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NO. 52908-4-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA AND THE DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

**BRIEF OF RESPONDENT,
CITY OF TACOMA**

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I. COUNTER-STATEMENT OF THE CASE

This case arises under the Industrial Insurance Act, Title 51.

The City presented the testimonies of cardiologist Dr. Robert Thompson (CP at 722-83), certified industrial hygienist Frank Riordan (*id.* at 656-719), and Mr. Leitner (*id.* at 483-569) in its appeal to the Board. Mr. Leitner presented the testimonies of himself (*id.* at 575-645), cardiologist Dr. Peter Chen (*id.* at 853-919), and physician assistant Aubrey Young (*id.* at 786-838).

Dr. Robert Thompson is a Board-Certified, active practice physician specializing in cardiology and internal medicine. *Id.* at 726-28. Dr. Thompson performed an Independent Medical Examination (“IME”) of Mr. Leitner on May 12, 2015. *Id.* at 732. Dr. Thompson testified that Mr. Leitner has a family history of heart disease, and his mother had a heart attack at a young age (in her 50s). *Id.* at 733-34. Additionally, Mr. Leitner was “definitely overweight.” *Id.* at 737.

Dr. Thompson explained that the Appellant had “coronary artery disease, atherosclerosis of his coronary arteries manifesting itself at first with angina pectoris, and then later as a myocardial infarction.” *Id.* at 739. “Atherosclerosis is a buildup of cholesterol in the artery walls that narrow...the arteries” that is caused by “high blood levels of cholesterol, high blood pressure, diabetes. Family history contributes to it, and just plain ol’

[sic] age contributes to it.” *Id.* at 740. Atherosclerosis is “at its peak in your mid 50s.” *Id.* Mr. Leitner was 52 years old at the time of his examination by Dr. Thompson. *Id.* at 736.

“Atherosclerosis is common in every demographic...[though] you mainly see it in people over the age of 40.” *Id.* at 756. Atherosclerosis of his coronary arteries was the cause of Mr. Leitner’s angina pectoris symptoms and myocardial infarction. *Id.* at 741. Dr. Thompson explained, “angina pectoris is a type of pain you get from temporary lack of blood flow to the heart through arteries that are narrower than normal...it does not damage the heart. The heart just starts to ache.” *Id.* at 739.

Mr. Leitner’s angina pectoris episode on December 31, 2014 did not cause any occupational disease or injury, nor did Mr. Leitner suffer any permanent damage from that episode. *Id.* at 743. Leitner “did not suffer a myocardial infarction as a result of the incident on December 31st when he pulled up this anchor line.” *Id.* at 746. Further, “the underlying cause [of the angina pectoris] was buildup of cholesterol in his arteries. The exertion just brought out symptoms of that, but it didn’t cause it.” *Id.* at 783. Indeed,

If the claimant would have had a treadmill test, it would have brought out symptoms of the same symptoms, but it wouldn’t hopefully cause a heart attack. Otherwise, we wouldn’t do treadmill tests on people for coronary artery disease.

Id.

After reviewing Mr. Riordan's fireboat diesel exhaust exposure report, Dr. Thompson opined that "the exposure was not severe enough to pose any threat to the Claimant." CP at 749. Dr. Thompson observed, "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." *Id.* at 751.

Dr. Thompson explained that Mr. Leitner's "heart problem" included his myocardial infarction and atherosclerotic buildup in his arteries. *Id.* at 755. Dr. Thompson could find no evidence that Leitner's employment with the City of Tacoma proximately caused, aggravated, or lit up his heart problems. *Id.* Mr. Leitner's employment did not proximately cause his myocardial infarction or atherosclerosis. *Id.* at 757. Mr. Leitner's "heart problem that was treated on" February 28, 2015 did not arise naturally and proximately from the distinctive conditions of his employment with the City. *Id.* at 758.

Frank Riordan is a certified industrial hygienist who testified at the request of the City. CP at 660. Mr. Riordan performed exposure assessments on October 14th and 16th, 2015, aboard the fireboat Destiny. *Id.* at 664. Riordan's exposure assessments tested for diesel particulate matter, nitrogen dioxide, nitric oxide, sulfur dioxide, carbon monoxide, carbon dioxide, temperature, and humidity. *Id.* at 666. Mr. Riordan took

measurements at the aft railing, immediately behind the exhaust ducts, and inside the “cab” where the boat is piloted from and where people would sit. *Id.* at 665. During the assessments, the boat motor was idling for the two-hour duration of each assessment, and the exhaust was emitted from the boat underwater, directed downward. *Id.* at 666. The sensors used to collect the data were all placed in “breathing zones” that would be representative or worst-case exposure situations. *Id.* at 674-75.

Mr. Riordan testified during his deposition that the levels of particulates allowed under the “National Clean Air Act” indicate a particulate matter limit (2.5 microns in size or less) of 35 micrograms per cubic meter averaged over a 24-hour period, and 12 micrograms per cubic centimeter averaged over three years. *Id.* at 681-83. Mr. Riordan’s testing indicated an equivalent to 12 micrograms per cubic meter in the cabin of the boat. *Id.* at 683. The diesel particulate matter in the cabin of the boat was measured to be 100 times lower than the Washington State permissible exposure limit. *Id.* at 684-85. Additionally, Mr. Riordan testified that the diesel particulate exposures at the rear-left and rear-right of the boat (“port” and “starboard,” respectively) were 100 times lower than the Washington State OSHA permissible exposure limit. *Id.* at 686; *see also, id.* at 685.

On the rear-right of the boat, nitric oxide concentrations were measured at 0.33 parts per million (“ppm”), as compared to the Washington

State permissible exposure limit of 25 ppm. *Id.* at 687. On the rear-left of the boat, nitric oxide concentrations were measured at 0.097 ppm. This translates to 75-100 times less nitric oxide on the right-side and about 250 times less on the left-side than is permitted by Washington State OSHA regulations. *See id.* at 688.

Nitrogen dioxide levels were measured to be 0.1 ppm and 0.2 ppm at the rear of the boat. *Id.* at 689. This translates to 5-10 times lower than the permissible exposure limit of 1.0 ppm. *Id.* Nitrogen dioxide levels were undetectable (less than 0.1 ppm) inside the cabin by the steering wheel of the vessel. *Id.* at 689-90. At the door of the cabin, levels were measured at 0.1 ppm, again, 10 times lower than the permissible exposure limits established by Washington State. *See id.* at 690. Sulfur dioxide levels were undetectable at the rear of the vessel on both days, as well as in the cabin. *See id.* at 691-92. This translates to at least five times lower than the permissible exposure limits set by the State. *Id.*

Mr. Riordan explained that the levels of diesel byproducts that he measured were “typical for a city” though “I’d expect higher levels of diesel exhaust particulates during certain times of the day.” *Id.* at 693. From an industrial hygiene perspective, no special precautions were deemed necessary when doing work on this boat because the exhaust was adequately controlled. *Id.* at 694.

Dr. Peter Chen testified that a myocardial infarction is a progression of atherosclerosis. CP at 861. Dr. Chen also identified six cardiac risk factors: diabetes, hypertension, high cholesterol, smoking, and family history; however, it was only reluctantly that Dr. Chen identified obesity as a risk factor. *Id.* at 866; *see also, id.* at 873. Dr. Chen later testified that “obesity is important, no question...[obesity] increase all the risks... [Mr. Leitner] is obese, no question.” *Id.* at 880.

When asked whether diesel fumes play any role in cardiac conditions, Dr. Chen explained that the articles provided to him by Claimant’s counsel say there is a connection, but “I don’t know.” *Id.* at 874. Indeed, the cause of Mr. Leitner’s myocardial infarction was because he had coronary artery disease, which is the most common cause of death in America. *Id.* at 881-82.

Dr. Chen also testified that Mr. Leitner had degenerative disc disease, back problems unrelated to any cardiac condition. *See id.* at 885. Dr. Chen also issued a concurrence with Dr. Thompson’s 5/12/15 IME. *Id.* at 887-89. This concurrence was never withdrawn. *Id.* at 889. On June 11, 2015, the day after Dr. Chen issued his concurrence to Dr. Thompson’s IME, Dr. Chen’s office received a phone call from Mr. Leitner who was offering “advice” to Dr. Chen whilst “filling out his independent medical exam” and

offering to come in to “see” Dr. Chen. *Id.* at 891-93. Mr. Leitner called Dr. Chen’s office twice that day. *Id.* at 904.

Aubrey Young, physician assistant, also testified on behalf of Mr. Leitner, when counsel for the Claimant wasn’t testifying on her behalf.¹ A physician assistant is required to be under the supervision of a physician. CP at 814. Ms. Young first began working in 2013 and worked part-time as a physician’s assistant since that time when not on leave. *Id.* at 811-12. Ms. Young’s work as a physician assistant has been in a family/general practice setting. *Id.* at 812. Ms. Young was not familiar with what “odds ratios” or “confidence intervals” were, nor how they influenced the credibility or weight of medical studies. *Id.* at 809. Ms. Young did not compare Mr. Meyers’ articles to other relevant medical literature that has been published. *Id.* at 810.

Ms. Young testified that she “assumed” Leitner’s myocardial infarction was work related because their office had done cholesterol labs (at some undisclosed time in the past), and he was not on any cholesterol medications that she was aware of. CP at 806. Ms. Young did acknowledge that “age” is a risk factor for heart disease. *Id.* at 818-19.

¹ Mr. Meyers took the liberty of offering approximately six pages of testimony during his deposition of Ms. Young. *See* CP at 798-804.

Ms. Young also testified that on August 12, 2015, she had put in her chart notes that Mr. Leitner was “here today to discuss what has been going on with his L&I case so we are on the same page.” *Id.* at 824. Then again, on January 4, 2016, Mr. Leitner indicated to Ms. Young that he would like to discuss paperwork to allow him disability retirement. *Id.* at 823. Lastly, Ms. Young confirmed that on Mr. Leitner’s March 4, 2015 visit (shortly after his mild heart attack), Leitner made zero mention of any fume exposure whatsoever. *Id.* at 832-33.

On February 8, 2017, the Board issued its Decision and Order that reversed the October 13, 2015 Department order allowing this claim for presumptive heart attack under RCW 51.32.185. *Id.* at 113-23. The Board noted that “critical” to the analysis “is understanding the nature of the heart problem that the Department allowed and when the problem started. The Department order allowed Mr. Leitner’s claim for the heart problem treated on February 28, 2015...myocardial infarction, commonly called a heart attack.” *Id.* at 116.

The Board found that “Mr. Leitner’s myocardial infarction was caused by the progressive buildup of atherosclerotic plaque in his arteries over many years combined with a portion of the plaque...breaking loose,” his “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,” and his “myocardial infarction did not arise naturally and proximately out of the distinctive conditions of his employment.” *Id.* at 119. The Board found that “[T]he City soundly rebutted the statutory presumption.” *Id.* at 115. On March 6, 2017, Mr. Leitner appealed the Board’s February 8, 2017 Decision and Order to Pierce County Superior Court. *Id.* at 1-2.

Judge Grant Blinn presided over Leitner’s trial in Pierce County Superior Court. CP at 1953-55, 1935. On November 14, 2018, after the testimony was read to the jury, the jury was instructed, the Parties gave their closing arguments, and the jury was sent out for deliberation. VRP at 928-1004. On November 15, 2019, the jury returned its Verdict, finding that the Board was correct in deciding that the City had rebutted the RCW 51.32.185 statutory presumption, and that the Board was correct in deciding that Leitner did not prove by a preponderance of the evidence that his “heart problems” were an occupational disease. *Id.* at 1009-1011, CP at 1951. On December 14, 2018, the superior court entered a Judgment and Order affirming the February 8, 2017 Board Decision and Order denying this claim. CP at 1953-55. Mr. Leitner’s present appeal follows.

II. ARGUMENT

Appellant Leitner offers five arguments in support of his request for this Court to reverse the Pierce County Superior Court Verdict and

Judgment, all of which should be rejected. First, Appellant argues that “The Board and Superior Court...treat[ed] this case as if the only condition applicable to the presumption” was his February 28, 2015 myocardial infarction. The City will demonstrate that the Board’s Decision and Order is not presently on appeal before this Court, and *in no universe* did the trial court limit Leitner to “myocardial infarction.” The City will also argue that the trial court erred in not limiting the Instructions and Verdict form to the February 28, 2015 myocardial infarction.

Second, the City will argue that the superior court did not misallocate the burdens of proof applicable at the Board and before the superior court, and Leitner was never wrongly deprived of the statutory presumption under RCW 51.32.185.

Third, the City will attempt to decipher what Appellant means by his argument that the trial court “committed reversible error by failing to reverse or modify the Board’s findings and decisions,” and will argue that it would be improper for the trial court judge to usurp the role of the jury in this case. Here, it is important to point out that the Appellant did not argue that the Verdict was not supported by substantial evidence. However, even if the Appellant *had* made that argument, it would be untenable on the record and upon the facts and arguments cited herein.

Fourth, and related to the third argument, the City will argue that the superior court's denial of Leitner's summary judgment motion was correct and proper. Finally, the City will argue that the trial court did not err by refusing to strike Mr. Riordan as a witness, and that even if it did, the trial court's various evidentiary rulings adverse to the City eliminated any unfair prejudice to Leitner.

A. The Superior Court Did Not Limit Mr. Leitner to “Myocardial Infarction” in His Appeal, As It Should Have Done Under *Brakus*.

Leitner's argument that the Board and the superior court erred by limiting him to the RCW 51.32.185 presumption for “myocardial infarction” is legally and factually errant for numerous reasons. First, the Board's² and superior court's proper scope of review was limited to that of the October 13, 2015 Department order's allowance for myocardial infarction. Second, the superior court *in fact* exceeded its proper scope of review by allowing Mr. Leitner's argument, Jury Instructions, and Verdict questions pertaining to any “heart problems” Leitner wished to argue from the evidence in the record. Third, the Board's Decision and Order is not on appeal before this court.

² To the extent the Appellant attempts to argue error by the Board of Industrial insurance appeals here, this is improper. RCW 51.32.140 explains that “Appeal shall lie *from the judgment of the superior court* as in other civil cases.” There is no authority supporting the notion that the Appellant can appeal the Board's Decision and Order a second time and years after its issuance. *See* RCW 51.52.110.

1. The Board's and superior court's scope of review should have been properly cabined to "the heart problem treated on 2/28/15," i.e., myocardial infarction.

On or about April 2, 2015, Andrew Leitner filed a workers' compensation claim for "heart attack" under Claim No. SZ-12196. CP at 649-52. Where the claim filing form ("SIF-2") asks the worker to identify the "Part of body injured or exposed," Leitner indicated "HEART ATTACK." *Id.* at 649. The SIF-2 also asks the worker to "Describe in detail how your injury or exposure occurred," to which Mr. Leitner indicated, "PLEASE SEE ATTACHED FOR PRESUMPTIVE ILLNESS." *Id.* Mr. Leitner attached a three-page "SIF-2 Addendum" to his SIF-2 describing in detail his February 28, 2015 myocardial infarction ("heart attack"), his treatment for his heart attack, and what he felt to be his "history of injury" relating to his heart attack. *Id.* at 650-52. On June 26, 2015, the Department issued an order denying this claim. *Id.* at 367.

On June 30, 2015, Mr. Leitner, by way of counsel, appealed the June 26, 2015 Department order to the Board. *Id.* at 369-78. Leitner's Notice of Appeal to the Board cited his alleged symptomology on December 31, 2014 (anchor-lifting call), on February 25, 2015 (fireboat calls), and his mild heart attack that occurred on February 28, 2015. *Id.* at 369-71. On July 9, 2015 and July 17, 2015, the Department issued orders reassuming jurisdiction of this claim. *See id.* at 201.

On October 13, 2015, the Department issued an order reversing its June 26, 2015 Department order and stating, “This claim is allowed for the heart problem treated on 2/28/15 pursuant to the provisions of RCW 51.32.18[5].” *Id.* at 284. The October 13, 2015 Department order expressly allowed this claim *only* for Leitner’s myocardial infarction.

On December 11, 2015, the City appealed the October 13, 2015 Department order to the Board. *Id.* at 181-84. The Board assigned the City’s appeal Docket No. 15 24680. *Id.* at 191. Mr. Leitner did not cross-appeal the October 13, 2015 Department order allowing his claim only for “the heart problem treated on 2/28/15.” *See id.* at 113, 169.

The Department of Labor and Industries has “original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred.” *Abraham v. Dep’t of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934); *see also, Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539-540, 886 P.2d 189 (1994).

“The Board's appellate authority is strictly limited to reviewing the specific Department action.” *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997). “[A]lthough the evidence before the board might take a wide range, the board cannot enlarge the lawful scope of the proceedings, which is limited strictly to the issues raised by the

notice of appeal.” *Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218, 220, 292 P.2d 865 (1956). Division I explained,

To ascertain whether the board acted within its proper scope of review...we look to the provisions of the order appealed to the board. The questions the board may consider and decide are fixed by the order from which the appeal was taken (*see Woodard v. Department of Labor & Indus.*, 188 Wash. 93, 61 P.2d 1003 (1936)) as limited by the issues raised by the notice of appeal.

Lenk v. Dep’t of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (Div. I 1970)(citing *Brakus*, 48 Wn.2d 218 (1956)); *see also*, RCW 51.52.070.

The Courts have “repeatedly held that in industrial insurance appeals the courts are limited to the question or questions which were actually decided by the department.” *Ramsay v. Dep’t of Labor & Indus.*, 36 Wn.2d 410, 412, 218 P.2d 765 (1950); *see also*, RCW 51.52.115. “[T]he jurisdiction of the superior court is limited to a review of ‘a question or questions which have been *actually decided* by the department.’” *Merch. v. Dep’t of Labor & Indus.*, 24 Wn.2d 410, 413, 165 P.2d 661 (1946), *emphasis in original* (citing *Leary v. Dep’t of Labor & Indus.*, 18 Wn.2d 532, 541, 140 P.2d 292 (1943)).

Here, the October 13, 2015 Department allowance order “actually decided” that this claim should be allowed for Leitner’s myocardial infarction for which he received treatment on “2/28/15.” Mr. Leitner himself explained that on February 28, 2015, “I had an acute myocardial

infarction...and I had a stent placed.” CP at 496; *see also, id.* at 650. Dr. Chen, the cardiologist who treated Leitner on February 28, 2015, explained that he “went to the emergency room to see [Leitner] because he had a heart attack.” *Id.* at 862; *see also id.* at 907. There is no indication in the record that Leitner received treatment for any other “heart problem” on February 28, 2015. *See id.* at 117, line 18.

The October 13, 2015 Department order expressly and exclusively allowed this claim for Mr. Leitner’s February 28, 2015 heart attack. This Department order set the metes and bounds of the issues on appeal before the Board, and subsequently at trial. Leitner’s alleged angina pectoris symptoms and preexisting coronary artery disease were therefore beyond the Board’s and superior court’s statutory authority (“jurisdiction”), and the superior court erred in permitting argument for claim allowance on these bases.

2. The superior court permitted and facilitated Leitner to argue conditions beyond myocardial infarction as presumptive conditions, thereby exceeding the trial court’s statutory authority.

Leitner’s briefing to this Court argues that the “Superior Court committed reversible error by treating this case as if the only condition applicable to the presumption” was the February 28, 2015 heart attack. Brief of App. at 4. Leitner’s argument is without factual merit.

Not only was “heart attack” the only condition within the superior court’s jurisdiction to reach, but the superior court *in fact* permitted Leitner to introduce evidence, Instructions, and Verdict form questions regarding “heart problems” other than his myocardial infarction. During de novo review of evidentiary rulings, the following exchanges occurred, in pertinent part,

Atty for City: ...the Department order itself said, we’re allowing this for the condition that was treated on 2/28...which was myocardial infarction, specifically...

Judge Blinn: And then, of course, we get back to the broader part of the statute, heart problems...

Atty for Leitner: The City continues to use “heart attack” or “myocardial infarction.” The statute says “heart problem.” They are heart problems. Anything that that jury sees in terms of jury instructions or verdict form should say “heart problems”...

Atty for City: Your Honor, the City would just lodge an objection to that. Anything relating to that, on the basis that it’s beyond this Board’s [*sic*] permissible scope of review to reach any other heart problem...when the Department order that was the source of all this to begin with specifically references heart attack.

VRP at 83-86.

The trial court accepted Leitner’s invitation to exceed its statutory and appellate authority. The superior court approved and delivered several Instructions to the jury, and a Verdict form, that invited them to consider all

Leitner's alleged "heart problems," beyond the myocardial infarction contemplated by the Department allowance order on appeal.

Instruction No. 9 framed the issues for the jury in terms of "the statutory presumption that Mr. Leitner's *heart problems* were an occupational disease." CP at 1922, emphasis added. The City offered an "issues" instruction, but the City's proposed instruction specifically identified "myocardial infarction" and omitted the "heart problems" language that was substituted by the superior court. *See id.* at 1832.

Instruction No. 10 framed the burden of proof at the Board as being "on the employer to rebut the presumption that 1) claimant's *heart problem(s)* arose naturally out of his conditions of employment...and, 2) his employment is a proximate cause of his *heart problem(s)*." *Id.* at 1923, emphasis added. This version of the Instruction was offered by Leitner and only the second paragraph was slightly modified. *Id.* at 1877.

Instruction No. 13: "*You* are to presume that if a firefighter experienced *any heart problems*...then those activities were a cause of those heart problems." *Id.* at 1933, emphasis added. This version of the Instruction was offered by the Department, with whom Leitner was aligned (*id.* at 1815).

Indeed, even the Verdict form adopted by the superior court invited the jury to consider all of Leitner's various alleged "heart problems."

Question 1 on the Verdict form asked “Was the Board of Industrial Insurance Appeals correct in deciding that the employer rebutted, by a preponderance of the evidence, the presumption that Andrew Leitner’s *heart problems* were an occupational disease?” *Id.* at 1935, emphasis added. Similarly, the second question on the Verdict asked “Was the Board of Industrial Insurance Appeals correct in deciding that the Plaintiff did not prove by a preponderance of the evidence that his *heart problems* were an occupational disease?” *Id.*, emphasis added. This version of the Verdict form was offered by the Department. *Id.* at 1819.

The City offered a Verdict form very similar to that offered by the superior court, though the questions were cabined to “myocardial infarction.” *See id.* at 1843. In response to the court’s rejection of the City’s proposed Verdict form, the City offered (in the alternative) a Verdict form with “heart problem” language, though featuring a third question asking the Jury to identify the conditions proximately caused by Mr. Leitner’s employment. *Id.* at 1844-45. The City argued to the trial judge that this third question would allow “the City to make a colorable scope of review argument to the Court of Appeals” in the event Leitner prevailed. VRP at 862. The superior court refused to offer the City’s proposed Verdict Question 3. *See CP* at 1935.

Leitner was given free reign by the superior court to argue that all heart problems supported by the record were also presumptive “heart problems” warranting claim allowance and reversal of the Board Decision. Leitner’s briefing points to nowhere in the record that he was precluded by the superior court from arguing his various presumptive “heart problem” theories, because he never was.

Thus, while the superior court erred in permitting Leitner and the Department to argue for claim allowance under angina pectoris and coronary artery disease theories, the Jury returned its Verdict in favor of the City and the superior court’s legal error *prejudicing the City* was rendered harmless.

B. The Superior Court Instructed the Jury on the Proper Burden Before the Superior Court and the Board, and the Board Applied the Proper Burden.

Scope of review/statutory authority issues aside, the Board and the superior court applied the proper burden of proof in the appeals below, in accordance with *Spivey*. While the Board’s application of the burdens of production and persuasion are not at issue here, in an abundance of caution, they will be addressed first. The superior court’s own application of applicable burdens will follow.

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- 1. The Board of Industrial Insurance Appeals did not fail to apply the burden of production and persuasion upon the City, as required by *Spivey*, and even if it had, this would have been harmless error.**

The Board appeal, under Docket No. 15 24680, was the City's appeal of the October 13, 2015 Department order allowing this claim for "the heart problem treated on 2/28/15 pursuant to the provisions of RCW 51.32.18[5]." *Spivey* explains the burden upon employers appealing to the Board under RCW 51.32.185:

We thus apply the Morgan theory to the presumption: once a firefighter shows that he or she suffers from a qualifying disease, RCW 51.32.185(1) imposes on the employer the burden of establishing otherwise by a preponderance of the evidence. To be clear, this is a burden both to produce contrary evidence and to persuade the finder of fact otherwise...

We stress, however, that this standard does not impose on the employer a burden of proving the specific cause of the firefighter's melanoma. Rather, it 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.

Spivey v. City of Bellevue, 187 Wn.2d 716, 735, 389 P.3d 504 (2017). Emphasis added. "Whether the City rebutted the firefighter presumption by a 'preponderance of the evidence' is a question of fact that may be submitted to the jury." *Id.* at 727-728.

The Board's February 8, 2017 Decision and Order found that Leitner was entitled to the statutory presumption because he "presented

evidence that he was exposed to diesel fumes on February 25, 2015, within 72 hours of his heart attack on February 28, 2015.” CP at 115. The Board continued, “However, based on the expert medical opinions presented at hearing – opinions that were largely uncontested – the City soundly rebutted the statutory presumption that Mr. Leitner’s heart attack was proximately caused by diesel fumes.” *Id.* “Critical to our analysis is understanding the nature of the heart problem that the Department allowed and when the problem started...Drs. Thompson and Chen each made clear that Mr. Leitner’s heart problem for which he was treated on February 28, 2015, was **myocardial infarction**, commonly called **a heart attack**.” *Id.* at 116, emphasis in original. “It is important to also understand a condition that was **not** accepted by the Department in its allowance order: angina pectoris, which means temporary chest pain.” *Id.* at 117.

The Board proceeded to evaluate the testimony offered into evidence. The Board acknowledged that Dr. Thompson and Dr. Chen agreed that Leitner’s heart attack began on the morning of February 28, 2015 and was therefore not an “ongoing” heart attack. *Id.* at 116. Thus, the statutory presumption does not attach to Leitner’s February 25, 2015 “physical exertion” while helping to lift a patient. *Id.* at 117.

The Board also noted that Dr. Thompson “found no feature in Mr. Leitner’s job history that caused, aggravated, or lit up his coronary

artery disease or the myocardial infarction he experienced on February 28, 2015.” *Id.* at 118. “Coronary artery disease is the leading cause of death in the United States.” *Id.* at 117. “Significant risk factors for a myocardial infarction include family history of heart disease, age (the mid-50s present maximal risk)...His mother had had an early heart attack and he was 52 years old.” *Id.* Leitner’s “mother had heart issues in her fifties as well.” *Id.* at 114. Plus, Mr. Leitner “was obese, weighing over 220 pounds at 5’10” in height.” *Id.* at 113. The Board noted that “Dr. Chen offered no explanation for Mr. Leitner’s coronary artery disease and heart attack. He made no suggestion that those conditions were caused by any features of Mr. Leitner’s work as a firefighter.” *Id.* at 118.

PA-C Young, “who has been practicing only three years, offered that she assumed that Mr. Leitner’s career exposures were a cause of his heart problems. She offered no basis for the thought other than that her patient’s cholesterol levels were within normal limits.” *Id.* Ms. Young “conceded that cholesterol levels do not evidence the plaque level in arteries, and that a cardiologist has more expertise than her in diagnosing and treating heart problems.” *Id.* “Based on their respective qualifications and supporting bases, Ms. Young’s opinion pales in comparison to Dr. Thompson’s on this issue.” *Id.*

The Board very clearly required the City to meet the burden of production and the burden of persuasion. The Board underscored that Dr. Thompson is a highly qualified cardiologist and internal medicine physician who testified to Leitner's non-occupational risk factors for heart attack – a family history of heart disease and age. Dr. Thompson also testified that he could find no causal link between Leitner's heart attack and his employment, on a more probable than not basis. The Employer met its burden of production. *See also*, RCW 51.32.185(1)(c) (stating, “This presumption...may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to...physical fitness and weight, lifestyle, hereditary factors...”).

Further, the City met its burden of persuasion before the Board as evidenced by the non-occupational risk factors (age and family history) noted by Dr. Thompson, as well as Leitner's obesity. Considering the lack of occupational link found by the testifying cardiologists and the non-occupational (statutory and medical) risk factors, a fair-minded person could conclude that Leitner's heart attack was not caused by his work for the City on a more-probable-than-not basis.

- 2. The superior court did not misapply the burdens of proof applicable upon Leitner's appeal to superior court, as evidenced by the Jury Instructions.**

The trial court gave Leitner's and the Department's proposed Instructions regarding the RCW 51.32.185 presumption and burdens of proof. The superior court did not misapply the burdens of proof at trial, and even if it did, this was Leitner's own error and not the court's.

Mr. Leitner offered an Instruction that informed the jury of two Board "determinations": that the employer rebutted the presumption by a preponderance of the evidence, and that Leitner did not suffer an occupational disease. CP at 1875. The Appellant's proposed instruction was given by the court as Instruction No. 8, with additional language added. *Id.* at 1921.

The superior court also gave Instruction No. 10, which explained the burdens of proof before the superior court, and before the Board. *Id.* at 1923. This instruction was offered by Mr. Leitner.³ *Id.* at 1877-78. Instruction No. 10 explained that it was Leitner's burden at trial to

establish by a preponderance of the evidence that the decision of the Board is incorrect.

At the hearing before the Board...the burden of proof is on the employer to rebut the presumption that 1) claimant's heart problem(s) arose naturally out of his conditions of employment as a firefighter and, 2) his employment is a proximate cause of his heart problem(s).

³ However, Leitner offered additional language that was not given, underscored and bolded here: "The burden of proof is on the firefighter to establish by a preponderance of the evidence that the decision of the Board is incorrect **by showing that the Board did not meet the burden or correctly apply the presumption.**"

Then, critically, the superior court erred *to the prejudice of the City* by giving Instruction No. 13, stating that “*You* are to presume that if a firefighter experienced any heart problems within seventy-two hours of exposure to smoke...or within twenty-four hours of strenuous physical exertion...then those activities were a cause of those heart problems.”⁴ *Id.* at 1926, emphasis added. Instruction No. 14 then told the jury that “*If the employer cannot meet this burden...the firefighter employee maintains the benefit of the occupational disease presumption.*” *Id.* at 1927, emphasis added. This Instruction, too, was offered by Leitner. *Id.* at 1894, 1902.

The superior court gave the Appellant and the Department every RCW 51.32.185 instruction they requested, with few minor adjustments. The Appellant cannot now decry the Instructions on the law that were given to the jury at his behest. The burden of production and persuasion was placed squarely on the shoulders of the City at trial, with only a cursory nod to Leitner’s burden as petitioner/plaintiff under RCW 51.52.115.

⁴ “RCW 51.52.115 does not fundamentally flip the burden of proof applicable at department or board proceedings. Rather, it imposes on the party challenging a board decision the burden to show that the Board’s decision was incorrect by demonstrating that the Board’s “findings and decision are erroneous.” *Gorre*, 184 Wn.2d at 36. Accordingly, it was proper for the jury to be informed of the employer’s burden at the board level so that it could determine whether the firefighter had made this demonstration.” *Spivey*, 187 Wn.2d at 736-37.

In no universe did the superior court commit “reversible error by failing to place the proper burden of proof on the City.” Indeed, to the extent the trial court *did* commit error in its RCW 51.32.185 rulings, it was to the detriment and prejudice of the City. The Appellant’s inordinate focus on the Board Decision, and inability or unwillingness to reconcile the Instructions given to the jury (*that he requested*) punctuates the untenable nature of his argument.

C. Substantial Evidence Supported the Jury Verdict⁵ and the Superior Court Did Not Err by “Failing to Reverse or Modify the Board’s Findings and Decisions.”

Mr. Leitner does not make it clear what he means when he alleges the superior court “committed reversible error by failing to reverse or modify the Board’s findings and decisions.” *See* Brief of App. at 5, Assignment of Error No. 3. The Brief of Appellant does not argue that the Verdict was unsupported by “substantial evidence.” “Findings of fact supported by substantial evidence are verities on appeal...Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992), internal quotations and citations omitted. However, the City maintains that the Jury’s Verdict *was*

⁵ The Brief of Appellant does not argue that the Verdict was unsupported by “substantial evidence.”

supported by substantial evidence, as evidenced by the record and facts cited herein.

But perhaps Leitner attempts to argue that the trial court erred by not reversing the Board's Decision and Order *as a matter of law*. Just prior to asserting that the trial court erred by "failing to reverse or modify" the Board, Leitner cites RCW 51.52.115 as ostensible authority for Judge Blinn taking unilateral action in favor of Leitner.⁶ *Id.* at 22. However, RCW 51.52.115 does not bestow upon the trial court judge the authority to unilaterally dispose of appeals on the merits in a jury trial.

RCW 51.52.115 explains, in pertinent part,

In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance **with the findings of the court**...In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and **the jury's verdict shall have the same force and effect as in actions at law**. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court. (Emphasis added)

Here, a 12-person jury was demanded and impaneled with two alternate jurors. CP at 1866. It would have been a violation of RCW 51.52.115 for the superior court judge to usurp the jury's right to weigh the evidence and pass upon the factual correctness of the Board's

⁶ The trial court's denial of Leitner's summary judgment motion will be addressed in sub-D below.

Decision and Order. *Spivey*, 187 Wn2d at 727-28 (holding that whether an employer has rebutted the firefighter presumption by a “preponderance of the evidence” is a question of fact that may be submitted to the jury). And as already pointed out above, the trial court gave the RCW 51.32.185 Instructions offered by Leitner and the Department.

D. Leitner’s Summary Judgment Motion Was Properly Denied by the Superior Court.

An appellate court reviews summary judgment decisions de novo, and “all facts and reasonable inferences must be viewed in the light most favorable to” the nonmoving party. *Wuthrich v. King County*, 185 Wn.2d 19, 24, 366 P.3d 926 (2016).

Leitner’s May 11, 2017 Motion for Summary Judgment argued that this case involves “four presumptive ‘heart problem’ claims,” that the CR 56 burden of demonstrating no issue of material fact upon *his motion* was the City’s, that *both* Dr. Chen’s and Ms. Young’s opinion is that Leitner’s work as a firefighter was a proximate cause of his “heart problem,” and that “There is no preponderance of relevant, admissible evidence with which to rebut the presumption...The SIE has presented no evidence to rebut Petitioner’s presumptive occupational heart problem.” CP at 1030, 1033, 1034; 1039-40, 1042. On July 13, 2017, the City filed its Response to Plaintiff’s Motion for Summary Judgment. *Id.* at 1053.

The City's response brief pointed out that "there was only one event alleged that could possibly qualify the Plaintiff's heart attack under the presumptive statute," and that the Department order on appeal was limited to Mr. Leitner's heart attack. *Id.* at 1065; *see, also, supra.*

The City's Response also pointed out that Leitner's "counsel cites Supreme Court cases for inaccurate statements of the law." *Id.* at 1074. Leitner's motion cited to *Spivey, Whatcom County*, 128 Wn.2d at 549, and *Young*, 112 Wn.2d at 225 as direct authority for his theory that the City bore the burden to demonstrate no issue of material fact upon *his* dispositive motion. *Id.* at 1034. The City's Response pointed out that "None of the Supreme Court cases cited has held that a firefighter can make a motion for summary judgment, but place the 'initial burden' of demonstrating no 'genuine issue of material fact' on the employer." *Id.* at 1074-75. "There is **zero** authority for the proposition that 'the party moving for summary judgment - except firefighters in presumptive occupational disease cases - bears the initial burden of demonstrating an absence of a genuine issue of material fact.'" *Id.* at 1064. Further, where a party fails to cite authority to support his or her argument, "We deem the failure to make such an argument as a concession that such an argument has no merit." *See State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (Div. I 1997).

Indeed, the City pointed out that Leitner's citation to Supreme Court precedent as direct authority for his proposed rule was improper and in contravention of long-established legal norms for using "signals" when citing cases as ostensible indirect authority, as learned by first-year law school students. *Id.* at 1075, 1077-79. The superior court erred in not awarding sanctions for these indiscretions.

Next, Leitner's summary judgment motion argued that *both* Dr. Chen's and Ms. Young's opinion is that Leitner's work as a firefighter was a proximate cause of his "heart problem." *Id.* at 1039-40. This, too, is demonstrably false. The Department issued a letter to Leitner on October 13, 2015 stating, "Allowance of this claim is supported because...Dr. Chen stated the exposure to diesel fumes at work on 2/26/15 probably aggravated Firefighter Leitner's Coronary Artery Disease." *Id.* at 386, 1074. However, there is zero evidence that Dr. Chen was of this opinion at all, and the Department appears mistaken. When Dr. Chen was placed under oath to testify, he offered no opinion with respect to Leitner's work being causally connected to his "heart problems" whatsoever. Indeed, Dr. Chen concurred with Dr. Thompson's May 12, 2015 IME report and never withdrew his concurrence. *Id.* at 887-89. Dr. Chen was apparently *not* of the opinion that Leitner's work had any causal connection to his employment.

The City also argues that Physician’s Assistant Aubrey Young’s testimony failed to rise to the level of “more-probable-than-not” causation evidence. The Board noted that Ms. Young

has been practicing for *only three years*, [and] offered that she *assumed* that Mr. Leitner’s career exposures were a cause of his heart problems. *She offered no basis for the thought* other than that her patient’s cholesterol levels were within normal limits. She conceded that cholesterol levels do not evidence the plaque levels in arteries, and that a cardiologist has more expertise than her in diagnosing and treating heart problems.

Id. at 1072 (citing *id.* at 60); *see also, id.* at 791, 806, 814-16. Emphasis added.

Finally, Leitner’s summary judgment motion flew in the face of RCW 51.32.185’s plain language (and medical science) when he argued that “There is no preponderance of relevant, admissible evidence with which to rebut the presumption...The SIE has presented no evidence to rebut Petitioner’s presumptive occupational heart problem.” *Id.* at 1042. Leitner appeared to argue that the *rebuttable* presumption of occupational disease is not rebuttable at all, and to find that the presumption *is* rebuttable “deprives him of due process.” *Id.* at 1039.

The medical evidence proves that Leitner had two of the factors identified by the Legislature as rebutting the statutory presumption under RCW 51.32.185. RCW 51.32.185(1)(c) expressly states that the

“presumption of occupational disease established in (a) and (b) of this subsection may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, **physical fitness and weight, lifestyle, hereditary factors**, and exposure from other employment or nonemployment activities.” Mr. Leitner was obese and had a family history of heart disease. CP at 630, 733-34, 737, 880.

Dr. Thompson identified five risk factors for coronary artery disease (“atherosclerosis”) – high blood levels of cholesterol, high blood pressure, diabetes, **family history, and “just plain ol’ age.”** *Id.* at 740, emphasis added. Mr. Leitner also has two of the five major risk factors for heart problems identified by medical science – he was in his 50s, and he has a family history of heart disease. Dr. Chen offered that the “usual cause of a heart attack” includes “diabetes, hypertension, high cholesterol, and family history of heart disease.” *Id.* at 866. Dr. Chen also agreed with Dr. Thompson that obesity is a risk factor for heart attack, though a minor risk factor. *Id.* at 873.

On August 25, 2017, oral argument on summary judgment occurred. 8/25/17 VRP. Following rebuttal argument by the City, the superior court judge stated, “Frankly, I agree with you. This is a matter for both sides that has to go to the jury. It’s a finding of fact issue. I appreciate the briefing.

I read *Spivey* when it came out, and I read again, come to the conclusion this matter has to go to the jury.” *Id.* at 11.

Leitner’s argument that the City was unable to produce sufficient evidence to rebut the statutory presumption of RCW 51.32.185 *as a matter of law* was without merit and his motion was correctly denied by the superior court. Through Dr. Thompson’s testimony, it was established that Leitner has two of the express statutory risk factors that may be offered to rebut the presumption. Dr. Thompson, and Dr. Chen, also testified that Leitner had non-occupational *medical* risk factors for heart attack that include a family history of heart disease, advancing age, and (to a lesser extent) obesity. Leitner’s summary judgment motion was correctly denied.

E. The Trial Court Did Not Abuse its Wide Discretion in Denying Leitner’s Motion to Strike Mr. Riordan as a Witness, Nor Was Leitner Unfairly Prejudiced by Riordan’s Testimony.

Finally, Appellant argues that the “Superior Court committed reversible error by failing to exclude the testimony of industrial hygienist Frank Riordan.” Brief of App. at 5. However, “[t]he admission of evidence will be reversed only for an abuse of discretion.” *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 314-315, 822 P.2d 271 (1992). “A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* at 315,

internal quotations omitted. The trial court did not abuse its discretion in refusing to strike Mr. Riordan as a witness.

As a preliminary matter, the Industrial Insurance Act does not permit new evidentiary objections to be raised for the first time on appeal to superior court, nor do the Board regulations permit objections to be lodged after a deposition has been concluded. RCW 51.52.115, WAC 263-12-117(5)(a)⁷. And despite having had the opportunity to engage in full discovery and pre-hearing motions practice, Leitner did not move to exclude Riordan prior to his testimony.

It was not until the end of Leitner's and the Department's cross-examinations of Mr. Riordan that the Department's attorney moved to strike "the deposition and the testimony **as not being relevant**. And I have no further questions." CP at 713, emphasis added. Leitner's counsel joined that objection. *Id.* No other objections to Riordan's deposition were lodged prior-to or during his deposition.

On May 3, 2018, Leitner filed his Motions in Limine with Pierce County Superior Court. CP at 1210. Leitner sought to exclude Mr. Riordan on the basis of "ER 702, ER 703, lack of foundation, prejudice, confusion, incomplete and unrealistic test conditions, and lack of scientific validity."

⁷ "The board may make rules and regulations concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board." RCW 51.52.020.

Id. at 1211. These objections were not “relevance” and were therefore waived by Leitner and the Department when they failed to make those objections by pre-deposition motion or during the deposition itself.

On November 1, 2018, oral argument was had on Leitner’s Motions in Limine and his attempt to strike Mr. Riordan. 11/01/18 VRP at 7-52. The trial judge observed that the City argued that “there’s not a timely objection, and to the extent that there was an objection later on towards the close...it wasn’t that objection.” *Id.* at 7. The Department attempted to argue that its objection was on relevance grounds “because there was a lack of foundation to show that anything that he tested was relevant to what Lieutenant Leitner had experienced.” *Id.* at 8-9.

On oral argument, the City explained that “the law is clear that if the objection isn’t made or preserved at the Board, it’s waived. And, here, as Your Honor noted, all we have is a relevance objection...relevance is a low bar.” *Id.* at 10. The City explained that Riordan’s testimony was relevant because he tested for airborne diesel particulate matter on and around the fireboat Leitner worked aboard on February 25, 2015, which purportedly triggered the RCW 51.32.185 presumption due to exposure to diesel exhaust. *See id.* at 10-11. “This fireboat *Destiny* thing is very critical, and Mr. Riordan testifies to what those particulates were...That makes the fact that Mr. Leitner was exposed to fumes or toxic substances maybe a little

less likely the cause of a myocardial infarction.” *Id.* at 11. The City also emphasized that “the City is not waiving its objection that is found in its petition for review at the Board. The presumption shouldn’t apply and the reason that the City argues that, Your Honor, is because as we go back to Mr. Riordan’s report, we’re talking about ambient level of these diesel particulates...the City doesn’t believe that there’s any exposure [on February 25, 2015] within the meaning of the statute.” *Id.* at 12.

The trial court judge explained that “I’m going to have to take it under advisement, and I want to read it very closely, and I think an honest application of the law requires me to rule on it on an objection-by-objection basis, and that will be my approach to it.” *Id.* at 12. The trial court did not abuse its discretion in refusing to strike Mr. Riordan.

And even if the trial court had erred in refusing to strike Mr. Riordan, any unfair prejudice to Mr. Leitner would have been eliminated upon the trial court’s significant striking of Mr. Riordan’s testimony on an “objection-by-objection basis.” *See* VRP at 213-345; *see also*, CP at 680-695, 717-718.

The trial court struck all of Mr. Riordan’s testimony regarding Washington State and OSHA regulations and standards for diesel exhaust exposure in workplaces, thereby depriving the City and the jury of meaningful context for the diesel emission data testified to. The trial court

also struck all testimony by Riordan establishing that the diesel emission results he obtained were within the exposure limits set by the State of Washington and OSHA for the workplace.

Perhaps most prejudicial to the City's case, the trial judge struck Mr. Riordan's testimony regarding ambient levels of particulate matter deemed permissible in cities by regulation, and that the diesel exhaust constituents tested on the fireboat *Destiny* were *at or below* ambient levels found in cities such as Seattle. *See, e.g.*, CP at 692-93. In so doing, the trial court hobbled the City from arguing that Leitner was not "exposed" to diesel exhaust on the fireboat any more than he would have been walking out his front door. *See* VRP at 969-70. The City was precluded from arguing that Mr. Leitner's work on the fireboat on February 25, 2018 did not qualify him for the presumption.

There was no unfair prejudice to Mr. Leitner due to the tatters of Mr. Riordan's testimony being admitted at trial.

III. CONCLUSION

For the reasons stated above, the City of Tacoma respectfully requests that the November 15, 2018 Jury Verdict and December 14, 2018 Judgment and Order affirming the February 8, 2017 Board Decision and Order be AFFIRMED.

RESPECTFULLY SUBMITTED this 9th day of July, 2019.



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NO. 52908-4-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and THE
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondents.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the City of Tacoma's Brief of Respondent and this Certificate of Service in the below-described manner:

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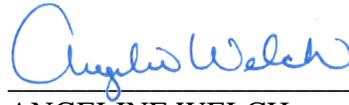
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