *supra* at 735.

In making its findings of fact and conclusions of law, the Board improperly limited the application of the presumption in this case to a singular “acute” “myocardial infarction” (instead of “any heart problem”) and improperly applied the 72 hour exposure prong to only “diesel fumes” (instead of “smoke, fumes or toxic substances”). *CP 113-122*. The Board also incorrectly applied the burden placed on the employer by RCW 51.32.185 as interpreted by the Appellate Court in *Gorre v. City of Tacoma*, *supra* and the Supreme Court in *Spivey v. City of Bellevue*, *supra*.

On appeal to the Superior Court, the Superior Court judge acknowledged that the Board’s rationale is flawed and that the Board applied the wrong standard. *VRP 459, 369*. The Court even stated: “I think the Board’s analysis was incorrect”. *VRP 369*. Despite the Court acknowledging

that the Board applied the wrong standard and that the Board's analysis was flawed – and despite the Supreme Court's holdings in *Spivey v. City of Bellevue*, and the Appellate Court's holdings in *Gorre v. City of Tacoma* – the Court failed to correct the Board's prejudicially flawed findings of fact and conclusions of law and failed to apply the proper burden on the employer. The Court had a duty under RCW 51.52.115 to reverse or modify the Court's findings of facts and conclusions of law – but failed to do so.

At trial, Lt. Leitner was deprived of the presumption as to “any heart problem” and was deprived of the protection of the burden-shifting mechanism of RCW 51.32.185.

Lt. Leitner was also prejudiced by the Court's failure to exclude the City's industrial hygienist expert – when his testimony was irrelevant because (a) it is undisputed that Lt. Leitner was exposed to diesel fumes on the fireboat on December 31, 2014 and so the “level” of fumes is immaterial under the presumptive disease statute and (b) who failed to perform any test of exposure to smoke, fumes or toxic substances to which Leitner was exposed while working at the fire station or from the fire engine on December 31, 2014 and February 25, 2015 and throughout his 30 year career; and (c) his testing performed as to the fire boat so far departed from the real world conditions that it was unreliable.

Riordan tested only the exposures on the fire boat – ignoring the various stations and apparatus to which Lt. Leitner was exposed throughout his career and during his heart problems experienced from December 31, 2014 through February 28, 2015.

He testified that the light wind was blowing off the water both days of his testing. *CP 698*. He admitted that in that situation, it was **impossible** to say whether the diesel exhaust from the boat would be pushed parallel to the upper surface of the boat so that it would not be coming across the boat or over the top of the working deck. *CP 698*.

He admitted that he never took the fireboat out in the bay - rather, “we stayed in the harbor.” *CP 699*. He admitted that they stayed “at a low speed.” *CP 699*. He admitted that during the two hours each day that he was at the dock and the ten, twenty, thirty minutes that he was out each day at low speed, they **did not** rev up the boat. *CP 699*.

He admitted that the conditions when he was on the fire boat weren't necessarily the typical routine for the fireboat's operation. *CP 712*. He testified: “They were just idling and staying on board.”

II. ASSIGNMENTS OF ERROR

1. The Board and Superior Court committed reversible error by treating this case as if the only condition applicable to the presumption in RCW 51.32.185(1)(a)(ii) was a February 28, 2015 “myocardial infarction” and as if that the only exposure

applicable to the presumption's 72 hour time-frame was "diesel fumes".

2. The Board and Superior Court committed reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue*.
3. The Superior Court committed reversible error by failing to reverse or modify the Board's findings and decisions to comply with the law as set forth in RCW 51.32.185 and *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue*.
4. The Superior Court committed reversible error by failing to grant Lt. Leitner's motion for summary judgment.
5. The Superior Court committed reversible error by failing to exclude the testimony of industrial hygienist Frank Riordan.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board and Superior Court commit reversible error by treated this case as if the only condition applicable to the presumption in RCW 51.32.185(1)(a)(ii) was a February 28, 2015 "myocardial infarction"? and that the only exposure applicable to the presumption's 72 hour time-frame was "diesel fumes"? Yes.
2. Did the Board and Superior Court commit reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue*. Yes.
3. Did the Superior Court commit reversible error when it failed to reverse or modify the Board's findings and decisions to comply with the law as set forth in RCW 51.32.185 and *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue*?

4. Did the Superior Court commit reversible error when it failed to grant Lt. Leitner's motion for summary judgment? Yes.
5. Did the Superior Court commit reversible error when it failed to exclude the testimony of industrial hygienist Frank Riordan? Yes.

IV. STATEMENT OF FACTS

For thirty-one years, Lt. Leitner was a fire fighter for the City of Tacoma. *CP 578:24 - 579:1*. He made Lieutenant in 1988. *CP 580:14-19*.

For most of Lt. Leitner's career, when the rig was backing into the fire station, Lt. Leitner stood behind the engine – and as a result, he would breathe fumes. *CP 541:1-3*. In approximately 2011, the City phased in a hose system to divert the exhaust from the rigs in the station, but until the connector is connected ,the fumes are still blowing into Lt. Leitner's face – because it was his job to connect the connector. *CP 626: 17-23; 541:5-12*.

This hose system is called the Nederman system - and without exception, it was Lt. Leitner's responsibility to attach that system when he would be returning back to the station on an engine after a call. *CP 560:7-18; CP 563:5-11*. He breathes diesel exhaust while he's walking back to connect the Nederman system. *CP 563:24 - 564:1*. Even with the diesel exhaust being connected to the Nederman system, there are still diesel exhaust fumes in the apparatus bay. *CP 564:12-16*.

Lt. Leitner smelled diesel exhaust in his living quarters at Station 14

as recently as the last shift he worked there, which was February 25, 2015. *CP 565:12-16* There was always a diesel smell at Station 14 in the living quarters. *CP 565:17-22.*

Lt. Leitner went on about 800 calls a year, generally, over the course of his 31 years as a firefighter for the City of Tacoma. *CP 622:20-25.* On every one of those calls, he was exposed to diesel fumes in the apparatus or on the scene or in returning to the fire station. *CP 623: 4-7.*

All vehicles, except for staff vehicles, that Lt. Leitner worked around during his employment as a firefighter and a fire lieutenant were diesel vehicles – and he was never assigned to a “staff vehicle.” *CP 633:13-20.*

During his career, Lt. Leitner responded to approximately five thousand fire suppression calls as a firefighter where there was smoke, fumes and toxic substances in either a residential or a commercial fire. *CP 626:5-627:22.*

During his December 31, 2014 24 hour shift, Lt. Leitner responded to multiple medical calls. *CP 582:22-23.* Fire engine 14 is a diesel rig. *CP 586:6-7.* Frequently, Lt. Leitner would do patient-transfers (i.e. lifting) involving 300 to 400 pound patients. *CP 589:14-590:4*

Also on his December 31, 2014 24-hour shift, Lt. Leitner performed a boat check, where they take the fire engine down to the fire boat and

perform the check. *CP 583:12-20*. Part of this boat check involves “exiting the alternator” – where the boat is started, the engines are revved up and down multiple time until the RPMs and the altnerator shows over 14 amps before going back down to an idle. *CP 583:18 - 584:5*. In doing this, there is a lot of diesel fumes from the back of the boat that permeates the area that Lt. Leitner was in. *CP 584:6-8*. He was in proximity to the diesel exhaust. *CP 585:7-586:1*.

Also on this new year’s eve, 2014 shift, Lt. Leitner was aboard the fireboat and responded to a “disabled boat” call where a man had deployed his anchor into the water - 200 maybe 300 feet of hoseline. The boat had no battery power, no lighting, and was in the shipping lane. The boat’s radio was not working. *CP 527:17- 528:17*.

The fireboat got up to 30 knots (around 30 mph). *CP 632:24-633:5*. While on the disabled boat, Lt. Leitner began pulling the anchor up, hand-over-hand. *CP 530:1-2*. The anchor was forty to fifty pounds. *CP 530:11*. After pulling the anchor up for three to four minutes, Lt. Leitner started to experience extreme sweatiness and nausea. The pain between his shoulders worsened, and started to radiate down his left arm, which was unusual to him. *CP 530:14-20*. He paused, and then continued to pull the anchor up for another four to five minutes. As he continued to pull the anchor up, the pain

started to increase again in his left arm, the pain between his shoulders started to feel like there was a knife poking between his shoulder blades, and the pain in his chest was an aching sensation, he still felt short of breath and he started to feel dizzy. He secured the anchor. He was out of breath. He felt nauseous. He had some chest pain. He did not feel very well. *CP 530:24 - 531:12; 596:14 - 597:1.*

During the remainder of that December 31, 2014 to January 1, 2015 shift, Lt. Leitner felt dizzy, tired, had a sharp pain between his shoulders, still had chest pain (but decreased) and his left arm was throbbing. *CP 598:12-19.*

At 2:00 am the morning of January 1, 2015, Lt. Leitner awoke drenched in sweat with the pain “really hard” between his shoulders **and going down his left arm.** *CP 533:5-7.* He felt that there was something wrong. *CP 599:10-11.* After he went home after his shift on January 1, 2015, he felt nauseous off and on. He felt weak and disoriented. *CP 600:9-14.* On January 2, 2015, he was still not feeling well. *CP 600:1-5.*

On February 25, 2015, Lt. Leitner started his shift at 7:00 am, and that shift ended on February 26, 2015 at 7:00 am. On this shift, Lt. Leitner responded to several calls. *CP 600:18- 601:8.* One call involved Mr. Leitner helping lift a very heavy man who had fallen. *CP 11-19.* Lt. Leitner felt

dizzy, light-headed and the pain between his shoulders increased. *CP 601:25 - 602:1*. On this shift, Lt. Leitner felt exceptionally worse than he had felt since December 31, 2014 - he testified "it was like a crescendo, an increasing, and that shift I notably told my crew again as I said when I started that, I don't feel good ,my left arm work me up again last night, which I told them that was common, every night around 2:00 my left arm would wake me up and it would hurt." *CP 605:18 - 606:4*.

Also on this shift (2/25/15 through 2/26/15 at 7:00 am), Lt. Leitner was dizzy at times, sometimes unsteady and was extraordinarily tired. *CP 606:5-8*. He also was awoken with extreme left arm pain at 2:00 am. *id*. After getting home on January 26, 2015, he took had no energy, felt off, did not feel well, felt nauseous off and on and the upper back pain was increasing and "it was different." *CP 607:4-15*.

The next day, February 27, 2015, Lt. Leitner felt worse. He was extremely tired, nauseous, confused and dizzy. *CP 607:16-23*. He got up from the couch and felt like he was going to pass out. *CP 607:24-608:1*. Lt. Leitner woke up at approximately 6:00 am on February 28, 2015 with extreme pain. He sat up in bed and his left arm was throbbing, aching, and he felt something in his chest. *CP608: 8-13*. After getting out of bed, walked around his house in a confuses state and he, again, was dizzy and nauseous.

CP 608:20-24. He broke out in a cold sweat and that pain that was between his shoulders went directly into his chest. *CP 609:1-4.*

He testified: “I think this has gone on too long, [. . .]”. *CP 611:1.* He called 911. *CP 611:9.* He was taken to the hospital. *CP 612:1-2.* He was taken into surgery. *CP 613:14.*

Lt. Leitner submitted the Supervisor’s Reports of Incident or Injury and SIF-2 regarding **December 31, 2014** and February 28, 2015. *CP 236-237.* He submitted his SIF-2 Addendum detailing a history of December 31, 2014 through February 2, 2015, culminating in his trip to the hospital on February 28, 2015. *CP 251-253.*

The Department of Labor and Industries (“Department”) accepted Lieutenant Leitner’s RCW 51.32.185(1)(a)(ii) presumptive occupational disease heart claim. *CP 187.* The employer appealed. *CP 181-184.* The IAJ affirmed claim acceptance under RCW 51.32.185, the presumptive occupational disease statute. *CP 169-179.* The employer sought review by the Board of Industrial Insurance Appeals (“Board”). *CP 140-164.*

In making its findings of fact and conclusions of law, the Board improperly limited the application of the presumption in this case to a singular “acute” “myocardial infarction” (instead of “any heart problem”) and improperly applied the 72 hour exposure prong to only “diesel fumes”

(instead of “smoke, fumes or toxic substances”). *CP 113-122*. This was despite evidence of other heart problems experienced within 24 hours of strenuous physical activity and within 72 hours of exposures to smoke, fumes or toxic substances.

As such, in Lt. Leitner’s trial on appeal from the Board’s Decision & Order, the jury was misled to believe that the jury’s decision was confined only to deciding the issues as it pertains to Leitner’s “myocardial infarction” (opposed to “any heart problem”) and when considering exposures, only exposures to diesel fumes (opposed to “smoke, fumes or toxic substances” more generally).

A second error at the Board occurred because the Board failed to apply the burden of proof placed upon the employer by RCW 51.32.185 as construed by the Court of Appeals in *Gorre v. City of Tacoma, supra* and *Spivey v. City of Bellevue, supra*. The City, as matter of law, fails to rebut the presumption by a preponderance of the evidence if there is no known association between the disease and firefighting, or if the employer fails to provide evidence from which a reasonable trier of fact could conclude that the disease was, more probably than not, caused by non-occupational factors.

The City’s medical expert’s testimony fits directly within what Washington State’s Appellate and Supreme Court has made clear does **not**

rebut the presumption. *See Thompson Dep at CP 748:16-25; 750:16- 751:7; 753:24 -754:6; 755:16- 756:3; 757:4-12; 758:8-17.*

Lt. Leitner appealed to the Pierce County Superior Court. *CP 1-4.*

Lieutenant Leitner moved for summary judgment in the Superior Court, stating in part:

- There is no preponderance of rebuttable evidence regarding causation because the SIE, as well as the Board, bases the "rebuttal" on the mechanism of the heart attack, not the cause, (CABR 5,15,18,21,35,36,38) and pure speculation. *CP 1039.*
- The SIE cannot rebut the presumption that Petitioner's heart problem is occupational. This highlights the significance of correct placement of the burden of proof and how failure to give Petitioner the benefit of the presumption deprives him of due process." *CP 1039.*
- Just applying speculation and conjecture to trumpet a conclusory opinion that firefighting isn't a cause of Petitioner's heart problem does not meet the evidentiary standard set forth in RCW 51.32.185 or required by *Spivey, id.* *CP 1042.*
- In other words, the SIE had, and continues to have, the burden of showing that all causes of Petitioner's heart problem originated outside of employment as a firefighter. *CP 1043.*

The Superior Court denied this motion. *CP 1157-1158.* This was error, given the case law in *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue* – which solidified the strength of the presumption and the burden that RCW 51.32.185 places squarely on the employer.

The Court also should have excluded the testimony of the City's other "expert", industrial hygienist Frank Riordan, CIH. *CP 660:13-14.*

Riordan performed an exposure assessment pertaining to the fireboat on which Lt. Leitner was on when he pulled up the anchor on December 31, 2014. *Riordan Dep at CP 663:12-15; 664:3-11; 666:7-12.*

Riordan did not do any measurement in this case on any of the engines or EMS apparatus at Stations 14, 12, 3 or 5. *CP 708:23 - 709:2.* Riordan did not do any testing at the fire house. *CP 712:21-23.* He also failed to go out on any fire calls that Station 14 may have been called out on after he was hired for this litigation. *CP 712:24 - 713:2; 712:4-12.* He admitted that the conditions when he was on the fire boat were not necessarily the typical routine for the boat's operation. *CP 712:16-19.* He testified: "They were just idling and staying on board." *CP 712:20.* He admitted that they did not actually "go out on the bay." *CP 699:4.* He testified that "We stayed in the harbor." *CP 699:4-5.* He admitted that they "Did not go full speed" and that they "stayed at a low speed." *CP 699:5-7.* He admitted that during the two hours each day that he was at the dock and the ten, twenty, thirty minutes that he was out each day at low speed, they did not "rev up the boat." *CP 699:16-24.*

During his testing, there was light wind blowing off of the water. *CP*

698:9-11. He then admitted that in that situation, it is **impossible to say** (without doing smoke tubes and seeing where the wind is going) whether the diesel exhaust would be pushed parallel to the upper surface of the boat so that it wouldn't be coming across the boat or over the top of the working deck. *CP 698:12-20.*

Lt. Leitner moved in limine to exclude this witness. *CP 1211-1212.* In his Motion in Limine, Lt. Leitner informed the Court that: "The data collected by the City of Tacoma's expert is incomplete, technically flawed, and will confuse – not assist – the jury." and "The opinion of the City of Tacoma expert was preordained by the lack of realistic conditions and by failure to test all sources of smoke, fumes and toxic substance exposures from diesel exhaust sources experienced by Lt. Leitner during his 24 hour shifts on December 31, 2014 and on February 28, 2015." and "Incomplete data collected under less than "real world" conditions has no value." *CP 1212.* *See Leitner's counsel's argument on this issue beginning at VRP 7:17; See also Lt. Leitner's argument at CP 19:4-20:1.*

After Pat DeMarco (the Department's attorney) cross examined Riordan, Ms. DeMarco moved to strike Riordan's deposition and his testimony:

Based upon all those bits of what I've heard in this testimony, I'm going to move to strike the deposition and the testimony as not being relevant. *CP 713:5-8.*

On appeal in the Superior Court, the Department joined-in with Lt. Leitner's counsel and argued to exclude Riordan:

The basis for the motion, Your Honor, is Mr. Riordan went out to the fireboat Destiny on two days. He tested for two hours only. There was no showing in the record that the weather or conditions over those two hours in two days approximated what Mr. Leitner was -- or Lieutenant Leitner was exposed to, and certainly didn't qualify -- there wasn't the qualifying foundation to render this opinion relevant to these facts.

[. . .]

THE COURT: 58. Thank you. Your objection was relevance?
MS. DeMARCO: Yes, because there was a lack of foundation to show that anything that he tested was relevant to what Lieutenant Leitner had experienced.

VRP 8:13-21; VRP 9:2-4. The Court did not exclude Riordan. This was prejudicial error.

On appeal to the Superior Court, the Superior Court judge acknowledged that the Board's rationale is flawed and that the Board applied the wrong standard. *VRP 459, 369.* The Superior Court even stated: "I think the Board's analysis was incorrect". *CP 369.* Despite the Supreme Court's holdings in *Spivey v. City of Bellevue*, and the Appellate Court's holdings in *Gorre v. City of Tacoma* – all of which show that in the present case the Board misapplied the presumptive disease statute – the Superior Court failed to correct the Board's prejudicially flawed findings of fact and conclusions

of law and failed to apply the proper burden on the employer.

Lieutenant Leitner was deprived of the presumption as to “any heart problem” and was deprived of the protection of the burden-shifting mechanism of RCW 51.32.185.

V. ARGUMENT

“The IIA is remedial in nature, and thus we must construe it “liberally ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”” *Spivey v. City of Bellevue*, supra at 726; quoting *Dennis v. Dep’t of Labor & Indus.*

The trial judge found that the Board used the wrong standard in applying the presumptive disease statute and that the Board’s analysis was incorrect and flawed.

- “[. . .] but simply to find that the City rebutted the presumption because they've disproved that the most recent exposure was the cause and, therefore, the presumption doesn't apply, I think, is the wrong analysis, [. . .]” *VRP 71:15-19.*
- “I think the Board's analysis was incorrect.” *VRP 369:17.*
- “I think they got to the way they got **the wrong way because of the way they addressed the presumption**, finding it had been rebutted, effectively, because the exposure within 72 hours, they felt, had been demonstrated to not be the cause of the heart problem in February. **That's not the standard.**” [Emph added]. *VRP 369:20-25.*

- I think the Board's rationale is flawed in light of *Larson and Spivey*. *VRP 459:13-14*

Imagine an apple tree, filled with ripe apples ready to be picked and used. The farm's manager decides which apples get picked. Imagine this manager picks only two of the apples from the tree, and leaves the remaining ripe apples in the tree, unpicked and thus unused. These remaining apples, if left on the tree, will rot. But the farm *owner*, aware that several ripe apples were left on the tree, can correct the manager's mistake and have all of the ripe apples picked for use.

This case is like that apple tree. The Board picked two apples (a singular myocardial infarction and diesel fumes) – and left all the other apples on the tree (all other heart problems, and exposures to smoke, fumes, and toxic substances over his career). The Court failed to fix the Board's error, and therefore Lieutenant Leitner was deprived of the full statutory presumption. He had to try his case with two apples, while all the remaining apples were left on the tree by the Board and then the Court to rot.

By limiting its findings and conclusions only to "myocardial infarction" even though the record evidences numerous "heart problems" and even though the presumption applies to "any heart problems", the Board created error that rippled all the way to the trial, the jury instructions and even the verdict form.

For example, the Board concluded: “The rebuttable presumption of occupational disease provided by RCW 51.32.185 applies to Mr. Leitner’s **myocardial infarction.**” *CP 61.*

As another example, the Board found: “Mr. Leitner’s **myocardial infarction** was not caused by any strenuous physical exertion at work, nor was it caused by his exposure to diesel fumes within the 72 hours just prior to his heart attack.” *CP 61.*

As a third example, the Board found: “Mr. Leitner’s **myocardial infarction** was not suffered within 24 hours of strenuous activity as a firefighter, [. . .]”. *CP 62.*

The Board’s findings of fact and conclusions of law failed to recognize all of Lieutenant Leitner’s heart problems and instead treated this case as if the only condition applicable to the presumption was a February 28, 2015 “myocardial infarction”.

The issue should not have been limited to whether or not Lt. Leitner had the singular event of a “myocardial infarction” within 24 hours of strenuous physical exertion or within 72 hours of exposure to “diesel fumes”. But the Board misapplied RCW 51.32.185(1)(a)(ii) and failed to give Lietner the complete presumption and failed to properly frame the issues.

This error was felt all the way through Leitner’s jury trial. Pursuant

to RCW 51.52.115, the court shall by instruction advise the jury of the exact findings of the Board on each material issue before the court. *See RCW 51.52.115*. Because the Board's decision is what is on appeal, the jury is tasked with deciding whether the Board was correct or incorrect. But in this case, the Board's decision pertained only to myocardial infarction – and so Leitner was deprived of all the other apples on the tree – and the jury never got the chance to apply the presumptive disease statute as correctly interpreted by Division II COA in *Gorre, supra* and by the Supreme Court in *Spivey, supra*.

And the ripple effect of this error carried all the way through closing arguments. City of Tacoma attorney stated in his closing argument: “You have a jury instruction in there that enumerates all the different Board's findings of fact. **Every one of those findings of fact** you can see as a click through what – **it's talking about myocardial infarction, heart attack**. As I was trying to tell you folks at the beginning, and hopefully I got it across, **that's what this is about**. Finding of Fact No. 2, “Mr. Leitner suffered a condition diagnosed as a **heart attack**. While off duty and at home.”” [emph added]. *VRP 968:1-10*

The Board misapplied the presumptive disease statute and the Judge acknowledged that error. The Judge stated: “[. . .] the analysis done by two

of the three members of the Board focuses on the connection, or lack thereof, between the most recent exposure and the heart problem. The statute [RCW 51.32.185] doesn't do that, and I don't think that's supported by *Spivey or Larson*." *VRP 70:5-9*. The judge also stated:

The City has the burden of overcoming that presumption by a preponderance of the evidence, and what they have to prove, because it's presumed to be an occupational disease, they have to rebut that presumption. And so I think there is some minimal relevance in opinions, or possibly even lay testimony, that the most recent exposure wasn't the cause of the heart problems, but it's -- and it's only minimally relevant because it is to say -- it's one tiny aspect of the work environment and it's a little bit like saying if Mr. Leitner has served ten thousand shifts, we have the burden of proving that nothing that happened on those ten thousand shifts contributed to the heart problems. We can eliminate this shift as causing the heart problems which tends to minimally move towards or in the direction of rebutting their presumption. The problem is, it places things out of context and it suggests to the jury that if the city proves that the most recent exposure didn't cause the heart problems, that alone rebuts the presumption, and it doesn't. I think it's minimally relevant in the same way that it would be relevant to go back to a shift ten years ago and say you weren't exposed to smoke or fumes or any noxious substances then. That is, if this presumption of occupational disease is almost like a wall that the City has to rebut, talking about what happened on the most recent shift is like taking one brick out of a thousand-brick wall, and the City bears the burden of overcoming that presumption. And so cause relating to the most recent exposure is relevant to that extent, but it does not, in and of itself, rebut the presumption." *VRP 252:24 - 254:6*

Speaking about the Board, the Court even stated: "I do think the rationale and the analysis was wrong, [. . .]" *VRP 77:22-23*. The Superior Court could

have, and **should have**, corrected this error.

The Court **shall** reverse or modify the decision of the Board if the Court finds that the Board exceeded its power or incorrectly construed the law and facts. “If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; **otherwise, it shall be reversed or modified.**” [Emph added] *RCW 51.52.115 in pertinent part.*

When discussing RCW 51.52.115's provision that the findings and decisions of the Board shall be prima facie correct, Lieutenant Leitner's counsel raised the correct point to the judge that: “[i]t is presumed correct when there are no obvious errors. There are obvious errors in the Board's decision because it is not using the test and the protocols that were adopted by the Supreme Court in interpreting RCW 51.32.185. So the "presumed correct" -- there's no doubt that they were incorrect. [. . .] That's why I would ask you to make some corrections in the record.”

Lt. Leitner's attorney also stated:

There's only one more complicating factor in these types of cases that I can think of, Your Honor. That's because this is de novo, you actually have the right to change the decision of the Board of Industrial Insurance Appeals if you think there's clear and obvious error. One of the reasons that we're here is because this decision came out about two weeks before the Spivey and Larson decisions where the supreme court said, hey, here's how this law is to be applied. And, clearly, if you

look at where the burdens were placed, the error came not because of any misfeasance but because everybody kind of argued always that the burden was on the claimant, and it wasn't until you got to the supreme court where they said no, it's not like that at all. *VRP 46: 1-15.*

But the Court failed to correct the Board's findings and decisions, which then compounded the Board's error at the Superior Court trial. The City of Tacoma took clear advantage, stating in closing argument: "You have an instruction in your packet that says the Board of Industrial Insurance Appeals is presumed correct. It's what they do. The Board of Industrial Insurance Appeals. That's what they do." *VRP 966:23 - 967:1*

The Board also misapplied the burden of proof in RCW 51.32.185 as interpreted by Division II in *Gorre, supra* and the Supreme Court in *Spivey, supra*. At trial, the City called two expert witnesses: Robert Thompson, MD and Frank Riordan, CIH.

Dr. Thompson testified that weight is a *mild* risk factor in the prevalence of heart disease, but when asked what he meant by "mild risk factor" he testified that "[. . .] mainly it acts through high blood pressure, high cholesterol, diabetes. It's a risk factor for those conditions which are, in turn, risk factors for blood vessel disease." *CP 737:13-20.* He then promptly admitted: "I was going to add that none of those conditions existed [pertaining to Lt. Leitner]." *CP 737:23-24.*

Dr. Thompson admitted that there was **no** history of diabetes, high blood pressure, high cholesterol or of cigarette smoking for Lt. Leitner. *CP 767:11-21*. Dr. Thompson also admitted that he does **not know**:

(1) that all of the apparatus for the City of Tacoma, including the fire engine that Lt. Leitner rides to work in and stands beside when he's going down to the fireboat Destiny are all diesel-fueled;

(2) how many thousands of exposures to smoke and fumes and toxic substances Lt. Leitner had during his career as a three-decade City of Tacoma firefighter;

(3) how many times during a shift that Lt. Leitner is exposed to diesel exhaust. *CP 772:3-12; 775:3-12; 771:24-25, respectively*.

Dr. Thompson – by his own admission – did not pay much attention:

Q NOW, I want you to assume that the reason Mr. Leitner was able to get the Department to issue an allowance order under the presumption statute, was the alleged experience within 72 hours of exposure to smoke, fumes or toxic substances a heart problem. Did an exposure to fumes, smoke or toxic substances approximately cause Mr. Leitner's heart attack on February 28th -- sorry, myocardial infarction on February 28, 2015?

MR. MEYERS: Same objections.

A Did he inhale the smoke within 72 hours? **I don't know. I don't remember. I didn't pay much attention.**

CP749:21-749:8.

The Supreme Court in *Spivey v. City of Bellevue, supra*, was clear that rebutting the presumption of occupational disease requires that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, **caused by nonoccupational factors**. See *Spivey, supra* at 716.

In *Gorre v. City of Tacoma, supra*, Division II held that the employer fails to rebut the presumption when the employer cannot identify the cause of the occupational disease or if the employer's basis is that there is no known association between the disease and firefighting. *Gorre v. City of Tacoma, supra* at 758, reversed on other grounds. Yet that is precisely what the City's defense was based on – medical expert opinions that as a matter of law fail:

Q This is a hypothetical. Assuming those facts with what we've talked about thus far, do you have an opinion on a more-probable-than-not basis as to whether or not that alleged exposure on February 25, 2015 was a proximate cause of his myocardial infarction on February 28, 2015?

A No.

A If smelling diesel fumes caused -- triggered immediate heart attacks, we would have heart attacks all over the place. **It's just not one of the things that causes heart attacks.**

Q What is it?

A Smelling diesel fumes **not known to cause heart attacks.**

CP 750:16- 751:7.

Well, why are you of that opinion that you don't believe that Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated or lit up by Mr. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?

A There is **no proof** whatsoever that casual exposure to small amount of diesel fumes will trigger a myocardial infarction.

CP 753:24 - 754:6. See also CP 748:16-25.

Q Without waiving objection; after everything that you've reviewed, do you have an opinion on a more-probable-than-not basis as to whether or not Mr. Leitner's employment with the City of Tacoma proximately caused, aggravated or lit up Mr. Leitner's heart problem?

MR. MEYERS: Objection; foundation; hearsay; speculation.

A I found no evidence that it did.

Q Why do you say that?

A I found no evidence of anything that would exacerbate or trigger atherosclerosis of his coronary arteries or a myocardial infarction.

CP 755:16 - 756:3. The City's expert was given another bite at the apple, and again he articulated an opinion that – as a matter of law – fails to rebut the presumption:

Q Without waiving objection, after everything that you've reviewed, did Mr. Leitner's employment for the City of Tacoma proximately cause Mr. Leitner to suffer a heart-related occupational disease?

A No.

Q Why do you say that?

A There's nothing that I found in reviewing the records that would trigger a heart attack or cause atherosclerosis of his coronary arteries.

CP 757:4-12. The City gave its expert a third try, but to no avail:

Q Without waiving objection, was the claimant's heart problem that was treated on 2-28-15 result of an occupational disease arising naturally and proximately from the distinctive conditions of his employment as a City of Tacoma firefighter?

MR. MEYERS: Objection; foundation; speculation.

A No.

Q For the same reasons articulated?

A Yes.

CP 758:8-17.

The City's other "expert", industrial hygienist Riordan, did not know whether or not all of the vehicles in the City's Fire Department apparatus bays are diesel engine fire apparatus. *CP 709:5-8.* He also admitted that during one day of his testing, when the fire boat's engine was started, there was smoke coming out of the water for about **fifteen minutes**. *CP 666:23 - 667:3.* He also admitted that he detected diesel particulate matter in his samples and that he saw diesel particulates and that there is "no way to know" what might not have come out of the water in this type of situation.

CP 667:20-22; 668:9-14.

Riordian's testimony (see facts section supra) was entirely irrelevant to rebut the presumption, because it is indisputable that Lt. Leitner was exposed to diesel fumes aboard the fire boat on December 31, 2014 and was exposed to smoke, fumes or toxic substances that day and on February 25, 2015.

Because the presumption establishes the causal connection to Lt. Leitner's heart problems experienced with 72 hours of exposure to **smoke, fumes and toxic substances**, and because rebutting the presumption requires that the City prove causation by **non-occupational** factors, the "level" of occupational exposure is completely irrelevant toward rebutting the presumption.

Riordan's testimony is also irrelevant because his testing was conducted under conditions that departed from the actual conditions that they rendered his testing unreliable and irrelevant. ER 401, 702 and 703.

The Superior Court judge found that the Board's rationale was flawed, that the Board's analysis was incorrect, that the Board "[g]ot to the way they got **the wrong way because of the way they addressed the presumption, [. . .]**" and that the Board applied the wrong standard. *VRP 459:13-14; 369:20-25; 4:5-15.* The Superior Court had an obligation to

reverse or modify the Board's findings of fact and conclusions of law. *See RCW 51.52.115*. The Court failed to do so.

Ultimately, the jury was asked to decide whether the Board was correct in deciding that the City rebutted, by a preponderance of the evidence, the presumption that Andrew Leitner's heart problems were an occupational disease. *See Verdict Form at CP 1935*. But the jury was led to believe that the only heart problem about which the jury was deciding was a February 28, 2015 myocardial infarction. This is because the jury was instructed as to findings of fact and issues in this case that were based on the Board incorrectly construing the presumption in RCW 51.32.185(1)(a)(ii), failing to correctly apply the burden placed on the employer in RCW 51.32.185(1), *Spivey v. City of Bellevue, supra* and *Gorre v. City of Tacoma, supra*, and leaving several apples on the tree, out of the juries reach, to rot. *See Jury Instruction 7 at CP 1919-1920; See Jury Instruction 8 at CP 1921*.

The Superior Court should have granted Lt. Leitner's motion for summary judgment, because the City could not – as a matter of law – rebut the presumption as required by RCW 51.32.185, *Gorre, supra* and the Supreme Court in *Spivey, supra*. The City cannot prove that Lt. Leitner's heart problems were caused by non-occupational factors. The testimony has been taken. The City does not make and cannot change what the law

presumes. And disagreeing with the causal connection between Lt. Leitner's heart problems and smoke, fumes, toxic substances, or strenuous physical activity, does not rebut the presumption. Citing to a "lack of evidence" – whether in the medical field or otherwise, does not rebut the presumption.

If the employer cannot meet this burden [to rebut the presumption], for example, if the cause of the disease cannot be identified by a preponderance of the evidence or even if there is no known association between the disease and firefighting, the firefighter employee maintains the benefit of the occupational disease presumption.

Gorre v. City of Tacoma, supra at 729. The burden to rebut the presumption is heavy. It is a burden of production *and* persuasion. See *Spivey v. City of Bellevue*, supra. Failing to apply the correct burden of proof on the City at the Board hearing and at trial renders the burden-shifting mechanism within RCW 51.32.185 meaningless. Constricting the presumption in RCW 51.32.185(1)(a)(ii) to a single myocardial infarction – when the statute says "any heart problems" re-writes the statute and deprives Lt. Leitner of the full presumption.

Lt. Leitner's motion for summary judgment should have been granted. The City could not rebut the presumption as a matter of law, based on their own expert's testimony and the high threshold for rebutting the presumption as set forth in *Gorre v. City of Tacoma*, supra and *Spivey v. City of Bellevue*, supra.

The MSJ was denied and the case went to trial. At trial, the judge – who found that the Board’s analysis was incorrect – had a duty under RCW 51.52.115 to modify or reverse the Board’s findings and conclusions. To not correct the Board’s errors resulted in the jury being improperly limited in the scope of what it was to decide, misleading instructions, an improper narrowing of the presumption, an incorrect burden of proof and an unfair trial an unfair trial.

Attorney Fees:

Lt. Leitner requests attorney fees and costs under RCW 51.32.185(9) for fees and costs of the appeal and under RCW 51.52.120 for fees and costs for services performed at the Department. RCW 51.32.185(9)(a) and (b) provides:

(9)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

Spivey v. City of Bellevue, id. RCW 51.52.120(1) states:

(1) Except for claim resolution structured settlement agreements, it shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director or the director's designee for services performed by an attorney for such worker or beneficiary, if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the department is communicated to the party making the application.

VI. CONCLUSION

This Court can and should decide as a matter of law that the City failed to rebut the presumption of occupational disease. In the alternative, this Court should remand this case to be tried under the proper application of RCW 51.32.185 and without the testimony of Riordan.

DATED: May 3, 2019.

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No. 52908-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

DECLARATION OF SERVICE OF
APPELLANT'S OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of Washington that on the date set forth below, I caused the documents referenced below to be served in the manners indicated on the following:

DOCUMENTS: 1. Appellant's Opening Brief; and
 2. Declaration of Service.

ORIGINALS TO:

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Washington State Court of Appeals Division II

Via hand delivery

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DATED this 3rd day of May, 2019, at Olympia, Washington.

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Mindy Leach, Litigation Paralegal