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THE SUPREME COURT OF THE STATE OF WASHINGTON

DELMIS SPIVEY

Petitioner,

v.

CITY OF BELLEVUE AND THE DEPARTMENT OF LABOR AND
INDUSTRIES FOR THE STATE OF WASHINGTON,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO MOTION
FOR DISCRETIONARY REVIEW

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ORIGINAL

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ARGUMENT

The lower Court took away from Lt. Spivey his right to have a jury decide if the evidence presented by the City rebutted, by a preponderance of all of the evidence, the presumption that his cancer is occupational. Washington's Constitution and RCW51.52.115 give firefighters a right to a trial by jury – Lt. Spivey was deprived of that right, just as all other firefighters will be if the administration of the Industrial Insurance Act continues to treat this question of fact as a question of law.

Lt. Spivey has a liberty interest arising from RCW 51.32.185 that if Lt. Spivey is an eligible firefighter with malignant melanoma – which he undisputedly is – then he is entitled to the benefit of the presumption that his melanoma is occupational. The lower Court took away that liberty interest from Lt. Spivey by ordering, on the City's motion, that the City rebutted this presumption. The City did not propose such an order, did not seek such relief in its motion and did not put that issue before the Court.

Lt. Spivey also has a liberty interest – arising from the expectation created by our state laws on multiple proximate cause and the presumption in RCW 51.32.185 that firefighting is a cause of his malignant melanoma – that the burden of proof in rebutting the presumption requires that the City must (a) establish a non-firefighting cause of his cancer and (b) disprove

firefighting as a cause. The lower Court took away that liberty interest when it did not apply the burden of proof required by RCW 51.32.185, given that the City cannot prove with competent non-speculative evidence a non-occupational cause and cannot eliminate firefighting as a cause.

The lower Court deprived Lt. Spivey of his right to due process when the Court did more than grant the City's motion, but added to the Order that the City rebutted the presumption. The City's motion was not to have a decision that it rebutted the presumption, but rather to have a decision on *who* determines if the presumption was rebutted (the judge or jury). Lt. Spivey had no notice or expectation that an affirmative ruling that the presumption was rebutted would be made – as the City did not propose an order that the presumption had been rebutted, did not seek such relief in its motion and did not put that issue before the Court.

While in his responsive brief to the City's motion, Lt. Spivey provided the lower Court with *some* evidence and argument as to why the City did not rebut the presumption, it was an incomplete record of pertinent evidence on that issue and the hearing transcript is void of argument on that issue – as the City was not asking the Court to rule that it rebutted the presumption. For example, the lower Court was ignorant to the fact that the City's expert epidemiologist Dr. Weiss testified that nobody proves causation

for disease (like melanoma):

Q: Do epidemiologic studies actually prove causation for a disease?

A: . . . “The word proof doesn’t fit with science, any science. We don’t prove things. . . . Nobody proves that.”

Mtn Disc. Review, Appendix B, Exhibit 5 to Decl of Tim Friedman. If the City’s expert opines that nobody proves causation for a disease, then the City cannot rebut by a preponderance of the evidence the presumption that his exposures as a firefighter caused his malignant melanoma. The lower Court was also ignorant to the fact that the City’s expert – Dr. Weiss – testified that every illness would have multiple causes:

Q: In any given sample of 100 cases of malignant melanoma, in how many of those cases can you determine the cause of the malignant melanoma?

A: I don’t think it’s appropriate to talk about the cause. Every, every illness would have multiple causes so that, for example, if you had – I’m picking a number out of the air now – 80 of those 100 people who have fair skin, you’d say yes 80 of those people had a cause of the disease; but that doesn’t preclude the possibility that other causes could have been present in those individuals.”

Id. If every illness has multiple causes, and firefighting cannot be disproved as a cause, then the City cannot rebut the statutory presumption. The lower Court was also ignorant to the fact that Dr. Weiss testified that:

Q: In any given sample of 100 cases of malignant melanoma can you tell all of the causes of malignant melanoma in any of those 100?

A: I think it’s safe to say that at the present time that would be

impossible.”

Id. The Court was ignorant to the fact that Dr. Weiss testified:

“... We certainly do not understand all the risk factors. There are many that we don't not understand. ...”

id. As another example, the Court was ignorant to the fact that City's dermatology expert Dr. Chien testified:

Q: Doctor, how does a malignant melanoma cell come into being? Are there stages? Is it healthy one day and malignant melanoma the next?

A: That is actually not known. . . .

Id, at Exhibit 6. If the City's expert dermatologist testifies that it is unknown how malignant melanoma originates, then the City cannot rebut that it originated from his exposures to carcinogens or work-related UV rays – and therefore cannot rebut the presumption. The lower Court was also ignorant that Dr. Chien testified:

Q: So what do you know about firefighters' occupational exposure to ultraviolet, Dr. Chien?

A: I don't think I know enough about firefighting to be able to answer that.

Id, at Exhibit 7. The lower Court was **not** asked by the City or the Department to rule that the City rebutted the presumption, and it was not an issue in the City or Department's motions. Lt. Spivey was not given notice that the Court would rule on that issue, and therefore was not given a fair opportunity to specifically and wholly defend against that issue. *See*

Transcript, Appendix A hereto and pages 43 and 44 in particular.

The Court committed obvious and probable error by going beyond the relief requested and beyond the issues presented by the City and Department and based on an incomplete record ruling that the presumption was rebutted. “An order based on a hearing in which there was not adequate notice or opportunity to be heard is void.” *Esmieu v. Schrag*, 88 Wash. 2d 490, 497, 563 P.2d 203 (1977).

The City’s claim that removing the presumption from Lt. Spivey’s trial does not render his trial useless because he is “still entitled to a jury trial” is disingenuous. The City incorrectly analogizes a regular worker’s compensation jury trial – where the burden of proof is on the worker – with a jury trial involving the burden-shifting protection of the presumption in RCW 51.32.185. The burden-shifting protection of the presumption cannot be overstated in its value to the firefighter and his trial. The City wants to tie one arm behind Lt. Spivey’s back and claim that he still has a fair chance in a fight against the government because he has another arm.

The presumption that certain cancers and other diseases are occupational provide protection for the firefighter in their case against the government – it is not just a garnish to be dismissed as insignificant. The lower Court’s error in gutting Lt. Spivey’s case of the presumption renders

his trial useless, as it misplaces the burden of proof and completely shifts the balance of power in his trial. Proper placement of the burden of proof is a fundamental expectation and responsibility within our judicial system.

The City's burden to rebut the presumption is not a mere burden of production as the City incorrectly asserts – but rather a burden of persuasion.

Some presumptions are rebutted **only** by a preponderance of the evidence. **Such a presumption relates to the burden of persuasion. . . .**

14A Wash. Prac., Civil Procedure § 31:14 (2d ed.) [emphasis added]. See also *Gorre v. City of Tacoma*: (“RCW 51.32.185, however, shifts the burden of **disproving** such occupational disease to the employer once the firefighter shows that he has a respiratory, infectious, or other qualifying disease under this statute.”[emph. added]). 180 Wash. App. 729, 757, 324 P.3d 716, 730 (2014), as amended on reconsideration, review granted, 343 P.3d 760 (2015).

RCW 51.32.185(1) creates a presumption that is rebutted **only** by a preponderance of the evidence. This is a significant shift in the balance of power in Lt. Spivey's trial.

While shifting the burden of production to the defendant requires him to present some evidence with respect to the fact in issue, shifting the burden of persuasion requires him to **affirmatively establish the fact in issue.**

State v. Bishop, 90 Wash. 2d 185, 188, 580 P.2d 259, 260 (1978). [emphasis added]. The statutory presumption does not vanish on appeal to the lower

Court from the Board's decision. The jury's job is to decide whether the City failed to rebut the presumption – and the burden of proof was and remains, per RCW 51.32.185, on the City to rebut the presumption.

There is no greater issue of public importance than ensuring a firefighter's rights to a trial by jury are secure and not taken away by an improper application and construction of the Act. Whether the City has overcome that presumption is for a jury to decide. That issue involves weighing the evidence and deciding factual matters. "A determination of proximate cause is generally a question of fact." *Alger v. City of Mukilteo*, 107 Wash.2d 541, 545, 730 P.2d 1333 (1987). *See Mtn Discr. Rvw. 10-13*.

Not only does this case involve administration of the Industrial Insurance Act in a way that deprives a firefighters' right to a jury, but it also in the way it deprives a firefighter's liberty interest in the burden shifting protection of RCW 51.32.185. In all firefighter presumptive disease cases, RCW 51.32.185 creates a liberty interest in the burden shifting protection.

"A liberty interest may arise from the Constitution,' from 'guarantees implicit in the word "liberty," ' or 'from an expectation or interest created by state laws or policies.'"
"

In re Bush, 164 Wash. 2d 697, 702, 193 P.3d 103 (2008).[emphasis added].

When the presumption applies – as it does here – the legislature in RCW 51.32.185 gave the firefighter *a right* to the protection of the presumption.

Understanding that the law allows multiple proximate causes of a condition, and understanding that the statutory presumption establishes firefighting as a cause, it follows that RCW 51.32.185 creates an expectation that to rebut the presumption the City must (a) establish a non-firefighting cause, **and** (b) disprove firefighting as a cause.

The Court did not apply the burden of proof required by RCW 51.32.185 in deeming the presumption rebutted. The record establishes that the City cannot prove a non-occupational cause and cannot eliminate firefighting as a cause. The Superior Court was uninformed of the complete record on whether the City rebutted the presumption -- that issue was not before the Court on the Respondents' motions and Lt. Spivey was deprived notice and opportunity to fully defend that issue.

The administration and construction by the Department, Board and lower Courts of the Industrial Insurance Act's ("Act") presumption of occupational disease is undeniably of broad public importance -- especially when it affects the placement of the burden of proof and a firefighter's right to a jury. The construction and administration of the Act is of a public nature.

"The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, see, e.g., *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 54, 615 P.2d 440 (1980); the validity and interpretation of statutes and regulations, see, e.g., *In re Wilson*, 94 Wash.2d 885, 887, 621 P.2d 151 (1980); . . ."

Hart v. Dep't of Soc. & Health Servs., 111 Wash. 2d 445, 449, 759 P.2d 1206, 1208 (1988) [emphasis added]. Firefighters must be ensured that the adjudicators of their claims construe and administer the Act in a way that upholds the purpose, goals and overriding strong public policy of promoting just determinations of actions and ensuring that all doubts in construing the Act are determined in the injured worker's favor.

The City cannot in good faith argue that there are no conflicts in the construction and application by the judicial system involving the statutory presumption. For example, the City claims that *Raum v. City of Bellevue* stands for the proposition that the rebutting the presumption requires only that the city "calls into question" whether the petitioner's condition qualifies as an occupational disease. (The City's words).

However, *Gorre v. City of Tacoma* shows that the government has a much steeper hill to climb than just "calling into question" causation. Referring to the burden to rebut the presumption, Division II stated:

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 employee maintains the benefit of the occupational disease presumption.

Gorre v. City of Tacoma, at 758 (2015).

We remand to the Board for reconsideration of Gorre's claim with instructions (1) to accord Gorre RCW 51.32.185's evidentiary presumption of occupational disease and (2) to shift the burden of rebutting this presumption to the City to **disprove** this presumed occupational disease by a preponderance of the evidence

Id. at 771. [emphasis added]. As another example, the City of Tacoma argued to this Court in *Gorre v. City of Tacoma* that the Court of Appeals in *Raum v. City of Bellevue* held that whether a particular condition falls under RCW 51.32.185 is a question of fact to be determined by the fact finder – and conversely that the Court of Appeals in *Gorre v. City of Tacoma* held that which conditions fall under the presumption is a question of law to be determined by judges.

On the issue of who decides if the government rebutted the presumption (the court or jury), the City of Bellevue has taken opposite positions in different appellate cases: *Raum v. City of Bellevue* and *Larson v. City of Bellevue*. See *Stmnt of Grounds, Apprx B & C*. While it is true that Division I's opinion in *Larson v. City of Bellevue* is pending, the non-prevailing party is sure to petition this Court for review.

CONCLUSION

Based on the foregoing as well as the motion for discretionary review and statement of grounds for direct review, the Supreme Court should accept review.

DATED: July 13, 2015

RON MEYERS & ASSOCIATES PLLC

By:  _____

Ron Meyers, WSBA No. 13169

Tim Friedman, WSBA No. 37983

Matt Johnson, WSBA No. 27976

Attorneys for Firefighter Spivey

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DELMIS SPIVEY,)	
)	
)	No. 14-2-29233-3 SEA
Plaintiff,)	
)	
v.)	
)	
CITY OF BELLEVUE and DEPARTMENT)	
OF LABOR AND INDUSTRIES,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
(FROM TAPED PROCEEDINGS)

BE IT REMEMBERED that the foregoing and numbered proceeding was heard on March 27, 2015, before THE HONORABLE SAMUEL CHUNG, Judge.

TIM FRIEDMAN and RON MEYERS, Attorneys at Law, 8765 Tallon Lane NE, Suite A, Lacey, WA 98516, appearing on behalf of the Plaintiff;

CHAD BARNES, Attorney at Law, PO Box 90012, Bellevue, WA 98009, appearing on behalf of the City of Bellevue;

BEVERLY GOETZ, Attorney at Law, Office of the Attorney General, 800 5th Ave., Suite 2000, Seattle, WA 98104, appearing on behalf of the Department of Labor and Industries.

(Proceedings transcribed by: Tammy Jarriel)

WHEREUPON, the following proceedings were had and done, to wit;

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City of Bellevue's Motion for Determination of 3

Legal Standard on Review and to Strike Portions

of Dr. Coleman's Testimony

DEPARTMENT OF LABOR & INDUSTRIES' MOTIONS AND RULINGS

Department of Labor and Industries Motions in 3

Limine

1 THE COURT: Okay. We're here on, uh, Spivey versus
2 City of Bellevue, um, Cause Number 14-2-29233-3. Counsels,
3 uh, make your appearances for the record. And try to speak
4 into the microphone, please.

5 MR. BARNES: Chad Barnes for the City of Bellevue.

6 MS. GOETZ: Morning, Your Honor. Beverly Goetz for
7 the Department of Labor and Industries.

8 THE COURT: All right.

9 MR. FRIEDMAN: Your Honor, Tim Friedman for Del
10 Spivey.

11 THE COURT: All right. Thank you.

12 MR. FRIEDMAN: And Ron Meyer's an associate.

13 THE COURT: Uh, we're here on City of Bellevue's
14 Motion for Determination of Legal Standard on Review and to
15 Strike Portions of Dr. Coleman's (phonetic) Testimony. Um,
16 and I also received a reply from L&I regarding, uh, a -- a
17 Motion in Limine, basically. Uh, I will give each side,
18 uh, ten minutes, uh. I don't think L&I needs the ten
19 minutes. I -- I'll give you five; is that fair enough?

20 MS. GOETZ: That's fine. Thank you.

21 THE COURT: All right. So, you can argue from the
22 lower bench, uh, or from the table -- uh, Counsel table,
23 whichever you wanna do.

24 MR. BARNES: With that, I guess, uh, I'll approach,
25 Your Honor --

1 THE COURT: That's fine.

2 MR. BARNES: -- if that's okay?

3 THE COURT: You may reserve any of the ten minutes you
4 want.

5 MR. BARNES: Okay. I'll reserve two minutes --

6 THE COURT: All right.

7 MR. BARNES: -- if I could. Morning, Your Honor.

8 Chad Barnes on behalf of the City of Bellevue. This, uh --
9 the City's Motion for a Determination of the Legal Standard
10 on Appeal. Uh, briefly, Your Honor, just, uh, for the
11 record. This is an appeal from a decision of the Board of
12 Industrial Insurance Appeal. So in this instance, the
13 Superior Court is setting in its appellate capacity. The
14 reason I mention that is it's important, uh, to keep in
15 mind the Court's role in its appellate capacity, uh, versus
16 a -- a standard trial.

17 In this case, it is the Petitioner or the Appellant's,
18 uh, burden to show that the decision of the Board of
19 Industrial Insurance Appeals was incorrect.

20 THE COURT: Uh huh.

21 MR. BARNES: To -- this is done on -- simply on a
22 reading of the record as it was developed before the Board.
23 Uh, it will be read to a jury. I will require Your Honor
24 to make, um, evidentiary rulings to either overturn or --

25 THE COURT: Uh huh.

1 MR. BARNES: -- uh, sustain the evidentiary rulings
2 that were made at the Board and rule from there. So, it's
3 important to keep in mind that appellate capacity because
4 it has to do with the burden of proof. And in this case,
5 the Appellant, Mr. Spivey, has the burden of proof to
6 overturn the Board's decision. What that means is the
7 City, at this point, as the prevailing party below before
8 the Board does not have a burden of proof at this appeal
9 level. There's no burden of proof.

10 THE COURT: Just one second. Mr. Palmer, could you
11 close the front door. I don't know why that's open.

12 MR. BARNES: I'm closer, if you'd like.

13 THE COURT: That's all right.

14 MR. BARNES: Okay.

15 THE COURT: Go ahead and continue.

16 MR. BARNES: Okay. So, with that in mind, that's the
17 reason that we brought, uh, this Motion for the
18 Determination of a -- the Legal Standard on Appeal. Uh,
19 it's no -- I don't think there's any mystery, uh, Mr.
20 Friedman, myself, uh, his office and my office, have been
21 through a number of these cases before. And it's always an
22 open question of dealing with the evidentiary presumption -
23 -

24 THE COURT: Uh huh.

25 MR. BARNES: -- uh, in an -- this type of occupational

1 disease, the case, uh, with a firefighter. And there is
2 the presumption of occupational disease under RCW 51.08 --
3 uh, excuse me -- 51.32.185.

4 THE COURT: Uh huh.

5 MR. BARNES: So -- and there's two approaches really -
6 - it -- to that. It's -- it -- Mr. Freidman's, uh, um,
7 opinion and desire to have that heard as a factual question
8 for the jury to decide, whether that presumption has been
9 overcome. It's the City's position that that is a legal
10 determination that Your Honor should make whether the City
11 has met its burden of production. In other words, under
12 the statute it gives the firefighter a prima facie, uh --
13 the -- there's a prima facie case that the firefighter has
14 an occupational disease. It's not the be all end all.
15 It's just a prima facie.

16 And the Courts have ruled specifically in *Rahm*
17 (phonetic) --

18 THE COURT: Uh huh.

19 MR. BARNES: -- that once the employer puts in
20 contrary evidence then the jury gets to weigh that
21 competing evidence and make a determination of whether the
22 Board's order should be, uh, overturned or sustained.

23 THE COURT: Hmm.

24 MR. BARNES: So, with that guidance from *Rahm* that
25 once there is competing evidence as --

1 THE COURT: Uh huh.

2 MR. BARNES: -- to the nature of the occupational
3 disease that that's when the jury makes its determination.
4 What that means in shorthand, then, is the determination of
5 whether the City has met its burden of production, whether
6 the City has put forth sufficient evidence to overcome the
7 presumption of occupational disease within the statute is
8 essentially a question of law for the jury -- or excuse me
9 -- for the -- the judge --

10 THE COURT: For the Court?

11 MR. BARNES: -- whether we have met that burden of --
12 of production. And --

13 THE COURT: Given that, um, the full Board has, uh,
14 uh, decided, um, against Mr. Spivey, does -- what -- what
15 does that establish?

16 MR. BARNES: So, once the Board has decided against
17 Mr. Spivey that's where I mentioned the, uh -- the
18 appellate capacity.

19 THE COURT: Uh huh.

20 MR. BARNES: So, as the appealing party, he has the
21 burden to show that the Board's decision was incorrect.
22 So, it's his burden at this level to show that that Board's
23 decision ruling against him is incorrect. And that's why I
24 mention the City doesn't have a burden.

25 So, taking, uh, Mr. Spivey and Mr. Friedman's argument

1 that this is a factual decision, unfortunately what that
2 would do is it would place a burden of proof on the City --

3 THE COURT: Uh huh.

4 MR. BARNES: -- to the jury at the appellate level,
5 which the statutes are clear, we have no burden of proof on
6 appeal where we were the prevailing party below. So taking
7 that together, as the prevailing party we don't have the --
8 the burden of proof at this level; that is there burden of
9 proof.

10 THE COURT: Uh huh.

11 MR. BARNES: And simply whether we have met our burden
12 or production put forth sufficient evidence, uh, to raise a
13 factual question of whether the Board's decision should be
14 overturned is essentially the question of law for, uh, Your
15 Honor. Does Your Honor have additional questions --

16 THE COURT: Um --

17 MR. BARNES: -- related to that?

18 THE COURT: -- no. I -- I --

19 MR. BARNES: Okay.

20 THE COURT: -- I don't.

21 MR. BARNES: And I think, uh, we cited it, so I won't
22 belabor in, uh, too much detail, but we cited to the
23 portions of *Rahm* that basically outline this. And I will
24 acknowledge that those portions of *Rahm* that we cited to
25 are not the holding in *Rahm*.

1 THE COURT: Hmm.

2 MR. BARNES: But I think it gives us a good indication
3 of how the Court approach -- approaches the issue. And
4 what I'm pointing to in the *Rahm* decision is where the
5 Court said, "Once there is, uh, compelling" -- or excuse me
6 -- "Once there is competent medical evidence in -- to
7 counter the Appellant's claim" --

8 THE COURT: Uh huh.

9 MR. BARNES: -- excuse me -- "the Claimant" -- in this
10 case's claim -- then, that is the factual question for the
11 jury to basically look at that evidence. But to get to
12 that point it -- basically implicitly if the City has put
13 forth, uh, a preponderance of evidence --

14 THE COURT: Uh huh.

15 MR. BARNES: -- to counter the occupational disease,
16 then that has met its burden of production.

17 THE COURT: Right.

18 MR. BARNES: The second issue that, uh -- that we
19 briefed, Your Honor, is, uh -- has to do with Dr. Coleman,
20 which is a Plaintiff's expert in this case. And it -- it's
21 our request that portions of Dr. Coleman's, uh, testimony
22 be stricken. And there's really two bases that we come at
23 -- come at this.

24 So first, uh, by way of background, Dr. Coleman, uh,
25 was provided a number of articles, uh, by Counsel, went out

1 found a few additional articles, I think is a fair
2 characterization. And was then asked to testify about
3 those articles. Uh, and unfortunately a proper foundation
4 to use these articles was never laid in the testimony.

5 And where I'm coming from there is in order to use a
6 scientific article, a medical article, something of that
7 sort, at hearing or at trial, you need to have a proper
8 foundation that -- that that article has been basically
9 peer vetted, peer reviewed --

10 THE COURT: Uh huh.

11 MR. BARNES: -- and it's generally relied upon by
12 people in that speciality.

13 So, from a -- from a foundational, uh, standpoint, we
14 have -- what's the best characterization -- we have solid
15 evidence from Dr. Coleman, his testimony, that he did not
16 independently research --

17 THE COURT: Hmm.

18 MR. BARNES: -- and look at whether any of these
19 articles were peer reviewed, whether they were in published
20 peer reviewed, uh, articles. He relied upon the articles
21 that were provided to him, found a few additional on his
22 own. But did no analysis of whether the articles were peer
23 reviewed. So, he -- in that case, there is no indicia of
24 reliability --

25 THE COURT: Uh huh

1 MR. BARNES: -- or no one can testify as to an indicia
2 of reliability for those articles, uh, given that no one
3 had vetted those articles. He took them at face value, if
4 you will.

5 The second portion of the foundation argument is
6 beyond just taking the articles at face value --

7 THE COURT: Uh huh.

8 MR. BARNES: -- what was given to him, um, Dr. Coleman
9 doesn't have the independent ability to say that these
10 articles are generally relied upon in their field. Dr.
11 Coleman is a, uh, general practitioner, he's a family
12 doctor, does some ER work, uh, and he's also an attorney.
13 He's not a, in this case, dermatologist. We have, um,
14 testimony from other doctors, a dermatologist.

15 THE COURT: Hmm.

16 MR. BARNES: We have a -- a, um, epidemiological, uh,
17 testimony. We have, uh, medical researchers in the area of
18 melanoma that have also testified in this case. He doesn't
19 have any of those credentials, uh, nothing in
20 biostatistics, uh, epidemiology, anything like that. He's
21 simply a general practitioner. Given --

22 THE COURT: I was looking -- one second -- I was
23 looking at the, um -- the -- the testimony. He does say --
24 uh, he was asked whether these types of literature or data,
25 um, or which experts would reasonably rely upon formulating

1 an -- a, uh, cause -- a causal connection between the
2 occupation of firefighter and melanoma. Um, and there are
3 other portions of the -- his testimony where he does say
4 he's relying on these records -- I mean, these -- these,
5 uh, treatises. How do you address that?

6 MR. BARNES: Sure. Uh, simply because he relied upon
7 them or that he was given the articles --

8 THE COURT: Uh huh.

9 MR. BARNES: -- doesn't necessarily mean that they are
10 accepted within the field. He doesn't have the credentials
11 essentially to say that they're accepted with the field or
12 they're relied upon in the field. Uh, it'd be -- in
13 another context, it'd be no different than a chiropractor -
14 -

15 THE COURT: Uh huh.

16 MR. BARNES: -- or another medical speciality
17 testifying about a different medical speciality. We
18 wouldn't let a general practitioner testify about oncology.
19 Uh, we wouldn't let a chiropractor testify about, uh, the
20 need for a, uh, EKG, uh, for instance. It's a difference
21 in specialty.

22 So, simply being a general practitioner does not give
23 him a blank check, if you will, to say that this type of
24 information is generally relied upon by epidemiologists or
25 dermatologists or medical researchers in the field of

1 melanoma. So, it -- it's essentially a puffery statement,
2 if you will --

3 THE COURT: Hmm.

4 MR. BARNES: -- as a general statement. But there's
5 nothing to back that statement up in his credentials or
6 qualifications.

7 And the telltale sign is when he flat admitted he
8 didn't do any independent look, any independent research to
9 see whether these articles were vetted, peer reviewed, uh,
10 generally relied upon in, uh, the medical community. So,
11 that -- that goes to the foundation of the articles. Uh,
12 does Your Honor have any additional questions on the
13 foundational aspect?

14 THE COURT: Uh, no.

15 MR. BARNES: Okay. So, that goes to the foundational
16 aspect. The second aspect is if Your Honor was to find
17 that there's a sufficient foundation for the articles --

18 THE COURT: Uh huh.

19 MR. BARNES: -- so that they could be used, there's
20 still problems in how they actually were used in, uh,
21 basically the testimony.

22 So, in this case the -- Dr. Coleman basically -- or
23 excuse me, I should say, uh, Claimant's Counsel -- uh, Mr.
24 Spivey's Counsel read wholesale portions of different
25 medical articles to Dr. Coleman --

1 THE COURT: Uh huh.

2 MR. BARNES: -- and then asked for essentially his
3 acquiescence or his acknowledgment that that is generally -
4 - uh, you know, something that somebody else would rely
5 upon --

6 THE COURT: Uh huh.

7 MR. BARNES: -- and was, uh, used as forming the basis
8 of his opinion. The problem with that is where you allow
9 Counsel to read select portions of a medical article, not
10 giving up the foundational argument --

11 THE COURT: Uh huh.

12 MR. BARNES: -- but where you allow them to read the
13 portions simply into the record, you're essentially
14 allowing attorney testimony. It is beyond a leading
15 question, if you will, where you simply read in "Doesn't
16 this article say X, Y and Z and wouldn't you agree with
17 that?"

18 The proper way to use that article, I would submit, is
19 instead of reading it to the -- to the practitioner, if you
20 simply asked the practitioner, "Is there a medical article
21 that supports the opinions that you're giving in this case?
22 How does that medical article support it? Are there
23 portions that you can point to that would support that?"
24 In a nonleading way.

25 The difference is you are essentially allowing the

1 attorney to testify as to the contents of the article and
2 then having the medical practitioner back it up versus
3 using it in a nonleading way and allowing the medical
4 practitioner to develop their own testimony. Essentially
5 not be led by Counsel.

6 So -- and under ER 803(a)(18), which talks about, uh,
7 how a medical treatise can be used by an expert, there is a
8 difference between using those medical articles on direct
9 exam versus using them on cross exam. And as the -- the
10 rule outlines -- outlines just what I said, that the
11 practitioner on a direct exam should be asked a nonleading
12 question, allowed to then testify from an article once they
13 get that. Versus on cross examination where you can expect
14 medical practitioner may not wanna go where Counsel takes
15 them. And on cross examination the rule contemplates that
16 Counsel can read portions of the article and then seek the
17 opinion of the expert.

18 So, here we have two basis really, uh, to, kinda,
19 summarize for why those portions that we've cited of Dr.
20 Coleman's testimony should be stricken. And that's, first
21 --

22 THE COURT: Hmm.

23 MR. BARNES: -- there's no foundation from what he was
24 testifying to. Those are the medical articles. Didn't
25 peer -- didn't check to see if they're peer reviewed.

1 Doesn't have the independent qualifications to say that
2 these are generally relied upon by practitioners in the
3 specific specialties that the articles deal with. And
4 those are the development of melanoma, epidemiological
5 studies related to the development of melanoma, um, very
6 technical, scientific (sic) articles. So, there's the
7 foundational aspect.

8 Beyond the foundational aspect, we then get to just
9 how they were used. And reading an article to a doctor and
10 then saying, "You agree with that," that's, uh, wholesale
11 an improper use -- uh, ER 803(a)(18) and the use of, um --

12 THE COURT: My understanding --

13 MR. BARNES: -- treatise.

14 THE COURT: -- is that Dr. Coleman, uh, uh, had his
15 deposition taken perpetuation -- that he never actually
16 testified at the hearing; is that correct?

17 MR. BARNES: Correct. Correct. And what happens is
18 in these cases, uh, the medical testimony can be, uh,
19 perpetuated --

20 THE COURT: Uh huh.

21 MR. BARNES: -- uh, for the Board's consideration.
22 So, here his testimony was taken through a perpetuation
23 deposition. We don't have the --- I shouldn't say luxury --
24 but we don't have the benefit of having a judge there to
25 rule on objections as they're made. But, uh, I attempted

1 to preserve the record by --

2 THE COURT: Uh huh.

3 MR. BARNES: -- making this ER 803(18) objection each
4 time Dr. Coleman attempted to testify from an article
5 without a proper foundation or it was simply read to him.
6 So, we've cited those portions and I --

7 THE COURT: Uh huh.

8 MR. BARNES: -- put it to -- it's on page 16 of our
9 materials, the portions of Dr. Coleman's perpetuation
10 deposition that we're attempting to strike. And just a
11 summary of the reason, basically it's a resuscitation of
12 articles or it was simply read without any, uh -- it was
13 read to Dr. Coleman and his acquiescence was a --

14 THE COURT: How much of the perpetuation deposition
15 was used at the hearing?

16 MR. BARNES: The -- it was all used at the hearing.
17 So, what happens is the perpetuation deposition is in lieu
18 of their testimony at the hearing. So, the Board received
19 the full perpetuation deposition, then reads the
20 perpetuation deposition, uh, basically --

21 THE COURT: Were any of the evidentiary issues
22 discussed before the hearing?

23 MR. BARNES: Yes. At --

24 THE COURT: Or ruled upon?

25 MR. BARNES: -- at -- at -- at the Board level I

1 attempted to strike their Motion in Limine --

2 THE COURT: Uh huh.

3 MR. BARNES: -- those portions of Dr. Coleman's, uh,
4 testimony that we're dealing with today. The Board did not
5 rule in my favor at that point. Uh, all -- I should point
6 out at the Appellate level, uh, basically Your Honor has a
7 complete review of --

8 THE COURT: Yeah.

9 MR. BARNES: -- any of the evidentiary, um, objections
10 that were made below.

11 THE COURT: Okay. Thank you. Uh, why don't we have
12 L&I go next, um, since, uh, you also have a motion? And
13 then, um, um, we'll hear from, uh, Mr. Friedman next.

14 MR. BARNES: Thank you, Your Honor.

15 THE COURT: Thank you. Uh, Ms. Goetz?

16 MS. GOETZ: Thank you. Um, and I'd like to reserve
17 two minutes --

18 THE COURT: Okay.

19 MS. GOETZ: -- for rebuttal as well. Um, and forgive
20 me if, um, I get a little basic, um. I'm, sort of,
21 responding to the questions that I heard you direct to the
22 City of Bellevue.

23 Um, all workers who are exposed to a harmful substance
24 in their workplace can file an occupational disease claim.
25 Classic occupational diseases would be things like

1 asbestosis or silicosis.

2 THE COURT: Uh huh.

3 MS. GOETZ: Uh, red cedar dust asthma is one which,
4 um, the logging industry in this state made somewhat
5 endemic. Um, and then, there's a specific statutory
6 definition for occupational disease.

7 THE COURT: Correct.

8 MS. GOETZ: The rebuttable evidentiary preemption --
9 presumption just carves out, uh, an exception for one
10 little group of workers, firefighters. And then, the
11 statute specifies that a few distinct categories of
12 diseases are presumed to be occupational.

13 Um, if that presumption is rebutted, it's a matter of
14 law, then the firefighter becomes just like any other
15 occupational disease claimant. They have to prove that
16 what they have meets the statutory occupational disease
17 definition. So, the -- that's, kind of, how the process
18 works.

19 To begin with, this small group of workers, uh, has a
20 benefit that no other worker in the State of Washington
21 has. But if the presumption that they benefit from is
22 rebutted, then they just become like any other worker. And
23 that's what we have here now is Mr. Spivey is just like any
24 other worker with respect to whether he does or he doesn't
25 have an occupational disease claim and what the jury -- if,

1 um, you determine that the presumption was rebutted what
2 the jury will be asked to decide is whether he meets that
3 definition, whether his evidence -- whether he meets the
4 burden of proof to show that he has an occupational disease
5 as defined in the statute. Um, so, if you have any other
6 questions in that regard --

7 THE COURT: No, I don't have any questions in that
8 regard. Uh, you may wanna address your, um, issue
9 regarding the proposed order that you want excluded.

10 MS. GOETZ: Um, I don't have anything to add what was
11 -- beyond what was in the brief. I did want to make sure
12 that the Court understood that there was no weight, as a
13 matter of law, to be given to the decision of, um, the
14 Industrial Appeals Judge.

15 THE COURT: Uh huh.

16 MS. GOETZ: That decision is merely proposed.

17 THE COURT: Uh huh.

18 MS. GOETZ: They are merely employees of the Board
19 until adopted by the Board. Of course, in this case the
20 Board did not adopt, uh, the findings of the Industrial
21 Appeals Judge --

22 THE COURT: All right.

23 MS. GOETZ: -- I believe. Um, so, it would be
24 improper to -- to refer to that.

25 THE COURT: All right. Thank you. Mr. Friedman?

1 MR. FRIEDMAN: Thank you, Your Honor. I'll come up
2 front here.

3 THE COURT: That's fine. Catch your breath?

4 MR. FRIEDMAN: What's that?

5 THE COURT: You catch your breath?

6 MR. FRIEDMAN: Yeah. Thank you. Yes.

7 THE COURT: All right.

8 MR. FRIEDMAN: I'm good.

9 THE COURT: Go ahead.

10 MR. FRIEDMAN: Um, I'll just start by saying that I
11 think in order to determine this issue of is it a question
12 of law, is it a question of fact, you have to actually look
13 at what is -- you know, what's the presumption and what's
14 being rebutted here.

15 The presumption is that the -- Del Spivey's cancer is
16 occupational. And occupational is a legally defined term.

17 THE COURT: Uh huh.

18 MR. FRIEDMAN: An occupational -- and so, it might
19 sound legal, but occupational really means did his
20 firefighting -- was it caused by work? And was work the
21 proximate cause of that? And the presumption says yes.
22 And number two, did it arise naturally, um, from work? And
23 the presumption says yes.

24 Those are questions of fact. Uh, and so, for example,
25 I think I cited in my brief, uh, the *Whitebee CWP of*

1 Winthrop (phonetic) case. That's a, um, case, uh, from
2 2005. Proximate cause is generally a question of fact.

3 And so essentially, what we have here, then, is this
4 presumption, um, that was provided to firefighters, um, for
5 which we've asked judicial notice be taken with regard to
6 the legislative intent behind this, because of the toxins
7 and the smoke and the fumes to which our firefighters are
8 exposed to. That melanoma is presumed to be from
9 occupation -- from their occupation. And that shifts the
10 burden. And to rebut that presumption you're rebutting
11 facts.

12 So, it -- it -- this is essentially an attempt by the
13 City to take out of my client, to take away from a jury,
14 the decision as to whether by a preponderance of the
15 evidence the City has shown that his melanoma was not
16 caused by work. Well, that's a factual question based on
17 the evidence.

18 And the City's attempting to take away from the jury
19 the decision as to whether or not my client's melanoma
20 didn't arise from work. Because the presumption says it
21 does. And these are factual questions.

22 Um, analogous to this in my briefing, uh, on page 17,
23 uh, in our briefing, it was a case involving a claim for a
24 life insurance policy proceeds. Uh, the insurer was
25 disputing coverage by claiming a death by suicide. And the

1 Supreme Court went on to talk about, um, when the Plaintiff
2 proved the contract of insurance and the death of the
3 insurer, her case was made. And that's like in this case,
4 when the firefighter establishes that he's an eligible
5 firefighter and he has one of the enumerated diseases the -
6 - his -- his claim is -- it's made. Then, it goes to this
7 presumption.

8 The Court went on to say -- or it stated, "The jury
9 are the final arbiters as to the weight of the evidence
10 necessary to overcome the presumption."

11 THE COURT: But Mr. Friedman, doesn't RCW 51.52.115,
12 the burden of proof on appeal control?

13 MR. FRIEDMAN: I don't dispute -- he -- so, that's a
14 good question. So, when we're in the Superior Court my
15 client has the burden to show that the Board was incorrect.

16 THE COURT: Uh huh.

17 MR. FRIEDMAN: Right? But the presumption that the --
18 to which my client benefits as the firefighter, it doesn't
19 vanish just because we're on the Superior Court. The --
20 the presumption is a statutory presumption and that law
21 exists in the Superior Court, that law exists in the Board,
22 that law exists at the Department level. It is a
23 presumption. And the burden is on the City to rebut that
24 presumption.

25 And it's not to -- it's not a production, it's not a,

1 um -- you know, something where they can just produce, uh,
2 an opinion. They have to do what the statute says is --
3 was -- rebut the presumption. It's not a burden of
4 production that they have. They have to actually rebut the
5 presumption.

6 And we know from the Appellate Court in Gore
7 (phonetic) that that means that they have to come forward
8 and just prove it. Um, and I cited that in my briefing.

9 But I wanna get -- the Court in Gore said, "Under the
10 plain language of RCW 51.32.185(1)" -- and then, they went
11 on to talk about "Once the firefighter shows that he has
12 one of these types of diseases triggering the statutory
13 presumption that the disease is an occupational disease the
14 burden shifts to the employer to rebut the presumption by a
15 preponderance of the evidence by showing that the origin or
16 aggravator of the firefighter's disease did not arise
17 naturally and proximally out of employment. If the
18 employer cannot meet this burden, for example, if the cause
19 of the disease cannot be identified by a preponderance of
20 the evidence or if there is no known association between
21 the disease and firefighting, the firefighter employ -- uh,
22 employee maintains the benefit of the occupational
23 disease."

24 And the --

25 THE COURT: But --

1 MR. FRIEDMAN: -- Court uses the word --

2 THE COURT: -- doesn't the -- doesn't the full Board's
3 decision, um, ratifies that the City actually met that
4 burden, uh, um, in its -- in -- in its findings, basically?

5 MR. FRIEDMAN: Well, the -- this is a de novo review.

6 THE COURT: Uh huh.

7 MR. FRIEDMAN: If the jury gets to decide if the Board
8 got it right or wrong. And going back to your question --
9 I, kinda, got off on a tangent there -- but going back to
10 your question, within that decision, though, for the jury
11 they have to understand, though, at the Board level where
12 the cards are and what -- and -- and where everything
13 falls.

14 And at the Board level the City had the burden to
15 rebut that presumption. Now, the Board said they did.

16 THE COURT: Uh huh.

17 MR. FRIEDMAN: But the jury gets to decide if they're
18 right or wrong. And so, it would make -- it would just --
19 it would be a complete, um -- I don't know how to say -- it
20 would, like -- just the presumption would vanish if the
21 jury didn't get to know, "Well, hold on a second, at the
22 Board level there is a presumption and the City had to
23 produce evidence. And the City had to establish by a
24 preponderance of the evidence that the presumption was
25 rebutted." And that's what is up here on appeal.

1 And so, if we rip that presumption that's in the
2 statute away from this case, then -- and then the jury
3 looks at it, it's, like, two completely different cases.
4 You see, because although the Appellant --

5 And this was just like in the case in the -- with --
6 with actually, the captain of the Bellevue Fire Department.
7 I tried it in -- in the King County Courthouse in front of
8 a jury against the City of Bellevue. And the jury heard it
9 and decided 11 to one that the City -- that the Board was
10 wrong. That the City did not rebut the presumption.

11 Because those are factual issues that a jury decides.
12 And while it was my burden to prove to the jury that the --
13 that the -- that the Board got it wrong, within that and at
14 at the Board level exists the presumption that shifts the
15 burden to the Department (sic) -- I'm sorry -- to the City
16 to overcome that presumption. And it doesn't vanish. And
17 if it does vanish then it means the presumption just has no
18 meaning and doesn't exist. Um, 'cause, Your Honor, nothing
19 in RCW 51.32.185 says the presumption exists only up to the
20 point where we're at the board. But this statute no longer
21 applies if it goes to a Superior Court appeal.

22 So, it's an interesting, kinda, uh, analysis of
23 burdens, but -- but that burden existed at the low -- at --
24 at the Board level. And it doesn't go away just because a
25 jury gets to look at it now. Um, but I'm getting -- hope

1 that answered your question.

2 Uh, and again I wanted to go back to the Gore case
3 'cause it's not just the burden of production that the City
4 of Bellevue has. The Gore Court, uh, at least once, maybe
5 twice talked about rebutting the presumption -- talked
6 about disproving, not just coming forward with, you know,
7 some expert that just says, "Well, I think that this is
8 from a non-occupational sunlight." The statute says you
9 have to not just produce something to rebut it, you have to
10 rebut the presumption. And Gore looks at that and said
11 that means disprove. All right?

12 And they say, "Okay. You have to" -- I have it right
13 here. RCW 51.32.185, however, shifts the burden of
14 disproving such occupational disease to the employer once
15 the firefighter shows that he has a, you know, qualifying
16 disease. And it makes sense because the statute itself
17 says you have to rebut the presumption by what? By a
18 preponderance of the evidence.

19 And, kinda, getting back to this legal standard.
20 Well, who weighs the evidence? The fact finder does. And
21 so, my client has a Constitutional right to a trial by
22 jury. And while we do have to show, and it is our burden
23 to show, that the Board got it wrong, within that, though,
24 is this presumption -- because how would they know if the
25 Board got it wrong if they didn't know about the

1 presumption that existed at the Board and at the, uh, uh --
2 and before the IAJ?

3 How could they make that determination? Because it's
4 the Board's determination the presumption was rebutted.
5 But the jury has to know what the presumption is. And
6 then, get to look at the facts and look at the evidence --
7 the evidence, which is mentioned in the statute, and weigh
8 that and say, "Did the City come forward with enough in
9 looking at all of the evidence to rebut this presumption?"
10 And in the *Larson* (phonetic) case, the jury said, "No."
11 But that is a jury's determination to decide; just as I
12 cited in this case about, um, uh, this insurance, the --
13 the death claim -- death by suicide.

14 Uh, also, there's another case I cited. I think it
15 bears repeating even though I put it in my brief. Um, it
16 was a case involving a wrong -- a claim for wrongful debt.
17 Uh, the law -- and -- and the Court went on to say, "In
18 Washington the presumption of debt attaches where a party
19 has been absent for seven years without tidings of his or
20 her existence." So, there's this presumption and the Court
21 said the law presumes life during the first seven years of
22 absence. So, we have a presumption.

23 As to rebutting this presumption, the Court held the
24 presumption of debt arising from seven years unexplained
25 absence is always rebuttable. Jurors are the final

1 arbiters as to the weight of the evidence necessary to
2 overcome the presumption.

3 THE COURT: Let's move on to the, uh, Dr. Coleman
4 argument --

5 MR. FRIEDMAN: Thank you.

6 THE COURT: -- uh.

7 MR. FRIEDMAN: All right. Uh with regard to Dr.
8 Coleman on the first issue of foundation -- um, I was gonna
9 perhaps bring it up, but you brought it up. I think -- I
10 think that the big elephant in the room that you've already
11 dispensed with is, uh, he does say in his deposition, does
12 he not, that he's reviewed articles, that he's relied on
13 various articles and that they are reliable to the types of
14 facts and data -- I don't have it exactly how he said it,
15 but something that effect. If you can correct me if I'm
16 wrong. But the types of fact and data that, uh, are
17 reliable with respect to, uh, certain articles. And so,
18 that's the first thing.

19 The second thing is this is a licensed medical doctor.
20 And I appreciate that, you know, the City of Bellevue, they
21 wanna, kind of, not impugn him, but make him look less of a
22 doctor because he's not a dermatologist or an
23 epidemiologist. He's a licensed physician. This is not
24 the first case in which he's researched materials and in
25 which he's come and testified on this exact issue of

1 melanoma. He's done this before. Um, his active practice,
2 I believe, involves, uh, uh, biopsies. Um, you know, he --
3 And not only that, but you've got somebody who is
4 actually researched the literature. And as Counsel was
5 talking, I -- I looked back at the rule, um -- trying to
6 find here -- 803(a)(18) -- where is that? All right. And
7 interestingly -- 'cause the -- there was this -- I think
8 this suggestion by Counsel that well, he didn't say that
9 it's reliable to these folks. He said it was, you know,
10 just reliable.

11 But even if you look at 803(a)(18), um, and it, kinda
12 -- have to read it to get to where I wanna get, but it
13 says, "To the extent called to the attention of an expert
14 witness." Um, and it goes on to say, "Or relied upon by
15 the expert witness in direct examination." It goes on say,
16 uh -- talk about statements contained -- or let me back up.
17 "To the extent called to the attention of an expert witness
18 upon cross examination or relied upon by the expert witness
19 in direct examination, statements contained in published
20 treatises, periodicals or pamphlets on a subject of
21 history, medicine or other science or art" -- and here's
22 where I wanted to get you to -- "established as a reliable
23 authority by" -- by who? "By the testimony or admission of
24 the witness." And then, it says, "Or by other expert
25 testimony or by judicial notice."

1 So, it -- it doesn't say it has to be established as a
2 reliable authority by a dermatologist or an epidemiologist
3 or a group of physicians that aren't him. It says
4 "establishes reliable authority by the witness." We have
5 that in this case; do we not? I mean, I -- I would ask
6 that the City have to prove that he didn't say those
7 things, that he didn't say that they were reliable and that
8 he didn't say that he relied on them.

9 Um, we want a fair trial. We've got a licensed
10 medical doctor who has done the research, who has given
11 testimony. Um, he's more than qualified to do that. Any
12 argument, Your Honor, that, you know, hey, well, this isn't
13 reliable to these folks; that just goes to the weight. And
14 frankly, if the City wants to have, you know, their
15 epidemiologist or their dermatologist disagree with what
16 the articles say or disagree that, you know, maybe they're
17 not, you know, as reliable as Dr. Coleman says they are,
18 well they certainly can do that. But that's not a basis to
19 exclude Dr. Coleman or to, uh, suggest that -- that the
20 articles were used improperly.

21 Um, and I don't know if he actually has in active
22 practice -- if he -- if his active practice involves
23 biopsies, but I -- I said that earlier.

24 THE COURT: You have about a minute remaining. Um, I
25 know you didn't have an opportunity to address, uh, the

1 L&I's argument regarding, um, the -- the proposed order.
2 Uh, so, why don't you address that, and.

3 MR. FRIEDMAN: Thank you. Can I -- can I -- I wanna
4 do that -- can I use 30 seconds to do one more thing on Dr.
5 Coleman?

6 THE COURT: Uh, you have a minute left.

7 MR. FRIEDMAN: I'll do it as fast as I can. And --
8 the other thing I wanna mention on Dr. Coleman is that they
9 didn't make that an issue in their Petition for Review.
10 Their Petition for Review said nothing about -- in terms of
11 the issue they wanted reviewed, Dr. Coleman. It's whether
12 the Industrial Appeal Judge erred in finally concluding
13 that Mr. Spivey developed a malignant melanoma on his upper
14 back. They didn't say anything about, in this issue, Dr.
15 Coleman. So, they waived that right.

16 Also, in -- in ER 803(a)(18), how you use these
17 articles. It was called to his attention. It shouldn't
18 matter if the attorney reads it or if the doctor reads. If
19 it's called to his attention, he says they're reliable and
20 then he -- and he agrees with it, whatever. That's what
21 the jury needs and that's suffice.

22 As for their motion, the Board of Industrial Insurance
23 Appeals put in their, um, order, I believe, as a finding of
24 fact -- here it is -- that, uh, the cancer did not arise
25 naturally and proximately out of employment. That

1 necessarily means that the Board found that the City
2 rebutted the presumption. It's a question of fact.
3 Proximate cause. Did his disease -- was it caused by work?
4 Causation. That is not the question for a judge to decide.
5 That is always a question for a jury to decide. Did this
6 disease arise out of employment? That is always a question
7 for a jury to -- to decide if there are material questions
8 of fact on that 'cause it is a question of fact. So, to --

9 THE COURT: All right.

10 MR. FRIEDMAN: -- come forward with evidence to rebut
11 that, those are questions of fact.

12 THE COURT: All right, Mr. Friedman. Thank you. Your
13 time is up.

14 MR. FRIEDMAN: All right. Thank you, Your Honor.

15 THE COURT: All right. Uh, rebuttal?

16 MR. BARNES: Briefly, Your Honor. I'll pick up where
17 Mr. Friedman left off. As far as the procedural and
18 whether we've preserved our, uh, objections to Dr.
19 Coleman's testimony, that is briefed in our materials. We
20 did a -- make a assignment of error. Um, and I've cited to
21 that -- the portions in our brief. So, we've preserved
22 that issue.

23 Um, going to -- next to the foundational aspects, uh.
24 Before somebody can testify about something, um, you have
25 to have the proper foundation for it. So, uh, the weight

1 that is should be given, uh, the articles or Dr. Coleman's
2 testimony -- before you ever get to a weighing of the
3 evidence you have to make sure that that evidence has an
4 indicia of reliability.

5 And I would point out we cited in our materials that
6 Dr. Coleman testified he doesn't have a subscription to any
7 of the journals or publications that he referenced, uh,
8 with the exception of one text book. Uh, the articles were
9 provided to him by Appellant's, uh, attorney. Most knowing
10 (phonetic), Dr. Coleman conceded that he did not do any
11 independent investigation himself to determine if the
12 journals or publications were peer reviewed. So, he didn't
13 do his homework, if you will, Your Honor, on those.

14 We, then, cited in our materials a couple of cases,
15 *Miller v. Peterson*, 42 Wn. App., uh, 822, 1986 case. Uh,
16 those stand for the proposition and also portions of the
17 Washington Practice that stand for the proposition that to
18 establish a proper foundation proponent of a -- of the
19 publication must offer testimony to the effect that the
20 publication is generally regarded as authoritative among
21 the audience to whom it is directed.

22 So, if you're talking about an epidemiological study,
23 you need evidence that that epidemiological study is
24 generally accepted among epidemiologists. And the
25 rationale for that, uh, is fairly straightforward. Medical

1 science evolves. It changes over time. Anybody can go
2 back and grab an article that's 20 years old and yes, it
3 may have been published and peer reviewed 20 years ago. It
4 may have been good science then. But as science advances
5 so to do the other medical articles. So too does the body
6 of knowledge it -- related to that topic advance. And you
7 would need somebody current and in that area, that level of
8 science, to say that this study 20 years ago is still good.

9 You don't have that in this case. You don't have
10 somebody within that field that can look back and say that
11 these studies are still relied upon within this field.
12 It's not the field of general practice medicine. It's not
13 the field of -- of evidence -- or excuse me -- of emergency
14 room, uh, practice. It is epidemiological, dermatology,
15 melanoma science -- melanoma. So, those are the
16 foundational aspects.

17 THE COURT: Uh huh.

18 MR. BARNES: Uh, Mr. Friedman made, um, one argument
19 that -- well, two arguments that I wanna address briefly.
20 Um, and he talked about the jury should know what the
21 presumption is, you know, at this level. That the jury
22 needs to be told what the presumption was from the Board
23 level to determine whether, uh, the City rebutted it.

24 There's a case directly on point -- we've cited it at
25 page 11 of our materials -- *La Vera v. Department of Labor*

1 and Industries, uh, 45 Wn.2d, 413. It's a 1954 case. Uh,
2 but it recognized that the question of a burden of proof at
3 the Board level when you're on --

4 THE COURT: Uh huh.

5 MR. BARNES: -- a Superior Court review is immaterial.
6 Superimposing the -- or excuse me -- superimposing of the
7 potential procedural ramifications would only serve to add
8 complexity and confusion to a fact finding task that's most
9 difficult.

10 So, *La Vera* answers the question that there should be
11 no discussion to the jury. There should be no direction to
12 the jury that we had, as the City, a burden of proof below
13 at the Board level. That's not because we don't have that
14 burden of proof here on appeal, we were the prevailing
15 party. We had rebutted the presumption there. We don't
16 have that burden of proof here.

17 So, picking up on the last point, uh, briefly. Mr.
18 Friedman cited to a -- to *Gore*. I think if you look at
19 *Rahm*, there's actually more telling testimony as to how
20 these presumptions are treated. And in *Rahm* the Court
21 actually says, "If both parties present competent medical
22 testimony the jury must weigh the evidence to determine
23 whether the worker's condition arises naturally and
24 proximately out of employment."

25 What that means is once the presumption has been

1 rebutted it's the jury's decision as a -- a -- Ms. Goetz,
2 uh, alluded to -- that's when the jury makes that factual
3 finding of whether, like any other person, uh, the
4 Appellant in this case has met their -- their burden of
5 proof to overturn the Board's order. Does Your Honor have
6 any questions?

7 THE COURT: No, I don't have any.

8 MR. BARNES: Thank you.

9 THE COURT: Thank you. Ms. Goetz?

10 MS. GOETZ: Thank you. Um, you, of course, hit on the
11 -- on the key point in this case. Given the burden of
12 proof requirements in 51.52.115, if the jury is asked to
13 decide whether or not the City of Bellevue met its burden
14 of rebutting the evidentiary presumption; how does that
15 place the burden of proof on Mr. Spivey?

16 Um, of course, the answer to that question is that's
17 why we're here because the burden of proof has to stay on
18 Mr. Spivey. And were the jury to make that determination
19 that would improperly place the burden on the City. Mr.
20 Friedman alluded to a Superior Court case where that's
21 exactly what's happened. And that case is on appeal
22 pending in -- in Division 1 as a result of that.

23 Um, Mr. Friedman also said that if the jury doesn't
24 get to make that determination, then the presumption
25 doesn't exist. But of course, the presumption does exist.

1 And that's why we're here because the presumption does
2 exist. If you decide that it has not been rebutted, then
3 Mr. Spivey's claim is allowed and this goes back to the
4 Department to issue an order in that regard.

5 If, however, you determine that the presumption was
6 rebutted, Mr. Spivey still has his day in court. He still
7 gets to ask the jury to decide was the Board correct when
8 they decided that he did not have an occupational disease?

9 Um, I just wanted to, um, make sure that there were no
10 misunderstandings about the way evidence was handled at the
11 Board. If you take a look at the Board decision, which was
12 attached to --

13 THE COURT: Uh huh.

14 MS. GOETZ: -- the -- the City of Bellevue's
15 materials, um, and of course, which is is in the Board
16 record, on the first page it says, "The Board has reviewed
17 the evidentiary rulings and the record of proceedings and
18 finds that no prejudicial error was committed. The rulings
19 are affirmed." The proposed decision and order commonly
20 will go through each deposition that was, um, made part of
21 the record at the Board and do the evidentiary rulings.

22 Uh, there's also a WAC that governs procedure and
23 practice at the Board, it's 296-63. And that WAC covers,
24 uh, how you manage, um, objecting to evidentiary rulings
25 which were made in a Petition for Review. Um, a party is

1 not required to list every evidentiary ruling with which
2 they take issue. Rather the Board allows a party filing a
3 Petition for Review to say, uh, "We take exception to all
4 of the evidentiary rulings which were adverse to the party
5 in question." Uh, of course, here the City of Bellevue
6 prevailed. So, they would not be petitioning for review
7 regardless.

8 Uh, and there's a case -- I believe it's *Homemakers*
9 *Upjohn v. Russell* (phonetic) -- which says that the party
10 who prevails is not required to petition for review in
11 order to preserve its right to challenge evidentiary
12 rulings which were made at the Board. So, if you have any
13 other questions I'd be happy to answer them.

14 THE COURT: No. I do not. Thank you very much.

15 MS. GOETZ: Thank you.

16 THE COURT: Yeah. Um, there are two issues before me
17 today, uh, from the City of Bellevue and one issue from
18 L&I. Uh, from the City of Bellevue one is whether as a
19 matter of law City of Bellevue met its, uh, rebuttable
20 presumption. Um, and second, to strike the portions of,
21 uh, Dr. Coleman's testimony. Uh, the issue from L&I is,
22 uh, the proposed order, uh, be excluded, um, at trial.

23 Um, RCW 51.32.185 governs presumption of occupational
24 disease for firefighters. Um, (1) states that "there shall
25 exist a prima facie presumption that, uh, (c) such as

1 cancer or occupational diseases under RCW 51.08.140." One
2 that Mr. Friedman highlighted. That is that the disease or
3 the infection as arises as naturally or proximately out of
4 the employment.

5 The paragraph, uh, also states, however, that "This
6 presumption of occupational disease may be rebutted by a
7 preponderance of the evidence. Such evidence may include,
8 but is not limited to, use of tobacco, physical fitness and
9 weight, lifestyle, hereditary factors and exposure from
10 other employment or non-employment activities."

11 Um, RCW 51.52.115 that I, uh, stated earlier, that
12 discusses the burden of proof on appeal to a Superior Court
13 from, uh, L&I. And it states, uh, very clearly, "In all
14 court proceedings under -- under or pursuant to this title,
15 the findings and decisions of the Board shall be prime
16 facie correct. And the burden of proof shall be upon the
17 party attacking the same."

18 The history of the case, as I see it, uh, as I was
19 able to learn, is that Mr. Spivey is a firefighter with the
20 City of Bellevue and made a claim for, uh, employment
21 injury, uh, for melanoma on his back. Uh, the City denied
22 the claim. And in July 2014 Industrial Appeals Judge, uh,
23 made a proposed finding that reversed that denial. Then,
24 subsequently on October 9, 2014 the full Board reversed,
25 um, finding, uh -- and finding number ten that the melanoma

1 was due to sun exposure and not exposure while performing
2 firefighting activities.

3 Um, *Bellevue v. Raum*, 171 Wn. App. 124, uh, is
4 controlling in this case. If the rebuttable evidentiary
5 presumption applies that burden shifts to the employer
6 unless and until the employer rebuts the presumption.
7 Here, the -- I'm satisfied that, uh, the City of Bellevue
8 met that production, uh, and -- uh, and rebutted the
9 presumption. Um, so, I'm going to grant the City's motion,
10 uh, with the respect to the first issue.

11 Uh, with respect to, uh, Dr. Coleman's testimony, um,
12 ER 803(a), uh, (18), uh, the hearsay exceptions regarding,
13 uh, published treatises and periodicals, um, have to do
14 with whether or not, uh -- concerns whether or not, um --
15 and to the extent it rely upon the expert, um -- and other
16 experts, uh, in the field.

17 Um, here my review of the record is that Dr. Coleman,
18 uh, gave conflicting testimony in some portions of the, uh,
19 testimony. He -- he did state that he didn't review them
20 independently on his own, but he also did say, um, in other
21 parts of his, uh, perpetual -- perpetuation disposition
22 that those materials are, in fact, relied by other people.
23 Now, whether it's, uh -- whether or not he is as qualified
24 as to -- as other, uh, experts that are, uh, proposed --
25 uh, that testified on behalf of the City, I think, goes to

1 the weight of the evidence and not to the admissibility.

2 So, although, foundation, um, may, uh, seem suspect in
3 some -- some parts, I think he did compensate them in other
4 areas where he did say, um -- for example, on page, um, ten
5 of his March 10, uh, 2014 deposition, um, where he answered
6 very clear that these are types of literature or data
7 that's relied, uh, by others in finding the causal
8 connection between occupational firefighters and a
9 malignant melanoma. Uh, so, I'm going to deny, uh, the
10 City's request to, um, uh, strike, uh, Dr. Coleman's
11 testimony.

12 Um, with respect to the one remaining issue, the
13 proposed order from the hearing judge, I'm gonna grant that
14 motion. Uh, I think the -- uh, the -- the propose order is
15 -- is not a -- an official order. And it was, in fact,
16 reversed by the, uh, full Board.

17 So, um, I'm granting, um, uh, the City's -- of
18 Bellevue's motion with regarding the rebuttable
19 presumption. I'm denying, um, the second, uh, part of
20 their motion regarding striking Dr. Coleman's testimony.
21 And I'm also granting, uh, the L&I's motion.

22 All right. If you have --

23 MR. FRIEDMAN: Question.

24 THE COURT: -- uh, if you have proposed orders, I will
25 go ahead and sign them.

1 MR. FRIEDMAN: I -- I have a clarifying question, Your
2 Honor.

3 THE COURT: Go ahead.

4 MR. FRIEDMAN: Um, as I was listening to you, you're
5 granting the City of Bellevue's motion. But I just want to
6 make sure that we're clear because, um -- I mean, let me
7 try to find their issues. Here we go. This -- the City of
8 Bellevue's motion, the issue wasn't, like, a summary
9 judgment where they're asking the Court to decide if they,
10 in fact, rebutted the presumption. But rather it was just
11 here in -- as I'm reading it from their own brief, "It was
12 a -- is a decision whether the City met its burden of --
13 uh, of production to rebut the presumption of occupational
14 disease within RCW 51.32.185 a question of law to be
15 decided by the judge."

16 So, the -- the City's motion was for this Court to
17 determine whether or not the question as to whether the
18 presumption was rebutted a question of law opposed to a
19 question of fact. Their motion, as it stated by their
20 issue -- accordingly to their issues, was not for the Court
21 to actually decide on the merits was the presumption
22 rebutted. So, I just --

23 THE COURT: All right.

24 MR. FRIEDMAN: -- I thought I heard you saying
25 something else. I just want to make sure the order is

1 simply that it's a question of law --

2 THE COURT: All right.

3 MR. FRIEDMAN: -- to be decided by the judge for which
4 they could bring a second motion, if they want, where we
5 can actually, then, brief and argue that.

6 THE COURT: I'm not gonna take any questions on my
7 ruling. Um, uh, I've ruled. Uh, the written order will be
8 signed. Uh, if you have any other issues or, uh,
9 clarifications you need, then you can go ahead and file a
10 Motion, uh, for Reconsideration or for Clarification. I'll
11 consider it at that time. Uh, but I will go ahead, uh, and
12 sign the order as, uh --

13 MR. FRIEDMAN: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. BARNES: We'll -- we'll work on the language --

16 THE COURT: All right.

17 MR. BARNES: -- in that order if Your Honor --

18 THE COURT: Okay. And you can send it back and I'll
19 sign it in the back. Make sure Mr. Friedman had an
20 opportunity to look at the order.

21 THE COURT: Court's in recess.

22 (END RECORDING)

23

24

25

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From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, July 13, 2015 9:11 AM
To: 'Mindy Leach'
Cc: Ron Meyers; Tim Friedman; CBarnes@bellevuewa.gov; anas@atg.wa.gov
Subject: RE: Spivey v. City of Bellevue & Dept. of Labor & Industries; No. 91680-2

Rec'd 7/13/2015

Supreme Court Clerk's Office

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Subject: FW: Spivey v. City of Bellevue & Dept. of Labor & Industries; No. 91680-2

Dear Clerk:

Attached hereto for filing in the Spivey v. City of Bellevue & Dept. of Labor & Industries; Supreme Court No. 91680-2, are the following documents:

1. Petitioner's Reply to Respondents' Answer to Motion for Discretionary Review
2. Declaration of Service

Thank you.

Mindy Leach,
Paralegal



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