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NO. 52908-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ANDREW P. LEITNER,

Appellant,

v.

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

Respondents.

**BRIEF OF RESPONDENT,
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Leitner made the arguments to the jury that he claims the trial court prevented him from making, but the jury rejected his theory. Because he could not fully argue his theory, there was no legal error, and substantial evidence supports the jury's verdict.

Leitner is a firefighter who had a myocardial infarction a few days after his last work shift. Consistently with the terms of RCW 51.32.185, a statute which creates a presumption for firefighters that certain illnesses are occupational diseases, the trial court instructed the jury that any heart problems Leitner developed within 72 hours of exposure to smoke, fumes, or toxic substances (or within 24 hours of heavy exertion), were presumed to be related to his employment. Leitner argued to the jury that both the myocardial infarction after his last shift and other heart problems he had throughout his firefighting career were work-related, citing the presumption instruction. But the City of Tacoma presented evidence that non-work factors caused Leitner's heart problems, and the jury returned a verdict in the City's favor.

Leitner shows no error on appeal. Leitner objects to the Board of Industrial Insurance Appeals' (Board) decision to focus on the myocardial infarction and not all of his heart problems, but those arguments are misguided. This Court reviews the superior court decision on appeal

(RCW 51.52.115) and, contrary to what Leitner claims, the trial court's instructions allowed him to argue that all of his heart problems were presumed to be related to his firefighting work and the instructions did not limit him to seeking benefits based on the myocardial infarction alone. And substantial evidence supports the jury's finding that the City rebutted the presumption that Leitner's heart problems were more likely related to nonoccupational factors including his age, family history, and obesity, than to his employment. This Court should affirm.

II. ISSUES¹

1. Appellate courts do not review a trial court's decision to deny summary judgment when the reason for the decision is that material facts are in dispute. The trial court denied Leitner's motion for summary judgment because it found that there was a dispute about whether the presumption was rebutted. Should this Court review the denial of summary judgment?
2. An employer rebuts the presumption that work caused a firefighter's disease if a preponderance of the evidence supports that the disease is not work-related. The City presented a doctor who opined that Leitner's disease was unrelated to his work and other evidence that his disease was more likely related to nonoccupational factors than to his employment. Does substantial evidence support the jury's finding that the City rebutted the presumption?
3. The trial court instructed the jury that any heart problems Leitner experienced within 72 hours of work exposure to smoke, fumes, or toxic substances are presumed to be related to his employment. It also instructed the jury that

¹ The Department does not address the issue of whether the trial court abused its discretion when it declined to strike the testimony of the industrial hygienist.

the Board found that Leitner was regularly exposed to smoke, fumes, and other toxic substances throughout his work as a firefighter. The verdict form asked the jury whether the City rebutted the presumption that Leitner's heart problems were related to his employment. Did the instructions allow Leitner to argue that it was presumed that all of his heart problems were work-related?

III. STATEMENT OF FACTS

A. Leitner Filed a Claim with the Department for Heart Problems He Developed While Working for the City

Andrew Leitner has been a firefighter for over thirty years.

CP 554. Leitner's job duties often exposed him to smoke, fumes, and other toxic substances, and he routinely exerted himself physically. CP 61 (FF 2). Leitner performed many job duties, but much of his work was on a diesel-powered fireboat, the Destiny. CP 509-17.

On December 31, 2014, while working on the fireboat, Leitner began pulling an anchor, and experienced symptoms including sweatiness, nausea, shortness of breath, chest pain, and upper back pain that radiated into his left arm. CP 527-31. Leitner rested for a portion of the boat ride back to the harbor, and his symptoms subsided. CP 532-33. But after that day, Leitner experienced those symptoms off and on, and did not "feel well." CP 600.

Leitner worked a 24-hour shift on February 25, 2015, which began at 7:00 a.m. CP 498-99. Leitner was exposed to some diesel fumes while

working on that shift, as was typical for him. Also on that day, Leitner helped two other firefighters lift a heavy man off the floor during a medical call. CP 601. Leitner had back pain between his shoulders and some dizziness and light-headedness after lifting. CP 601-02. Within a half hour, his back symptoms subsided. CP 601-02. Leitner's shift ended at 7:00 a.m. on February 26, 2015, and he went home. *See* CP 606.

On February 27, 2015, just before 8:00 p.m., he felt chest pain when he got up from his chair at home. CP 607-08. He took a muscle relaxant and fell asleep. After sleeping about 10 hours, he awoke in an extreme cold sweat, and reported that for "the first time" he had "extreme... aching sharp, sharp pain that went directly into [his] chest." CP 608-09. Fearing a heart attack, he called 911, and medics took him to the hospital. CP 610-11. Peter Chen, M.D., saw Leitner in the emergency room, and treated him for a myocardial infarction, with a complete blockage of the coronary artery to the heart. CP 861-62. Dr. Chen inserted an emergency stent. CP 496.

The Department first rejected Leitner's claim in an order in June 2015. CP 200. After Leitner's appeal, the Department issued an order in July 2015 that stated "This injury or occupational disease/condition is allowed." CP 201. But four days later, the Department issued an order that stated that it was reconsidering the July 2015 order. CP 201. Ultimately,

the Department issued an order in October 2015 that allowed Leitner's claim but only for "the heart problem treated on 2/28/2015." CP 284.² The City appealed the October 2015 order to the Board. CP 201. Leitner did not cross-appeal. *See* CP 201.

B. The Board Reversed the Department's Order and Directed the Department To Reject Leitner's Claim

In support of its appeal, the City presented the testimony of Robert Thompson, M.D., a cardiologist who examined Leitner at the City's request. CP 726, 732. Dr. Thompson testified that Leitner had a myocardial infarction as a result of atherosclerosis, a form of coronary artery disease that causes cholesterol to cling to artery walls, narrowing them. CP 733-34, 740. The myocardial infarction occurred when the arteries became blocked. CP 733-34. Dr. Thompson explained that Leitner's arteries had been building cholesterol for quite some time, which produced no symptoms until the build up was enough to produce a blockage and the resulting myocardial infarction. CP 751.

Dr. Thompson explained that atherosclerosis is caused by non-work factors including obesity, cholesterol, diabetes, high blood pressure, and family history, and is also highly age dependent, with the

² The Department's order cited "RCW 51.32.182," but this is a typographical error as there is no such statute. CP 284. The Department presumably intended to cite RCW 51.32.185.

risk being highest in a person's mid-50s. CP 740. It is the leading cause of death in the United States. CP 740. Dr. Thompson did not identify exposure to smoke, fumes, or other substances as a risk factor for atherosclerosis. *See* CP 740. Dr. Thompson noted that obesity is primarily a risk factor in that it is associated with other things that are more strongly linked with atherosclerosis, such as high blood pressure, cholesterol, and diabetes, though obesity alone is also a factor, though a very mild one. CP 737-38. Dr. Thompson acknowledged that while Leitner was obese, he did not have high cholesterol, diabetes, or high blood pressure. CP 737-38. As to Leitner's family history, he found it significant that his mother had a coronary bypass in her mid-50s. CP 733-34.

Dr. Thompson testified that Leitner did not have a myocardial infarction on December 31, 2014. CP 769-70. Dr. Thompson testified that a myocardial infarction generally occurs within 24 hours of when the artery becomes blocked. CP 769.

Dr. Thompson concluded that nothing about Leitner's employment as a firefighter contributed to his heart attack. CP 755. He noted that there is no evidence that exposure to diesel fumes brings on heart attacks, particularly when working in an open-air environment. CP 743-44, 747-48, 754. He also knew that an industrial hygienist's report revealed that Leitner likely was exposed to relatively small amounts of diesel while

he worked on the fireboat. CP 747-48. Dr. Thompson acknowledged that exposure to an overwhelming amount of diesel fumes while in a confined space could bring on heart problems, but he did not believe that the exposure to diesel fumes that Leitner experienced while working as a firefighter had anything to do with his myocardial infarction.

CP 743, 747-48, 754.

The City also presented the testimony of Frank Riordan, an industrial hygienist, who conducted tests to determine exposure to diesel fumes on fireboats such as the Destiny. CP 660-64. Riordan tested for two hours on two days with low levels of wind. CP 664, 671. He estimated diesel exposure by testing gas levels produced during diesel fuel combustion. CP 679-80. Based on his testing, he found “very low” diesel exposure from the exhaust and stated that no special precautions were necessary to limit firefighters’ exposure to diesel fumes while working on the Destiny. CP 694.

Riordan explained that he tested a “worst case” scenario: non-rainy days with light wind. CP 671. With rain or more wind, the exposure levels likely would have been lower than when he tested. CP 668-71, 695.

Similarly, he tested the boat by having it idle for 30 minutes before a short trip around a bay. CP 715. He explained that this, too, matched a worst-case scenario, and that the exposure level would have been lower

had the boat been travelling at a higher speed. CP 715. He acknowledged that he had “no idea” what the actual test results would have been had he tested in February 2015, when Leitner had the myocardial infarction, but later clarified that the day he tested was likely a representative day. CP 694-95.

Dr. Chen, a cardiologist, testified at the Department’s request. CP 857. He testified that Leitner had a myocardial infarction as a result of the progression of his coronary artery disease. CP 861-62. Dr. Chen testified that the usual causes of heart attacks include diabetes, hypertension, high cholesterol, smoking, and family history. CP 866. Dr. Chen also noted that obesity is a risk factor for heart attacks but not an important factor, and that the more important risks are diabetes, high blood pressure, smoking, and family history. CP 866. Dr. Chen understood that Leitner was not a smoker. CP 865.

Dr. Chen testified that he strongly believed that Leitner’s myocardial infarction occurred on February 2015, when plaque in his arteries broke loose, blocking an artery completely. CP 918. Dr. Chen did not state what he thought had caused the plaque to break loose. *See* CP 918.

Leitner presented the testimony of Aubrey Young, PA-C, a physician’s assistant. CP 789. PA-C Young had treated Leitner for three

years as of the time that she testified. CP 793. PA-C Young believed Leitner's employment as a firefighter was a proximate cause of his heart problems. CP 804-05. She noted that she had tested Leitner's cholesterol level and found it to be normal, and Leitner was otherwise in good health, so she related his heart problems to his employment. CP 806.

PA-C Young acknowledged that a cardiologist would know more about heart problems and diseases than she would. CP 814. She also acknowledged that normal cholesterol levels do not mean that a person's arteries are not clogged with cholesterol. CP 816. She recognized that age was a risk factor for heart problems. CP 818.

The Board issued a decision and order that reversed the Department's order and that directed the rejection of the claim. CP 113-21. The Board noted that the only condition that the Department had allowed was the condition "treated" on February 28, 2015, and the evidence proved that the only condition treated on that date was the myocardial infarction, which occurred within 24 hours of February 28, 2015. CP 116. The Board concluded that the employer had "soundly rebutted" the presumption that the myocardial infarction was work-related and that the weight of the evidence showed that the myocardial infarction was not work-related. CP 115.

C. Leitner Appealed the Board's Decision To Superior Court, but the Court Affirmed the Board

Leitner appealed to superior court. CP 1-4. He moved for summary judgment, but the court denied the motion, concluding that there were material issues of fact about whether the employer had rebutted the presumption that the worker's heart problems were work-related. CP 1030-51, 1157-58; RP 8/25/2017 at 11.

The City moved to limit the issues to the myocardial infarction treated on February 28, 2015, so Leitner could not seek to have his claim allowed for other heart problems. CP 1161-72. The Court denied the motion. RP 2/16/2018 at 16.

Leitner moved to exclude the industrial hygienist's testimony, but the trial court declined to strike his testimony in its entirety, though it sustained some objections to some portions of his testimony, such as any testimony mentioning federal or state work place safety standards. RP 12, 252-55.

The court gave a jury verdict form that the Department and Leitner both agreed with, but to which the employer objected. RP 769-70, 774-76, 884-886. As given, the verdict form asked two questions:

1. 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?

2. 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?

CP 1935.³ The trial court rejected the employer's request for a third question, which would have asked the jury which heart problems in particular were caused by Leitner's employment. RP 884-86.

Over Leitner's objection, the court gave an instruction that apprised the jury of the Board's findings. CP 1919-20; RP 857-58. At Leitner's request, however, and over the City's objection, the court also gave an instruction that advised the jury of the Board's conclusions of law, though the instruction characterized them as "determinations." CP 1921; RP 761-66, 783-92.

Leitner argued to the jury that, under the court's instructions, the presumption applied to any heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances. RP 931-32. Leitner argued that the jury should consider all of the heart problems, which he said arose on December 31, 2014, and continued into February 2015, and told the jury it had to consider all of those problems. RP 928-34. Leitner also

³ The verdict form directed the jury not to answer question number 2 if they answered "no" to question number 1.

argued that the Board's decision was wrong, going through the Board's findings one by one, and asserted that the Board failed to consider whether Leitner's problems on December 31, 2014 related to his firefighting work. RP 941.

Following closing argument, the jury answered "yes" to both questions on the verdict form. CP 1935. The court entered judgment based on the jury's verdict. CP 1953-55. Leitner now appeals to this Court. CP 1958-63.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.⁴ This Court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

⁴ The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW 51. RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180.

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence, and all reasonable inferences from the evidence, in the light most favorable to the prevailing party. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015); *Gagnon*, 110 Wn. App. at 485.

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012). When substantial evidence supports the trial court's findings, "we do not reweigh the evidence and substitute our judgment even though we might have resolved the factual dispute differently." *Zavala*, 343 P.3d at 776.

V. ARGUMENT

Leitner establishes no basis to overturn the jury's verdict. First, the Court should decline Leitner's invitation to review the trial court's decision to deny his summary judgment motion. Appellate courts do not review decisions to deny motions for summary judgment when there is a

factual dispute, as here. Because substantial evidence supports the verdict, Leitner fails to establish that the City failed to rebut the presumption.

Second, substantial evidence supports the jury's verdict, as the City presented medical evidence that non-work factors caused Leitner's heart problems, which the jury could have reasonably relied on in concluding that the City rebutted the presumption that his work caused his heart problems.

Third, the court's instructions were proper as Leitner could, and did, use them to argue his theory of the case to the jury. The trial court's instructions and its verdict form allowed Leitner to argue that all of his heart problems, not just the myocardial infarction, were presumed to be related to his work as a firefighter. He argued exactly that to the jury. Though the jury rejected his argument, the instructions did not bar him from making it.

Finally, the trial court did not abuse its discretion when it admitted the testimony of the industrial hygienist. This Court should affirm.

A. This Court Should Not Review the Trial Court's Denial of Summary Judgment as Such Denials Are Not Reviewable on Appeal

Leitner repeatedly argues that the trial court should have granted his summary judgment motion and its failure to do so was "reversible error." AB 5, 29. Because the parties presented disputed facts about the

cause of his heart problems, this Court should decline to review the trial court's decision on summary judgment.

Appellate courts do not review a trial court's decision to deny summary judgment after a case has been submitted to a jury when the trial court denied the motion based on its determination that a material fact was in dispute. *Johnson v. Rothstein*, 52 Wn. App. 303, 304-05, 759 P.2d 471 (1988) (stating, "We hold that a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact."); *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799-800, 65 P.3d 16 (2003) (denial of summary judgment is not reviewable if denial was based on a determination that there were material facts in dispute, but is reviewable if no material facts are in dispute and the case presents a pure question of law); *see also Hudson v. United Parcel Service, Inc.*, 163 Wn. App. 254, 257 n.1, 258 P.3d 87 (2011).

Here, the superior court denied Leitner's motion because it determined that a material fact was in dispute—namely, whether the City presented a preponderance of the evidence that Leitner's heart problems were not work-related. CP 1157-58; RP 8/25/2017 at 11. Because the trial court denied the motion for summary judgment on that basis, this Court

should not review its decision to deny summary judgment. *See Rothstein*, 52 Wn. App. at 304-05; *Kaplan*, 115 Wn. App. at 799-800.

Leitner asks this Court to review the trial court's denial of summary judgment but neither recognizes the authority that such rulings are not subject to review nor offers any plausible argument as to why that rule would not apply here. AB 5, 13, 29-30. Leitner has waived the right to argue that there is an exception to the general rule that denials of summary judgment are not reviewable by raising no such argument in his opening brief. *See Cramer v. PEMCO Ins. Co.*, 67 Wn. App. 563, 567, 842 P.2d 479 (1992) (stating that a party cannot raise an issue for the first time in a reply brief). And in any event, there is no basis to argue that this rule does not apply here.

Leitner makes much of the trial court's comments that it did not fully agree with the Board's analysis (AB 16, citing RP 369, 459), but ignores that the trial court denied the motion for summary judgment because it concluded that the record as a whole created a genuine issue of fact about whether the presumption had been rebutted. RP 459 (explaining, "I think the Board's rationale is flawed . . . but their ultimate conclusions, that's an issue for the jury."); RP 369-70 (commenting, "But the rest of their conclusions are supported by some evidence" and commenting, "That's the jury's role" in response to Leitner's argument

that the employer did not present enough evidence to rebut the presumption). This explains why the trial court denied Leitner's motion despite not agreeing with everything the Board said. Leitner shows no error.

B. Substantial Evidence Supports the Jury's Verdict That the City of Tacoma Rebutted the Presumption That Leitner's Employment as a Firefighter Caused His Heart Problems

Because the City presented evidence that could satisfy a reasonable person that Leitner's heart problems were more likely related to nonoccupational factors than to his employment as a firefighter, substantial evidence supports the jury's verdict that the City rebutted the presumption. *See Spivey v. City of Bellevue*, 187 Wn.2d 716, 727-28, 389 P.3d 504 (2017) (holding that whether a presumption has been rebutted is a question of fact); *Ruse*, 138 Wn.2d at 5 (explaining that superior court's findings are reviewed only for substantial evidence). Leitner argues that the City failed as a matter of law to rebut the presumption created by RCW 51.32.185, but his argument misstates the applicable standard under *Spivey*—whether there is substantial evidence that the worker's disease is related to nonoccupational factors rather than the worker's employment as a firefighter—and ignores evidence that supported the City's appeal.

AB 24-28.

1. The presumption is rebutted when the preponderance of the evidence establishes that a disease is unrelated to employment

RCW 51.32.185 creates a rebuttable presumption that when a firefighter contracts certain diseases, including the heart problems at issue here, the disease is occupationally related. As *Spivey*'s discussion shows, whether an employer has rebutted the presumption created by RCW 51.32.185 is a question of fact that a jury may decide. *Spivey*, 187 Wn.2d at 727-28. This is because an employer rebuts the presumption if a preponderance of the evidence shows that the disease is unrelated to the worker's work as a firefighter. This is both a burden of *production*—which means the party challenging the presumption must present its evidence first—and a burden of *persuasion*—which means that the party challenging the presumption must persuade the trier of fact that its evidence should be given more weight than the evidence presented by the firefighter. *Id.* at 728-29, 731. And it is the trier of fact, not an appellate court, who weighs conflicting evidence on a material issue of fact: the appellate court accepts the trier of fact's findings so long as substantial evidence supports them. *Ruse*, 138 Wn.2d at 5.

Spivey makes clear that the party challenging the firefighter presumption need not establish the precise cause of the worker's illness to rebut the presumption. *Spivey*, 187 Wn.2d at 735 (“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, a party rebuts the presumption by proving that the worker's disease is more probably than not caused by nonoccupational factors. *Spivey*, 187 Wn.2d at 735. No other showing is necessary to rebut the presumption. *See id.*

Leitner's arguments rely on a test that *Spivey* rejected. Relying on dicta in the Court of Appeals' decision in *Gorre* that *Spivey* rejected, Leitner argues that there is a three-part test that is used to decide whether a party rebutted the presumption. AB 1-2; *see Gorre v. City of Tacoma*, 180 Wn. App. 729, 758, 324 P.3d 716, *rev'd* 184 Wn.2d 30 (2014); *Spivey*, 187 Wn.2d at 735. Leitner argues that a party fails to rebut the presumption: 1) if the cause of the disease cannot be determined, or 2) if there is no known association between the disease and firefighting, or 3) the party fails to present evidence establishing that it is more probable than not that the disease is unrelated to employment. AB 1-2. Leitner's proposed test cannot be reconciled with *Spivey* and does not make sense on its own terms.

Under *Spivey*, the first two prongs of Leitner's proposed test are wrong, and it is only what Leitner calls the third prong that determines whether the City rebutted the presumption. *Spivey*, 187 Wn.2d at 735. *Spivey* held that the party challenging the presumption need not establish

the actual cause of the disease: the party simply needs to establish that the disease is more likely unrelated to firefighting employment than related to it. *See Spivey*, 187 Wn.2d at 735. And while *Spivey* does not specifically address if a party can rebut the presumption by showing there is no known association between the disease and firefighting, *Spivey* unambiguously held that the presumption is rebutted if the evidence establishes that the disease is more likely to be unrelated to firefighting than related to it. *See id.* So if there is no known association between a disease and firefighting *and* the evidence establishes that the disease is most likely unrelated to firefighting work, then the presumption was rebutted under *Spivey*. *See id.*

Furthermore, the language in *Gorre* that Leitner relies on was dicta because the *Gorre* Court did not decide either whether the presumption was rebutted or what the party challenging the presumption needed to show to rebut the presumption. *See Gorre*, 180 Wn. App. at 756, 758. In *Gorre*, the Department, the Board, and the superior court each determined that the presumption did not apply to the disease the worker alleged to be an occupational disease. *Gorre*, 180 Wn. App. at 756. The Court of Appeals concluded that the presumption did apply to the disease and remanded the case to the Board for a new hearing with the understanding that the presumption governed that appeal. *Id.* The Court of Appeals did not enter a holding about how the Board should decide whether the

presumption was rebutted, but did comment that when the presumption applies in a given case:

[T]he burden shifts to the employer to rebut the presumption by a preponderance of the evidence by showing that the origin or aggravator of the firefighter's disease did not arise naturally and proximately out of employment. If the employer cannot meet this burden, 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 employer maintains the benefit of the occupational disease presumption.

Gorre, 180 Wn. App. at 758 (internal citation omitted).

The comment was dicta because the issue the *Gorre* Court decided was whether the presumption applied at all. The Supreme Court reversed the Court of Appeals' decision and held that the presumption did not apply. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 34, 357 P.3d 625 (2015). And it is not clear whether the Court of Appeals meant to imply through its dicta that an employer *necessarily* fails to rebut the presumption whenever there is no known association between a disease and firefighting. *See Gorre*, 180 Wn. App. at 758. It appears more likely that the Court meant that the *presumption still exists* even if there is no known link between the disease and firefighting, and it is then up to the employer to establish by a preponderance of the evidence that the disease is more probably unrelated to employment than related to it. *See id.* If so, the

Court's comment in dicta was essentially correct but does not help Leitner, because the issue here is what an employer needs to show to rebut the presumption. And in any event, *Spivey* held that an employer rebuts the presumption by proving that the disease is more likely unrelated to employment than related to it, and does not support placing any additional requirements on what the employer must establish to rebut the presumption. *Spivey*, 187 Wn.2d at 735. If the Court of Appeals' statement in dicta suggests otherwise, it was overruled by *Spivey* and should not be followed here.

Additionally, Leitner's proposed test would lead to absurd results that the Legislature could not have plausibly intended when it enacted RCW 51.32.185. Under Leitner's proposed test, the presumption was not rebutted even if the evidence showed that the disease was almost certainly unrelated to employment, if it is true either that the exact cause of the disease is not known or that there is no known association between the disease and firefighting. *See* AB 1-2. But where the evidence is overwhelming that firefighting did not cause a particular worker's disease, it would make no sense to say that the party nonetheless failed to rebut the presumption, especially when RCW 51.32.185 provides that the presumption can be rebutted by a preponderance of the evidence.

2. Substantial evidence supports the jury's finding that the presumption was rebutted

The City presented evidence that could persuade a reasonable person that Leitner's disease was most likely unrelated to his employment and so substantial evidence supports the jury's verdict. Leitner's argument (at AB 24-28) that the City failed to rebut the presumption fails because he cannot show that the verdict lacks substantial evidence. Both Dr. Thompson's and Dr. Chen's testimony support the conclusion that Leitner's heart problems were more likely related to nonoccupational factors—age, family history, and obesity—than to firefighting. CP 733-34, 737-40, 755, 861-62, 873, 875. The jury could reasonably rely on this testimony and conclude that the City rebutted the presumption that Leitner's firefighting work caused his heart problems.

Dr. Thompson testified that Leitner had a form of coronary artery disease—atherosclerosis—that caused cholesterol to build on artery walls, ultimately causing a myocardial infarction when an artery became completely blocked. CP 739-40. Dr. Thompson identified the risk factors for atherosclerosis as including age, smoking, high blood pressure (hypertension), diabetes, and genetics. CP 751-52. Dr. Thompson also noted that atherosclerosis sometimes develops without a particular risk factor being present. CP 751.

Dr. Thompson emphasized that the disease is highly age dependent and that Leitner's age, 52, was within the highest risk zone—the mid 50s. CP 756-57. Dr. Thompson noted that Leitner's mother had a coronary bypass when she was in her 50s, which Dr. Thompson considered a significant finding about Leitner's family history. CP 733-34. Dr. Thompson concluded that Leitner's heart problems were unrelated to his exposure to smoke and, more generally, were unrelated to anything he experienced in his work as a firefighter. CP 754-55.⁵

Dr. Chen similarly testified that Leitner had coronary artery disease that led to a myocardial infarction. CP 861-62. When asked whether Leitner's myocardial infarction related to his work as a firefighter, Dr. Chen testified that the usual causes of heart attacks include diabetes, high blood pressure, high cholesterol, smoking, and family history. CP 866. At no point did Dr. Chen endorse exposure to smoke, fumes, or toxic substances, or any other occupational exposure associated with firefighting, as a probable cause of Leitner's heart attack. When asked whether environmental exposures—such as those a firefighter encounters—can contribute to heart attacks, Dr. Chen

⁵ Dr. Thompson explained that angina pectoris is a condition caused by a narrowing of the artery. CP 739. Angina pectoris results when the heart receives less blood than it needs as a result of the narrowing of the artery. CP 739. Thus, the angina pectoris would be related to the atherosclerosis, as the atherosclerosis is what caused the narrowing of Leitner's arteries. *See* CP 739-40.

acknowledged that environmental exposure can cause anything, but reiterated that the most important risk factors were the ones Dr. Chen had mentioned before. CP 875. Thus, even when asked questions that encouraged him to link Leitner's heart attack to his work as a firefighter, Dr. Chen instead emphasized nonoccupational factors as the key ones to consider. *See* CP 866, 875.

Based on Dr. Thompson's and Dr. Chen's testimony, a reasonable trier of fact could conclude, as the jury did here, that Leitner's heart problems were more likely caused by nonoccupational factors, including his age, family history, and obesity, than they were by his work as a firefighter. CP 733-34, 737-40, 755, 861-62, 873, 875, 1935.

Dr. Thompson's and Dr. Chen's testimony show that the cause of all of Leitner's heart problems, including the myocardial infarction and the angina pectoris, was atherosclerosis itself most likely related to his age, family history, and (though to a lesser extent) his obesity. CP 733-34, 737-40, 755, 861-62, 873, 875. The jury could rely on this testimony, especially when it is coupled with Dr. Thompson's express testimony that Leitner's heart problems were unrelated to any of his work exposures as a firefighter, to conclude that the City rebutted the presumption. While a reasonable trier of fact could have reached a different conclusion, a

reasonable trier of fact could also conclude, as the jury did here, that the City rebutted the presumption.

Contrary to Leitner's suggestion, Dr. Thompson addressed whether Leitner's heart problems related to any part of his work as a firefighter, not just whether his exposure to diesel fuel within 72 hours of the myocardial infarction proximately caused the myocardial infarction. AB 24-25. While Dr. Thompson did answer some questions addressing the exposure within that limited window, he also addressed the global issue of whether anything related to Leitner's work as a firefighter caused the heart problems, and opined that it did not. CP 753-55. And perhaps more importantly, Dr. Thompson's and Dr. Chen's testimony allowed a reasonable trier of fact to conclude that Leitner's disease was more likely related to his age, family history, and obesity than it was to firefighting. CP 733-34, 737-40, 755, 861-62, 873, 875.

Dr. Thompson's testimony also does more than just comment that there is not a known link between firefighting and heart problems. Leitner argues that Dr. Thompson's testimony was inadequate because it was limited to failing to find a connection between firefighting and heart problems, which Leitner claims is insufficient under *Gorre* and *Spivey*. AB 25. But what *Gorre* states, in dicta, is that the presumption applies even if there is no *known* association between a disease and firefighting.

Gorre, 180 Wn.2d at 758. Dr. Thompson did not testify that there was no *known* association between firefighting and heart problems—he testified that based on the information he reviewed he did not see anything that would lead him to conclude that Leitner’s heart problems were in fact work-related. CP 755. And even leaving this testimony aside, Dr. Thompson’s and Dr. Chen’s testimony supports the inference that Leitner’s heart problems were more likely related to his age, family history, and obesity than to his work as a firefighter, which is enough to rebut the presumption under *Spivey*. CP 733-34, 737-40, 755, 861-62, 873, 875; *Spivey*, 187 Wn.2d at 735.

Although the Department and City agree that substantial evidence supports the verdict, the Department disagrees with an argument that the City advances about the presumption statute. The City has argued that to rebut the presumption in RCW 51.32.185, it has to show only that a worker’s heart problem was not proximately caused either by exposure to smoke, fumes, or toxic substances within 72 hours of the development of that problem or by strenuous activity within 24 hours of the development of the problem. CP 1068-69. This misreads the statute.

Under RCW 51.32.185, there is a presumption that a firefighter’s heart problems are work-related if the heart problem arose within 72 hours of exposure to smoke, fumes, or other toxic substances, or within

24 hours of performing a strenuous activity. *See* RCW 51.32.185. But once there is evidence of a heart problem arising within the defined time periods, RCW 51.32.185 creates a presumption that the firefighter's heart problem is an occupational disease. An employer rebuts the presumption by establishing that it is more probable that the worker's heart problem is because of nonoccupational factors than that it is because of firefighting. RCW 51.32.185; *Spivey*, 187 Wn.2d at 735. Merely showing that the exposure that triggered the applicability of the presumption in the first place did not cause the disease is insufficient, since this evidence alone does not establish that the cause of the disease is more likely to be nonoccupational than occupational.

This distinction is not determinative here, however, because the employer did not *only* address the exposure to smoke, fumes, and toxic substances within 72 hours of the myocardial infarction; it also presented evidence that allowed a reasonable trier of fact to conclude that the disease was more probably caused by nonoccupational factors than by work as a firefighter. So substantial evidence supports the jury's verdict that the City rebutted the presumption. This Court should affirm.

- C. **The Court's Instructions Advised the Jury That the Firefighter Presumption Applied To All of His Heart Problems and Allowed Leitner To Argue That All of His Heart Problems Should Be Allowed as Occupational Diseases**

The Court's instructions and verdict form allowed Leitner to argue that all of his heart problems—not just the myocardial infarction treated on February 28, 2015—were subject to the presumption and should be allowed under his claim. CP 1920-23, 1926, 1935. Leitner argues that by reading the Board's findings to the jury, the trial court effectively limited him to arguing that his myocardial infarction was presumptively allowed, under the rationale that the Board's findings were limited to that issue and that the Board's mistake somehow tainted the jury. AB 29. Leitner also contends that the Court failed to properly apply the burden of proof for firefighters. AB 16-17, 31. These arguments fail because the instructions as a whole unambiguously provided that the presumption applied to all of Leitner's heart problems, not just his myocardial infarction, and they unambiguously allowed Leitner to make the argument that he claims he could not make. CP 1920-23, 1926, 1935. That the jury rejected his argument does not prove that the instructions somehow prevented Leitner from making the arguments. Leitner shows no error.

Jury instructions are proper when, read as a whole, they accurately state the law, are not misleading, and allow each party to argue its theory of the case. *Spivey*, 187 Wn.2d at 738. Leitner argues that by advising the jury of the Board's findings, the trial court prevented him from arguing his theory of the case, because he claims the Board's findings were too

limited in scope to allow him to seek acceptance of any condition besides the myocardial infarction. AB 29. Leitner's argument fails for three reasons.

First, several of the court's instructions, including Instruction Nos. 8, 9, 10, and 13, as well as the verdict form, unambiguously informed the jury that they were to consider all heart problems—not just the myocardial infarction—when deciding whether the City rebutted the presumption. CP 19201-23, 1926, 1935. As *Spivey* observes, the jury is presumed to follow the court's instructions absent evidence to the contrary, and Leitner offers no evidence suggesting that the jury disregarded the trial court's instructions, including the ones that told the jury to consider all of Leitner's heart problems when deciding the case. *Spivey*, 187 Wn.2d at 738.

Instruction No. 8 advised the jury that the Board determined that “the employer rebutted the presumption by a preponderance of the evidence” that “Andrew Leitner's *heart problems* were an occupational disease.” CP 1920 (emphasis added). Instruction No. 9 told the jury that it had to decide “[w]hether the City of Tacoma rebutted, by a preponderance of the evidence, the statutory presumption that Mr. Leitner's *heart problems* were an occupational disease.” CP 1922 (emphasis added). Instruction No. 10 advised the jury that, before the Board, the burden was

on the City to rebut the presumption that “claimant’s *heart problem(s)* arose naturally out of his conditions of employment as a firefighter” and “his employment is a proximate cause of his heart problem(s).” CP 1923 (emphasis added). These instructions allowed Leitner to argue that the issue before the jury was whether the City rebutted the presumption for all of his heart problems. Furthermore, the instructions made clear that the City had the burden of proving that it had rebutted the presumption for all of those heart problems.

Instruction No. 13 similarly made clear that the presumption applied to all heart problems and not just the myocardial infarction, advising the jury, “You are to presume that if a firefighter experienced *any heart problems* within seventy-two hours of exposure to smoke, fumes, or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting, then those activities were a cause of those heart problems.” CP 1926 (emphasis added). This instruction also rebuts Leitner’s claim (at AB 16-17, 31) that the court misapplied the burden of proof: the instruction explained that the City had the burden of proof about rebuttal of the presumption, and the instruction did so in terms consistent with *Spivey*. CP 1926; *Spivey*, 187 Wn.2d at 735, 738-39.

The verdict form also directed the jury to consider all heart problems when deciding whether the presumption was rebutted, asking

“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?” CP 1935 (emphasis added). The verdict form’s second question similarly encompassed all heart problems, asking (if the jury found that the City rebutted the presumption) whether Leitner proved “by a preponderance of the evidence that his heart problems were an occupational disease.” CP 1935. And notably, the verdict form is almost identical to the one in *Spivey*, which the *Spivey* Court cited with seeming approval. *Spivey*, 187 Wn.2d at 723-24.

Taken as a whole, the instructions allowed Leitner to argue that the jury should apply the presumption to all of his heart problems, not just the myocardial infarction. *See* CP 1921-23, 1926, 1935. The instructions also made clear that the City had the burden of rebutting the presumption for all of those heart problems. CP 1921-23, 1926, 1935. The jury could not have plausibly believed that acceptance of the myocardial infarction was the only issue before them, given the language of Instructions Nos. 8, 9, 10, and 13 and the verdict form. *See* CP 1921-23, 1926, 1935.

Second, there is no support for Leitner’s argument (at AB 22-23) that a court should not inform a jury of the Board’s findings if it concludes that the Board’s findings were not comprehensive enough about the issues

before the Board. Leitner relies on language in RCW 51.52.115 that “[i]f 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.” AB 22 (emphasis omitted). Leitner suggests that this statutory language means that if the court thinks the Board made the wrong findings, the court can rewrite the Board’s findings to conform to what the court thinks the Board should have found. AB 22. But the language in RCW 51.52.115 that Leitner cites refers to the superior court’s authority to reverse the Board’s decision on the merits if the superior court concludes that the Board’s decision was wrong. As for advising a jury of the Board’s findings, the statute, far from authorizing the court to change the Board’s findings, directs the superior court to advise the jury “of *the exact findings of the board* on each material issue before the court.” RCW 51.52.115 (emphasis added).

Leitner suggests that the trial court should have corrected the Board’s findings and read the corrected findings to the jury, but fails to explain how the trial court could have properly done so. AB 22-23. Presumably, Leitner believes the court should have replaced the phrase “myocardial infarction” in the Board’s findings with the phrase “heart problems.” But RCW 51.52.115 does not authorize the court to tell the

jury that the Board made factual determinations that it did not make. The Board did not find that none of Leitner's heart problems were related to employment: it found only that the myocardial infarction was unrelated to that employment. CP 119-20. Leitner was free to argue to the jury both that the findings were wrong and that the Board failed to address the issues before it, but there is no reason why the trial court should have misled the jury and told it that the Board made findings that it did not make.

Indeed, modifying the findings in this way would have likely prejudiced either Leitner or the City. Rewriting the Board's finding to say that the Board found that none of Leitner's heart problems were related to his work as a firefighter would have prejudiced Leitner, because it would have suggested that the Board made a finding that thoroughly rejected Leitner's contentions on appeal, when the Board's findings did not address some of Leitner's contentions. Though Leitner apparently would have preferred it if the Court informed the jury that the Board made such a finding, doing so would likely have worked against Leitner's interests and made it harder for him to have a fair trial. On the other hand, editing the Board's findings to say that the Board found that Leitner's heart problems *were* related to his employment would unduly prejudice the City by

suggesting that the Board's findings favored Leitner when the findings favored the City.

Third, at least one of the Board's findings helped Leitner argue that the presumption applied to all of his heart problems. *See* CP 119, 1919. The Court informed the jury that the Board found that "Andrew Leitner worked as a firefighter for the City of Tacoma for over 30 years from some time in 1984 until the morning of February 26, 2014. *In his work he was regularly exposed to smoke, fumes and toxic substances, and regularly exerted himself physically, sometimes strenuously.*" CP 119 (FF 2) (emphasis added); *see* CP 1919. The Board's finding that Leitner was "regularly" exposed to smoke, fumes and toxic substances, coupled with the Court's Instruction No. 13, which said that the presumption applied to all heart problems arising within 72 hours of exposure to smoke or within 24 hours of strenuous exertion, allowed Leitner to argue to the jury that the Board's own finding meant that the presumption applied to all of Leitner's heart problems, not just the myocardial infarction, because all of his heart problems necessarily arose shortly after he was exposed to smoke, fumes, or other toxic substances. CP 119, 1919, 1926.

Leitner also ignores that he made the arguments to the jury that he now claims that he could not make. Leitner argued to the jury that, under Instruction No. 13, the presumption applied to any heart problems

experienced within 72 hours of exposure to smoke, fumes, or toxic substances. RP 931-32. Leitner argued extensively that the jury should consider all of the heart problems, which he said arose on December 31, 2014, and continued into February 2015, and told the jury it had to consider all of those problems. RP 928-34. Leitner also argued that the Board's decision was wrong, going through the findings one by one, and attacked the Board's decision because it failed to consider whether Leitner's problems on December 31, 2014, related to his firefighting work. RP 941. Leitner made the arguments that he says he could not make, and the court's instructions allowed him to make them. CP 1921-23, 1926, 1935. Leitner establishes no error.⁶

VI. CONCLUSION

Substantial evidence supports the jury's finding that the City rebutted the presumption that Leitner's occupational disease was related to his work as a firefighter. Dr. Thompson concluded that Leitner's heart

⁶ The Court need not decide this here, but the Department notes that the Board's ruling about its scope of review was correct. The Board's authority is appellate only, so its scope of review is limited to the issues the Department addressed through its order and that the party challenging the Department's order raised in its appeal. *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012). When a court reviews a Board decision, its scope of review is similarly limited to the issues properly before the Board. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994). The Department's order addressed only the heart problems treated on February 28, 2015—the myocardial infarction—not the other heart problems, so the proper scope of review extends only to that issue. But since the trial court allowed Leitner to address all of his heart problems on appeal and since Leitner is the only appellant, this Court need not decide whether the Board properly limited its scope of review.

problems were unrelated to his firefighting work, and were more likely related to nonoccupational factors including his age and family history. A reasonable trier of fact could accept this testimony and agree that Leitner's disease was more likely unrelated to his employment than related to it. Leitner argues that the presumption was not rebutted as a matter of law, but fails to support the argument. Leitner also seeks review of the trial court's denial of summary judgment, but such decisions are not properly reviewable by appellate courts.

Leitner establishes no basis for overturning the jury's verdict and this Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of July, 2019.

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NO. 52908-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ANDREW P. LEITNER,

Appellant,

v.

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

Respondents.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

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