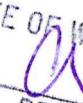


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 52908-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

“The IIA is remedial in nature, and thus we must construe it “liberally ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”” *Spivey v. City of Bellevue*, 187 Wash. 2d 716, 726, 389 P.3d 504, 509–10 (2017), quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987).

II. ARGUMENT

The Department of Labor and Industries, which supported Lt. Leitner at trial, has now turned an about-face and taken the opposite position. The Department should be judicially estopped from making its arguments in opposition of Lt. Leitner’s claim. At trial, the Department’s attorney stated:

- “I will remind Mr. Meyers that the Department has been aligned with Lieutenant Leitner from the very beginning because the Department's order that the self-insured employer appealed was to allow the claim under the presumption.” [bold added]. VRP 34:8-12.
- “What's happened in this case is the City of Tacoma has asked, and the Board agreed, that you should ignore all of the straw that had accumulated on this camel's back until two hours of Lieutenant Leitner's last shift that he worked before his myocardial infarction on February 28th. So, essentially, they're asking you to ignore 30 years worth of shifts where he was inhaling diesel particles and diesel exhaust, he was inhaling smoke, fumes, and toxic substances as he did his work as a first responder for the City of Tacoma. I submit to you that the evidence that you heard in this trial includes all of the straw that was on this camel's back, not the last two hours or two hours in the last shift that he worked.” [bold added]. VRP 955:3-17.

- “The law says the City had to have produced sufficient evidence at the Board to overcome the presumption of causation by a preponderance of the evidence. **I would suggest to you that they did not meet that standard.**” [bold added]. VRP 959:22-23.
- “So when you look at your verdict form, as Mr. Meyers pointed out, the first -- the first question is, was the Board of Industrial Insurance Appeals correct when it decided that the City had rebutted the presumption -- the occupational presumption by a preponderance of the evidence? **The answer should be, No,** the Board did not get it right.” [bold added]. VRP 959:23-960:4.
- “**The City did not put forth sufficient evidence to rebut the presumption** that Andrew Leitner's heart problems -- any of his heart problems -- weren't proximately caused by his work as a firefighter.” [bold added]. VRP 961:5-9.
- **Dr. Thompson specifically stated that pulling up the anchor on 12/31/14 lit up his angina pectoris.** So there's evidence in the record to support this. There's been plenty of testimony that the -- the building up of cholesterol, the coronary artery disease, if you will, happened over a period of time. Mr. Leitner didn't know about it, but Dr. Thompson specifically said it was a temporary lighting up of this condition.” [bold added]. VRP 805:14-22
- “The only thing that I would weigh in on this one is **Gore is good law,** and it remains good law, [. . .]” [bold added]. VRP 838:6-8;
- “It certainly conflicts with what we're giving for the lighting-up instruction which comes directly out of **Dr. Thompson's testimony because, there, we've said that the condition could be latent or quiescent and pre-existing and the work activity lights it up.**” [bold added]. VRP 868:14-19;
- “I'm thinking of the testimony in this case and how the doctors defined the angina pectoris, and how it's a partial blockage that starves the heart of blood. So the way I've conceptualized this is **it's one, long continuum with the lesser symptoms preceding the ultimate which was the myocardial infarction.** So I don't see them

necessarily as distinct conditions. I see them along the pathway to a heart attack, speaking from some personal experience with that.” [bold added]. VRP 877:25-878:9

Judicial estoppel bars the Department’s attorney from now arguing that the Board and Superior Court did not limit the issue to only myocardial infarction. *See Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d 13 (2007).

The City of Tacoma (“City”) states:

- First, the Board’s and superior court’s proper scope of review as limited to that of the October 13, 2015 Department order’s allowance **for myocardial infarction**. [bold added]. *RB p. 11.*
- 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.” [bold added]. *RB p. 14.*
- “The October 13, 2015 Department order expressly and exclusively allowed this claim for Mr. Leitner’s February 28, 2015 **heart attack**. [bold added]. *RB 15.*

This claim (that the Department’s order exclusively allowed the claim for a 2/28/15 myocardial infarction, i.e. heart attack) forms the basis for the City’s larger argument- which is that Lt. Leitner’s other heart problems such as his angina pectoris symptoms and his coronary artery disease were “beyond the Board’s and superior court’s statutory authority”. *See RB p.15.*

The problem with the City’s argument are the facts. The City’s claim that the Department’s order was limited to “myocardial infarction” fails when

confronted with the provable fact – that it was not. *See CP 1145*. Reality is that the Department’s order states in pertinent part: “This claim is allowed for the **heart problem** treated on 2/28/15 pursuant to the provisions of RCW 51.32.182.” [bold added]. *CP 1145*. **Nowhere** on the Department’s October 13, 2015 order are the terms “myocardial infarction” or “heart attack”. *CP 1145*.

Leitner submitted his SIF-2 Addendum detailing a history of December 321, 2014 through February 28, 2015, culminating in his trip to the hospital on February 28, 2015.¹ *CP 251-253*.

The City also claims that Lt. 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.” *RB p. 19*. The Department makes a similar argument.

Even if that were true, it was rendered futile because the jury was led to believe that the only heart problem about which the jury was deciding was a February 28, 2015 myocardial infarction. The Board’s findings of fact are limited to “myocardial infarction.” *CP 61*. The jury must be advised by jury instruction of the “**exact findings** of the Board”. [bold added]. *See RCW*

1

The opening brief at p. 11 mistakenly states “through February 2, 2015.” It should read “through February 28, 2015.

51.52.115. The jury was instructed by the court as to the Board's material findings - which pertained only to one heart problem - a "myocardial infarction".

The City's attorney took the following position in his closing argument:

You have a jury instruction in there that enumerates all the different Board's findings of fact. **Every one of those findings of fact** you can see as a click through what – **it's talking about myocardial infarction, heart attack**. As I was trying to tell you folks at the beginning, and hopefully I got it across, **that's what this is about**.
VRP 968:1-10.

Judicial estoppel bars the City's attorney from now arguing that the Board and Superior Court did not limit the issue to only myocardial infarction.

Quoting *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006), the Supreme Court stated: "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc., id.*, at 538.

The City claims that the Board's application of the burdens of production and persuasion are not at issue here. *RB p. 19*. That is inaccurate. The following is Issue No. 2 in Lt. Leitner's Opening Brief:

Did the Board and Superior Court commit reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue*. Yes.

Prior to the Supreme Court's opinion in *Spivey v. City of Bellevue, id.*, the government would claim that whether an employer rebutted the presumption in RCW 51.32.185 should be left to the judge to decide as a matter of law **in every instance**. See e.g. *Spivey, id.*, at 728. The issue went up to the Supreme Court, and the Supreme Court disagreed with the government. see *id.* The Supreme Court determined that it was a question of fact and **may be** submitted to the jury. See *Spivey, id.*, at 727-728. But that is not to say that it *has* to go to the jury.

The Supreme Court in *Spivey, id.*, stated: "Because neither party has briefed the issue, we decline to address whether it would ever be permissible for a judge to decide the issue as a matter of law." *id.*, at 729.

CR 56 states that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The City repeatedly relies on a position that has already been determined by case law as failing to rebut the statutory presumption of occupational disease. On direct examination, the City's expert was asked the basis for his ultimate opinion, and his basis, was legally incompetent to rebut the

presumption under *Spivey v. City of Bellevue, id., and Gorre v. City of Tacoma*, 180 Wash. App. 729, 736, 324 P.3d 716, 720 (2014), as amended on reconsideration, reversed on other grounds. The court erred when it denied Lt. Leitner's motion for summary judgment.

Dr. Thompson testified that Lt. Leitner had a buildup of cholesterol in his arteries for years and years prior to the February 28, 2015 "event". *CP 751*.

When asked what caused that buildup, he testified that the cholesterol "in our blood seeps into our arteries and accumulates." *CP 751*. But when asked what caused that to happen, Dr. Thompson testified not about Lt. Leitner specifically, but in a general sense: "Age, smoking, high blood pressure, diabetes and **sometimes you never know** why one person gets it and another doesn't." *CP 751*.

On cross examination Dr. Thompson testified specifically about Lt. Leitner, in that that there was:

- **No history** of cigarette smoking for Lt. Leitner,
- **No history** of high blood pressure for Lt. Leitner,
- **No history** of diabetes for Lt. Leitner; and
- **No history** of or high cholesterol for Lt. Leitner.

CP 767. Dr. Thompson admitted that prior to December 31, 2014 (the day Leitner pulled up the anchor) Lt. Leitner had shown **no symptoms** or no awareness of any kind of his heart disease or heart problems. CP 778.

“In light of the foregoing authority, we hold that aggravation of a pre-existing, asymptomatic disease may be compensable as an occupational disease within the meaning of RCW 51.08.140, provided that the employment conditions producing the aggravation are peculiar to, or inherent in, the particular occupation.” *Snyder v. Dep't of Labor & Indus.*, 40 Wash. App. 566, 575, 699 P.2d 256 (1985).

“In a long line of cases in this jurisdiction, it has been established that if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury and not to the pre-existing physical condition, and it is immaterial whether the infirmity might possibly have resulted in eventual disability or death, even without the injury.” *Harbor Plywood Corp. v. Dep't of Labor & Indus. of State of Wash.*, 48 Wash. 2d 553, 556–57, 295 P.2d 310 (1956).

On direct examination, Dr. Thompson was asked what his opinion was on a more probable than not basis, after everything he has reviewed, as to whether or not “Mr. Leitner’s 2-28-15 heart attack proximately caused,

aggravated or lit up on Mr. Leitner's alleged exposure to smoke, fumes or toxic substances within 72 hours of the 2-28-15 heart attack." CP 753. Dr. Thompson gave the conclusory opinion "no". CP 753.

"Conclusory opinions lacking adequate factual support are insufficient to defeat a motion for summary judgment." *Tiger Oil Corp. v. Yakima Cty.*, 158 Wash. App. 553, 575, 242 P.3d 936 (2010).

And then Dr. Thompson's ultimate opinion was revealed when the City's attorney asked Dr. Thompson **why** he is of the opinion that he does not believe that "Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated or lit up by Lt. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?" CP 753-754.

This was where the rubber met the road. This was the City's expert's chance to provide the basis for his opinion that Lt. Leitner's 2-28-15 heart attack was not proximately caused, aggravated or lit up by his exposure to smoke, fumes or toxic substances within 72 hours of the 2-28-15 heart attack.

If the expert's basis for his opinion was to disagree with the causal-connection established by the presumption, then that basis fails to rebut the presumption as a matter of law. *See Spivey, id.*, at 735. And that is precisely what the City's expert did:

Q Well, why are you of that opinion that you don't believe that Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated

or lit up by Mr. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?

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

CP 753-754. The government cannot rely on a lack of a known association between the disease and firefighting to rebut the presumption. *See Gorre v. City of Tacoma, id.*, at 758, reversed **on other grounds**.

Dr. Chen testified that Lt. Leitner's coronary artery (in which the stent was placed on February 28, 2015) was one hundred percent blocked and that "a complete blockage is usually an acute event." CP 909.

The Department argues that "Where the evidence is overwhelming that firefighter did not cause a particular worker's disease, it would make no sense to say that the party nonetheless failed to rebut the presumption, [. . .]" RB. p.22. It may not "make sense" to the Department, but it makes sense to Division II of the Appellate Court and to the Supreme Court:

"[the standard for rebutting the presumption] 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, id.*, at 735.

[. . .] if the cause of the disease cannot be identified by a preponderance of the evidence or even if there is no known association between the disease

and firefighting, the firefighter employee maintains the benefit of the occupational disease presumption.” *Gorre v. City of Tacoma*, *id.*, at 758.

This Court has the right and should review and overturn the trial court’s denial of Lt. Leitner’s motion for summary judgment, when it was the trial court’s misapplication of the burden of proof in RCW 51.32.185, as interpreted by *Gorre v. City of Tacoma*, *id.*, and *Spivey v. City of Bellevue*, *id.*, that gave rise to the court’s order. Leitner is not “raising this issue for the first time” in reply, but rather is responding to the Department’s claim that this Court cannot review the trial court’s MSJ order.

The Superior Court also committed reversible error by limiting the application of the statutory presumption to “myocardial infarction.” The presumption applies to “heart problems” not just “myocardial infarction”. *See RCW 51.32.185*. Also, Lt. Leitner is not required to identify the specific toxic agent responsible for his disease or disability. *See Intalco Aluminum v. Dep’t of Labor & Indus.*, 66 Wash. App. 644, 656, 833 P.2d 390 (1992).

Indeed, Lt. Leitner had a myocardial infarction, which is a heart problem. But even the City’s expert admitted that Lt. Leitner had coronary artery disease, **which his a heart problem**, and angina pectoris, **which is also a heart problem**. CP 779, 782. Dr. Chen also testified that angina pectoris is **a heart problem**. CP 909.

Dr. Chen was also asked: "So, Doctor, let's talk about Mr. Leitner. I think your prior testimony was that the 100 percent blockage of that left descending coronary artery was **based on plaque breaking loose?**" [bold added] CP 918. Dr. Chen answered: "Yeah, I strongly believe so." id.

Dr. Thompson even admitted that it appears that the symptoms of angina pectoris occurred while Lt. Leitner was engaged in activities on the job:

Q And you talked about angina pectoris, and you talked about that specifically in relationship to the anchor incident on 12-31-2014. You would me, would you not, that angina pectoris is a heart problem, correct?

A Yes.

Q And you would agree with me that it appears that the symptoms of angina pectoris occurred while Mr. Leitner was engaged in physical activities on the job, correct?

A Yes.

CP 779. Dr. Thompson testified that "The underling cause [of the angina pectoris] was buildup of cholesterol in his arteries." CP 781-782. And he had already admitted that (1) "sometimes you never know why one person gets it and another doesn't." and (2) Lt. Leitner had no history of diabetes, high cholesterol, high blood pressure or cigarette smoking.

It was Lt. Leitner's strenuous physical activity at work that brought out the symptoms. Dr. Thompson admitted: "The underlying cause [of angina pectoris] was buildup of cholesterol in his arteries. **The exertion just**

brought out symptoms of that, [. . .]” [bold added]. CP 783. Dr. Thompson also admitted that if a ruptured plaque had healed over, it could be damaged by strenuous physical activity, and he admitted that prior to December 31, 2014 (the day Leitner pulled-up the anchor) Mr. Leitner had shown no symptoms or awareness of “any kind of his heart disease or heart problems.” CP 769, 778.

The Board limited the issue to a February 28, 2015 myocardial infarction - even though Lt. Leitner had multiple “heart problems” as evidenced by the medical testimony. CP 61. Even though the *Department’s* order said “heart problems”, the Board picked one heart problem from a tree-full of heart problems and put that, and only that, in its findings of fact.

The City and Department make much about Instructions 8, 10, 13 and the Special Verdict Form using the term “heart problems” or “heart problem(s)”. But as far as the jury was led to believe, when the instructions and special verdict form used these terms, the problem being referred to was the singular heart problem found by the Board and repeated in instruction No. 7 – the February 28, 2015 “myocardial infarction.” *See Instruction No. 7 at CP 1919-1920.*

This is further evident by the City’s counsel’s representation to the jury in closing argument. *See VRP 968:1-10.*

The Superior Court failed to correctly apply the burden of proof as set forth in RCW 51.32.185 and interpreted by *Gorre v. City of Tacoma, id.*, and *Spivey v. City of Bellevue, id.* The Superior Court, knowing that the Board's analysis was incorrect, failed to correct the error as required by statute and therefore erred itself.

If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it **shall be** reversed or modified.

[bold added]. *RCW 51.52.115. in pertinent part.*

- “I think the Board’s rationale is flawed in light of *Larson* and *Spivey*, [. . .]” *Judge Blinn. VRP 459:13-14.*
- “I think the Board’s analysis was incorrect. [. . .] I think they got to the way they got the wrong way because of the way they addressed the presumption, finding it had been rebutted, effectively, because the exposure within 72 hours, they felt, had been demonstrated to not be the cause of the heart problem in February. That’s not the standard.” *Judge Blinn VRP 369:17-25.*
- “[. . .] but simply to find that the City rebutted the presumption because they’ve disproved that the most recent exposure was the cause and, therefore, the presumption doesn’t apply, I think, is the wrong analysis, [. . .]” *Judge Blinn, VRP 71:15-19.*
- “[. . .] and I do think the rationale and the analysis was wrong, [. . .]” *Judge Blinn, VRP 77:22-23*
- “I can’t remember if it was Dr. Thompson or Mr. Riordan. One of them essentially testified that there is no evidence that the myocardial infarction was caused by the most recent exposure and, therefore, concluded that it wasn’t causally connected, but that flips the burden, doesn’t it, if there’s no evidence and it’s presumed, then there’s

nothing to rebut. There's no evidence to rebut. And to the extent that he concludes that it's not causally connected to the exposure within 72 hours because there's no evidence to suggest that it is, doesn't that flip the presumption on its head?" *Judge Blinn, VRP 79:20- 80:6.*

In *Clark Cty. v. McManus*, 188 Wash. App. 228, 354 P.3d 868, 877 (2015), rev'd in part, 185 Wash. 2d 466, 372 P.3d 764 (2016), the worker contended that the trial court's refusal to revise the Board's finding so that it reflected only injury to his lumbar spine was error, and the Court of Appeals agreed. *id.*, at 242.

The Court of Appeals in *Clark Cty. v. McManus, id.*, stated: "Thus, the issue before the jury was whether the Board's determination that a causal link existed between McManus' claimed industrial injury and the conditions of his work for the County. Because the Board's finding of fact 5 as represented to the jury referenced the wrong injury, it effectively precluded McManus from establishing this link." *Id.*, at 244.

The Court of Appeals held: "Thus, the trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial." *Id.*, at 245.

Here, the issue before the jury was whether the Board was correct in deciding that the City rebutted the presumption that Lt. Leitner's heart problems were an occupational disease. But because the Board's findings of fact as represented to the jury in Instruction No. 7 referenced only myocardial

infarction (leaving out all of his other heart problems) it effectively precluded Lt. Leitner from a full and fair application of the presumptive disease statute RCW 51.32.185 which is **not** limited to myocardial infarction.

The trial court acknowledged that the Board's rationale and its analysis **was wrong**. The trial court's refusal to correct the Board's obvious error materially affected the outcome of the trial. No Respondent, employing reason and objectivity, would say otherwise.

Lt. Leitner had a **right to the full statutory presumption** in RCW 51.32.185 as to "heart problems": on two separate shifts, and to the proper application of the burden-shifting mechanism of that statute. The Superior Court rendered the protection of the statutory presumption meaningless when it failed to uphold the legislative expectation that (1) the presumption applies to all heart problems, not just myocardial infarction and (2) the presumption survives an opposition that merely disagrees with the causal connection established by the presumption.

A liberty interest may arise from an expectation or interest created by state laws. *See In re Bush*, 164 Wash.2d 697, 702, 193 P.3d 103 (2008). The Fourteenth Amendment protects individuals from deprivation of liberty without due process of law, and from the arbitrary exercise of the powers of government. *In re Lain*, 179 Wash. 2d 1, 14, 315 P.3d 455, 461 (2013).

The argument that Lt. Leitner “argued his theory of the case” misses the fundamental error in this case. Lt. Leitner did not fold-up shop and go home. He played the erroneous, biased facts and law he was dealt. The Board limited the presumptive disease statute to an event of myocardial infarction, failed to properly apply the presumptive-disease statute’s burden of proof, and the trial court did nothing to fix that error. Lt. Leitner could have “argued his theory of the case” until he was blue in the face, but the jury must follow the jury instructions. And it was quite clear that the “heart problems” referenced in the jury instructions related to the ONE heart attack incident that the Board found and on which the jury was instructed – a February 28, 2015 myocardial infarction.

The City improperly comports the “all objections” provision in WAC 263-12-117(5)(a) with a motion to exclude Riordan. Regardless, the City admits that the Department’s attorney moved to strike the deposition and the testimony of Riordan at the end of Leitner’s and the Department’s cross-examination of Riordan. RB p.34.

Because, Riordan’s testimony is irrelevant because the “level” of occupational exposure is completely irrelevant toward rebutting the presumption, where, as here, the presumption establishes the causal connection to Lt. Leitner’s heart problems experienced with 72 hours of

exposure to **smoke, fumes and toxic substances**, or strenuous physical activity, and because rebutting the presumption requires that the City prove causation by **non-occupational** factors.

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

It was an abuse of discretion to allow the City to present Riordan's testimony. Having conducted testing under conditions that greatly departed from the actual conditions, and because the "level" of occupational exposure is completely irrelevant toward rebutting the presumption where, as here, the presumption establishes causation and the City is required by law to rebut the presumption by proving causation from a non-occupational factor, Riordan's testimony was not helpful to the jury.

Admissibility of an expert's testimony depends on three factors, one of which is that it be helpful to the trier of fact *See State v. Willis*, 151 Wash. 2d 255, 262, 87 P.3d 1164 (2004).

During his career, Lt. Leitner responded to approximately five thousand fire suppression calls with smoke, fumes and toxic substances in either a residential or a commercial fire. CP 626:5-627:22. The City wants to ignore the repeated exposures by Lt. Leitner to smoke, fumes and toxic substances

while working.

On December 31, 2014, Lt. Leitner was engaged in strenuous physical activity pulling up a heavy anchor and the left arm pain, feeling like there was a knife poking between his shoulder blades, chest pain, shortness of breath and dizziness.

One call on February 25, 2015 involved Mr. Leitner helping lift a very heavy man who had fallen. *CP 11-19*. Lt. Leitner felt dizzy, light-headed and the pain between his shoulders increased. *CP 601:25 - 602:1*. On this shift, Lt. Leitner felt exceptionally worse than he had felt since December 31, 2014.

On February 28, 2015 Lt. Leitner woke up at approximately 6:00 am on with extreme pain. He sat up in bed and his left arm was throbbing, aching, and he felt something in his chest. *CP608: 8-13*.

This is not a case about a single myocardial infarction on February 28, 2015, but multiple heart problems supported by the medical testimony and the testimony of Lt. Leitner, beginning on December 31, 2014.

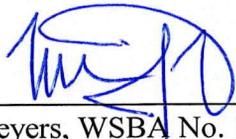
II. CONCLUSION

This Court can and should decide as a matter of law that the City failed to rebut the presumption of occupational disease. In the alternative, this Court should remand this case to be tried under the proper application of

RCW 51.32.185 and without the testimony of Riordan.

DATED: August 7, 2019.

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DECLARATION OF SERVICE OF
APPELLANT'S REPLY BRIEF

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

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

ORIGINALS TO:

David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II

Via hand delivery

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DATED this 7th day of August, 2019, at Olympia, Washington.


Mindy Leach, Litigation Paralegal