

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 02, 2015, 12:40 pm
BY RONALD R. CARPENTER
CLERK

E

RECEIVED BY E-MAIL *byh*

No. 91680-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DELMIS SPIVEY,

Petitioner,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

RESPONDENT CITY OF BELLEVUE'S COMBINED
ANSWER TO MOTION FOR DISCRETIONARY REVIEW AND
ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

Chad R. Barnes, Assistant City Attorney
WSBA No. 30480

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
450 110th Avenue NE
Bellevue, WA 98004
(425) 452-2061

THE SUPREME COURT OF THE STATE OF WASHINGTON

 ORIGINAL

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
APPENDICES	vi
I. IDENTITY OF RESPONDING PARTY	1
II. STATEMENT OF RELIEF SOUGHT.....	1
III. FACTS RELEVANT TO MOTION.....	1
A. Summary of Underlying Case.....	1
B. Procedural History	2
C. Testimony Presented by the City in the Motion at Issue	4
D. Summary of Testimony Presented by Petitioner in Opposition to Motion.....	8
IV. GROUNDS FOR RELIEF AND ARGUMENT.....	9
A. Direct Review Is Not Warranted.....	11
1. The Trial Court did not invalidate a statute as unconstitutional.....	11
2. There are no conflicting or inconsistent decisions among the appellant Courts or Supreme Court.....	12
3. While it may be important to the individual Petitioner, application of the presumptive occupational disease to facts of hs case does not raise a fundamental and urgent issue of broad public importance.....	13
B. Interlocutory Discretionary Review Is Not Warranted.....	13

1.	The Trial Court’s decision finding the City had rebutted the evidentiary presumption of occupational disease was not in error and does not render further proceedings useless.....	15
2.	Petitioner placed the merits of whether the evidentiary presumption was rebutted at issue	19
V.	RELIEF REQUESTED.....	19
A.	The Trial Court Ruling Does Not Render Further Proceedings Useless.....	21
B.	The Trial Court interlocutory evidentiary ruling does not affect Petitioner’s ability to act outside the litigation	21
VI.	CONCLUSION.....	23

TABLE OF AUTHORITIES

	PAGE
Cases	
<i>Geoffrey Crooks, Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure,</i> 61 Wash. L. Rev., 1541, 1545–46. (1986).....	22
<i>In re Indian Trail Trunk Sewer Sys.,</i> 35 Wn.App. 840, 843, 670 P.2d (1983).....	15
<i>Larson v. City of Bellevue</i> , No. 71101-6-I.....	13
<i>Mackowik v. Kansas City, St. J. & C.B.R. Co.,</i> 196 Mo. 550, 94 S.W. 256, 262(1906).....	15, 16
<i>Maybury v. City of Seattle,</i> 53 Wn.2d 716, 721, 336 P.2d 878 (1959).....	13, 14
<i>McCleary v. State,</i> 173 Wn.2d 477, 269 P.3d 227 (2012).....	13
<i>Minehart II v. Morning Star Boys Ranch Inc.,</i> 156 Wn.App. 457, 463, 232 P.3d 591 (2010).....	14
<i>Raum v. City of Bellevue,</i> 171 Wn.App. 124, 286 P.3d 695 (2012)), Review Denied 176 Wn.2d 1024 (2013),.....	12, 15, 16, 19, 21
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines,</i> 165 Wn.2d 525, 199 P.3d 393 (2009).....	13
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council,</i> 105 Wn.App. 813, 820, 21 P.3d 1157 (2001).....	14
<i>Seeley v. State,</i> 132 Wn.2d 776, 940 P.2d 604 (1997).....	12

<i>State v. Abrams</i> , 163 Wn.2d 277, 178 P.3d 1021(2008).....	11
<i>State v. Howland</i> , 180 Wn. App. 196, 321 P.3d 303 (2014).....	22
<i>Taufen v. Estate of Kirpes</i> , 155 Wn.App. 598, 604, 230 P.3d 199 (2010).....	15

Rules

RAP 2.3.....	passim
RAP 4.2.....	passim
RCW 51.08.140	2, 3, 16
RCW 51.32.185	passim
RCW 51.52.115	3, 11, 12
WPI 155.03	3

Washington State Constitution

Article 1, § 21	11
-----------------------	----

APPENDICES

Appendix A: Order Granting In Part Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix B: Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix C: Plaintiff's Response in Opposition to City's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix D: Department's Reply to City of Bellevue's Motion re RCW 51.32.185 and to Motion to Strike Portions of Spivey's Brief and It's Reply to Spivey's Response to the City of Bellevue's Motion

Appendix E: Delmis Spivey Testimony (Excerpts)

Appendix F: Kenneth Coleman, M.D. Testimony (Excerpts)

Appendix G: Janie Leonhardt, M.D. Testimony (Excerpts)

Appendix H: Noel Weiss, M.D. Testimony (Excerpts)

Appendix I: Andy Chien, M.D. Testimony (Excerpts)

Appendix J: John Hackett, M.D. Testimony (Excerpts)

Appendix K: Decision and Order

I. INDENTITY OF RESPONDENT

Respondent, City of Bellevue (City), opposes Petitioners request for review of the trial court's interlocutory decision finding that the City had rebutted the evidentiary presumption of occupational disease in RCW 51.32.185.

II. STATEMENT OF RELIEF SOUGHT

The City asks this Court to find that there are no grounds for direct review pursuant to RAP 4.2(a), and to deny the Petitioner's motion for discretionary review pursuant to RAP 2.3.

III. FACTS RELEVANT TO MOTION

A. Summary of Underlying Case

This matter involves Petitioner Delmis Spivey's claim for workers compensation benefits. Petitioner is a firefighter for the City and contends that a malignant melanoma removed from his upper back, in an area that would normally be covered by a shirt, is an occupational disease. As a firefighter, RCW 51.32.185 affords Petitioner a rebuttable evidentiary presumption that his condition is an occupational disease. The Board of Industrial Insurance Appeals (Board) found that the City presented medical testimony and evidence identifying UV radiation (cumulative sun exposure) as the cause of his melanoma, thus the rebutting the evidentiary

presumption. Ultimately, the Board ruled in the City's favor finding the Petitioner's melanoma was not an occupational disease.

Similarly, in Petitioner's appeal to the King County Superior Court, the court found that the City had rebutted the evidentiary presumption in RCW 51.32.185; precipitating Petitioner's current request to the Supreme Court for review. This evidentiary ruling by the superior court does not end Petitioner's workers compensation appeal. Petitioner is still entitled to a jury trial regarding whether his malignant melanoma is an occupational disease arising naturally and proximately out of the conditions of his employment. Petitioner has the burden to prove the decision of the Board was incorrect, that burden has not changed with the trial court's evidentiary ruling.

B. Procedural History

Petitioner, Delmis Spivey filed a claim for an occupational injury with the Department of Labor and Industries ("Department"). Petitioner's claim for benefits was rejected by the Department as not being an occupational disease as contemplated by RCW 51.32.185 and RCW 51.08.140. Petitioner appealed the Department's denial of his claim to the Board of Industrial Insurance Appeals. A hearing was conducted and upon completion of the hearing an Industrial Appeals Judge issued a Proposed Decision and Order on July 2, 2014 in favor of Petitioner.

The City filed a Petition for Review of the hearing examiner's proposed decision which was accepted by the Board on September 3, 2014. The full Board of Industrial Insurance Appeals considered the City's arguments and reversed the hearing examiner's decision. The Board's final Decision and Order affirmed the order of the Department and concluded that the City had rebutted, by a preponderance of the evidence, the statutory presumption embodied in RCW 51.32.185 that Petitioner's melanoma was an occupational disease. The Board found that Petitioner's melanoma was not an occupational disease within the meaning of RCW 51.08.140.

Petitioner appealed the final Decision and Order of the Board to King County Superior Court pursuant to RCW 51.52.115. The trial in King County Superior Court will be limited to a reading of the testimony presented at the Board hearing to a jury. The findings and decision of the Board of Industrial Insurance Appeals are presumed to be correct. WPI 155.03.

On February 27, 2015 the City filed Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony. On March 6, 2015, Petitioner filed Plaintiff's Response in Opposition to City of Bellevue's Motion for Determination of Legal Standard on Review and Motion to Strike Portions

of Dr. Coleman's Testimony. On or about March 16, 2015 the Department of Labor and Industries filed a joinder to the City's motion titled Department's Reply to City of Bellevue's Motion RE RCW 51.32.185 and To Motion to Strike Portions of Spivey's Brief and its Reply to Spivey's Response to City of Bellevue's Motion.

On March 27, 2015 the court heard oral argument on the motion and ruled that "Respondent City of Bellevue's Motion for Determination of Legal Standard on Review is Granted, and the City has met its burden to rebut the presumption of occupational disease within the meaning of RCW 51.32.185." The court denied Respondent's motion to strike portions of Dr. Coleman's testimony.

On April 6, 2015 Petitioner filed a motion for reconsideration. The court denied Petitioner's motion for reconsideration on April 27, 2015.

C. Testimony Presented by the City in the Motion at Issue

In its motion regarding the application of RCW 51.32.185 the City presented the following testimony from the Board record. Delmis Spivey is a career firefighter who began working full-time with the City of Bellevue in approximately 1995. When not working he enjoys a variety of out-door recreational activities including coaching Junior and High School football (over ten years as a coach), hunting, fishing, and bike riding for

exercise and for a while as a commuter. Spivey testimony 4/2/14 Tr. p. 159-162. (Appendix F)

While working for the Bellevue Fire Department, Mr. Spivey admitted he could not think of any incident where he was not wearing his SCBA (Self Contained Breathing Apparatus) and personal protective equipment in the course of fighting a fire. See Spivey testimony at 4/22/14 Tr. p. 164-165. Mr. Spivey also testified that he has a number of recognized risk factors for melanoma including, a predominately English background, freckles over his body, and a history of sunburns as a kid that were severe enough to use Solarcane. *Id.* at p. 153-157.

During a routine dermatological exam on December 22, 2011, his dermatologist Dr. Janie Leonhardt noted many lentigines (areas of pigmentation) over his head, neck, trunk and extremities. Leonhardt Dep. p. 27, lines 4-23. (Appendix G) Lentigines, or lentigos, also known as “sun freckles” are the result of cumulative sun exposure over a person’s lifetime. *Id.* at p. 28-29 lines 22-1; p. 33-34, lines 19-1. Due to its size and coloration, Dr. Leonhardt performed a shave biopsy of an atypical lentigo on Mr. Spivey’s upper back below his collar line. The pathologist at Virginia Mason confirmed the biopsy was of “sun-damaged skin” and represented an evolving melanoma. *Id.* at p. 41-42 lines 7-5.

Dr. Leonhardt testified in this matter that the medical literature supports the relationship between ultraviolet radiation exposure (sun) and the development of melanoma. *Id* at p. 52 lines 2-4. Dr. Leonhardt further testified that she was not aware of any scientific literature or medical evidence that would support a causal link between development of melanoma and the inhalation of a substance or the presence of a substance on a person's skin. Leonhardt Dep. p. 46 line 5 – p. 47 line 20.

Dr. John Hackett performed a medical exam of Mr. Spivey and reviewed his medical records, and deposition. Dr. Hackett noted that UV light is the medically recognized risk factor that is most strongly associated with the development of melanoma. Hackett Dep. p. 9 lines 13-16. (Appendix J) He further testified sun exposure is the most common form of UV exposure. In Mr. Spivey's case he testified on a more probable than not basis the melanoma on Mr. Spivey's upper back was the result of ultraviolet light exposure and not work related. *Id.* at p. 27 lines 14-23. His opinion was supported in part by the fact that the skin where the lesion developed had evidence of sun damage on biopsy. Hackett Dep. p. 27 line 14 – p. 28 line 19.

Dr. Noel Weiss an epidemiologist from the University of Washington also testified regarding the associations between UV exposure and melanoma and the lack of scientific evidence to support chemical

exposure as a potential cause for melanoma. Dr. Weiss testified that on a more probable than not basis, based on his review of scientific studies addressing firefighters and the development of certain cancers it would be incorrect to infer firefighters are at an increased risk for the development of melanoma. Weiss testimony 4/3/14 Tr. p. 24 line 9 – p. 25 line 14. (Appendix H) Similarly, he testified that he is not aware of any studies that would indicate that the inhalation of a substance including, diesel fumes, can lead to the development of melanoma. Weiss testimony 4/3/2014 Tr. p. 28 line 7 – p. 30 line 3. Ultimately, Dr. Weiss testified that there is no causal association between the exposure sustained as a firefighter and the development of melanoma. He believes more likely than not that Mr. Spivey's illness was not related to his firefighting. *Id.* at p. 86 lines 1-16.

Dr. Andy Chien is a dermatologist and melanoma researcher for the University of Washington. He is a peer reviewer for 10-12 scientific journals and has published articles on the risk factors for melanoma. Chien testimony 4/3/14 Tr. p. 92 lines 19 – p. 93 lines 7. (Appendix I) Dr. Chien testified that the two most strongly accepted causes of malignant melanoma are genetics and ultraviolet light. *Id.* at p. 108 lines 4-12. He explained that 85% of the gene mutations associated with the development of melanoma are attributable to an ultraviolet light signature. Chien

testimony 4/3/14 Tr. p. 97 line 16 – p. 99 line 11. Even a one-time use of a tanning bed increases the risk of developing melanoma. *Id.* at p. 113 lines 6-16. Addressing, Mr. Spivey’s theory that exposure to toxic substances in the course of firefighting caused his melanoma, Dr. Chien explained, there is no medical research to indicate that the inhalation of a substance including smoke, soot, diesel fumes, or “polycyclic aromatic hydrocarbon” can lead to the development of malignant melanoma. Chien 4/3/14 Tr. p. 113 lines 24 – p. 115 lines 8. Dr. Chien also addressed whether it was possible to develop melanoma due to absorption through the skin. Dr. Chien testified, there is no evidence the exposure to soot, ash, or diesel fumes on a person’s skin can lead to the development of melanoma. Chien 4/3/14 Tr. p. 115 lines 9-18

D. Summary of Testimony Presented by Petitioner in Opposition to Motion

Petitioner retained one expert in this matter, Dr. Kenneth Coleman. In opposition to the City motion Petitioner cited to Dr. Coleman’s testimony that on a more likely than not basis Petitioner’s occupation of firefighting was a proximate cause of his melanoma. Additionally, to support his opinion Dr. Coleman noted several other firefighter for the City have developed skin cancers, including melanoma. Petitioner also pointed out that Dr. Coleman is familiar with “relevant peer reviewed

articles” that found a causal connection between firefighting and melanoma.

Petitioner also pointed to specific portions of the record for each of the City’s experts attacking that they do not know all of the causes of melanoma. Petitioner also argued the City’s experts could not parse out Petitioner’s work related sun exposure verse his recreational exposure. Thus Petitioner argued the City could not rebut the presumption of occupational disease. See Plaintiff’s Response in Opposition pp. 10-13, (Appendix C)

IV. GROUNDS FOR RELIEF AND ARGUMENT

The Petitioner's motion does not meet the criteria set forth in RAP 4.2(a) for direct review of a superior court decision by this Court, and does not meet the criteria set forth in RAP 2.3(b) for discretionary review. Therefore, this Court should deny the Petitioner's Motion for Discretionary Review and deny the Petitioner's request for direct review by this Court.

RAP 4.2 provides that for a party to obtain direct review of a superior court decision by this Court one of the following criteria must be met:

- (1) Authorized by Statute. A case in which a statute authorizes direct review in the Supreme Court.

- (2) Law Unconstitutional. A case in which the trial court has held invalid a statute, ordinance, tax, impost, assessment, or toll, upon the ground that it is repugnant to the United States Constitution, the Washington State Constitution, a statute of the United States, or a treaty.
- (3) Conflicting Decisions. A case involving an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.
- (4) Public Issues. A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.
- (5) Action Against State Officer. An action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus.
- (6) Death Penalty. A case in which the death penalty has been decreed.

RAP 4.2(a).

Similarly, a motion for discretionary review will be granted only if one or more of the following stringent requirements set forth in RAP 2.3(b) are satisfied:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings ... as to call for review by the appellate court; or

- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

A. Direct Review Is Not Warranted

There is no basis for direct review by this Court of the superior court decision. None of the criteria set forth in RAP 4.2(a) are met in this case. Simply put, this case does not involve direct review authorized by statute, an action against a state officer, or the death penalty.

RAP 4.2(a)(1,5,6).

1. The Trial Court did not invalidate a statute as unconstitutional

Petitioner blithely asserts that the Superior Court invalidated RCW 51.32.185, RCW 51.52.115, and Article 1, § 21 of the Washington State Constitution. In reality, Petitioner is arguing the application of the Court's ruling is incorrect and violates due process principles. Petitioner does not cite any portion of the record where the Court invalidated a statute as repugnant to the State Constitution or Federal Constitution. RAP 4.2(a)(2). The application of a statute is a fundamentally different inquiry than invalidating a statute on constitutional grounds. See e.g. *State*

v. *Abrams*, 163 Wn.2d 277, 178 P.3d 1021(2008) (Direct review granted under RAP 4.2(a)(2) where trial court invalidated entire perjury statute as unconstitutional); *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (Direct review granted under RAP 4.2(a)(2) where trial court held classification of marijuana as a narcotic unconstitutional). Here, the trial court did not invalidate a statute as repugnant to the constitution. Therefore, pursuant to RAP 4.2(a)(2) direct review is not appropriate.

2. There are no conflicting or inconsistent decisions among the Appellant Courts or Supreme Court.

Petitioner points out there are decisions pending before the Supreme Court and Division I of the Court of Appeals that involve the firefighter presumptive disease statute. However, Petitioner does not articulate any conflict between the reported decision in *Raum v. City of Bellevue*, 171 Wn.App. 124, 286 P.3d 695 (2012) and any of the other cases that are still pending before Division I or the Supreme Court. It is axiomatic that if a matter is still pending it has not reached a point of finality, to potentially come into conflict with any other legal precedent. Thus, Petitioner has not demonstrated that direct review is warranted under RAP 4.2(a)(3).

//

//

//

3. While it may be important to the individual Petitioner, application of the presumptive occupational disease statute to facts of his case does not raise a fundamental and urgent issue of broad public importance.

This Court typically grants direct review under RAP 4.2(a)(4) only when the issue to be resolved is of broad public importance. See e.g. *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (Direct Review under RAP 4.2(a)(4) warranted to resolve issues related to public funding of education); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (Review under RAP 4.2(a)(4) granted related to public records act). Here, Petitioner fails to articulate how the trial court's application of a burden shifting evidentiary presumption in a firefighter occupational disease claim involves a fundamental issue of broad public importance requiring an urgent decision. RAP 4.2(a)(4) As Petitioner points out, this issue is currently before Division I of the Court of Appeals in *Larson v. City of Bellevue*, No. 71101-6-I. Thus, it can reasonably be anticipated additional guidance on the application of the firefighter presumptive disease statute is forthcoming.

B. Interlocutory Discretionary Review Is Not Warranted.

Interlocutory review is disfavored. *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). “Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.” *Id.* Generally, interlocutory review is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest. RAP 2.3(b) defines four situations in which an appellate court may grant pretrial review. In this case, only the first two of those criteria are alleged by Petitioner:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.

RAP 2.3(b)(1) & (2).

Under these criteria, there is an inverse relationship between the certainty of error and its impact on the trial. Where there is a weaker argument for error, there must be a stronger showing of harm. *Minehart II v. Morning Star Boys Ranch Inc.*, 156 Wn.App. 457, 463, 232 P.3d 591 (2010). Discretionary review is an extraordinary procedure that should only be grant in exceptional cases. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn.App. 813, 820, 21 P.3d 1157 (2001); RAP 2.3.

Here, Petitioner has not met the requirements of RAP 2.3(b)(1) or (b)(2) to justify discretionary review of the Trial Court's interlocutory order.

1. The Trial Court's decision finding the City had rebutted the evidentiary presumption of occupational disease was not in error and does not render further proceedings useless.

In *Raum v City of Bellevue*, 171 Wn.App. 124, 286 P.3d 695 (2012), review denied 176 Wn.2d 1024 (2013), Division I of the Court of Appeals addressed the operation of the rebuttable evidentiary presumption of RCW 51.32.185. The court held that "if RCW 51.32.185's rebuttable presumption applies, that burden shifts to the employer unless or until the employer rebuts the presumption." *Id.* at 142 (emphasis added).

Notably, "[t]he sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue." *Taufen v. Estate of Kirpes*, 155 Wn.App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer Sys.*, 35 Wn.App. 840, 843, 670 P.2d (1983)). As the Indian Trial Court pointed out, "its efficacy is lost when the other party adduces credible evidence to the contrary. Presumptions are the "bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." *Indian Trail*, 35 Wn.App. at 843 (quoting *Mackowik v. Kansas City, St. J. & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256, 262(1906))

To continue to apply the presumption is “but to play with shadows and reject substance.” *Mackowik*, 94 S.W. at 263.

RCW 51.32.185 creates a burden of production verses an ultimate burden of persuasion. The use of the term “prima facie presumption” within the statute contemplates that once contrary evidence is introduced (i.e. production) the burden of proof returns to the claimant. This was recognized by the court in *Raum*, where the court stated:

RCW 51.32.185's presumption is not conclusive and may be rebutted by a “preponderance of the evidence.” RCW 51.32.185(1). If the employer rebuts the presumption, the burden of proof returns to the worker to show he is entitled to benefits, i.e., that he suffers from an “occupational disease” as defined in RCW 51.08.140. If both parties present competent medical testimony, the jury must weigh the evidence to determine whether the worker's condition “arises naturally and proximately out of employment.” RCW 51.08.140

Raum, 171 Wn.App. at 152.

Expressed differently, once the City produces “competent medical testimony” calling into question whether the Petitioner's condition qualifies as an occupational disease, it has met its burden of production to rebut the presumption. At that point, the presumption disappears and it is the jury's duty to weigh the evidence and determine if the Petitioner has met its burden to prove their condition arose naturally and proximately out of employment.

In this case, the trial court correctly decided that the question of whether the evidentiary presumption had been rebutted is a question of law.

In its motion the City cited relevant portions of the Board record. Dr. Chien, a melanoma researcher testified that the two most strongly accepted causes of malignant melanoma are genetics and ultraviolet light. *Id.* at p. 108 lines 4-12. (Appendix I) He explained that 85% of the gene mutations associated with the development of melanoma are attributable to an ultraviolet light signature. Similarly, the City's epidemiologist from the University of Washington also testified regarding the associations between UV exposure and melanoma and the lack of scientific evidence to support chemical exposure as a potential cause for melanoma. Dr. Weiss testified that on a more probable than not basis, based on his review of scientific studies addressing firefighters and the development of certain cancers it would be incorrect to infer firefighters are at an increased risk for the development of melanoma. Weiss testimony 4/3/14 Tr. p. 24 line 9 – p. 25 line 14. (Appendix H)

Dr. John Hackett performed a medical exam of Mr. Spivey and reviewed his medical records, and deposition. Dr. Hackett noted that UV light is the medically recognized risk factor that is most strongly associated with the development of melanoma. Hackett Dep. p. 9 lines 13-

16. (Appendix J) He further testified sun exposure is the most common form of UV exposure. In Mr. Spivey's case he testified on a more probable than not basis the melanoma on Mr. Spivey's upper back was the result of ultraviolet light exposure and not work related. *Id.* at p. 27 lines 14-23. His opinion was supported in part by the fact that the skin where the lesion developed had evidence of sun damage on biopsy. Hackett Dep. p. 27 line 14 – p. 28 line 19.

In counter point, Petitioners opposition to the City's motion cited portions of their expert Dr. Kenneth Coleman's testimony. Dr. Coleman testified that a proximate cause of Petitioner's melanoma was his occupation as a firefighter. See Plaintiff's Response in Opposition pp. 10. (Appendix C)

Additionally, Petitioner addressed the testimony of each of the City experts noting their testimony that the precise nature or cause of every melanoma is unknown. Thus Petitioner argued the City's experts did not rebut the presumption. See Plaintiff's Response in Opposition pp. 10. (Appendix C)

With this evidence called to the Court's attention, the Court correctly ruled that as a matter of law the City had rebutted the evidentiary presumption of occupational disease in RCW 51.32.185. As noted in *Raum* if both parties present competent medical evidence the jury must

then decide if the condition arose naturally and proximately out the conditions of employment without reference to the evidentiary presumption. *Raum*, 171 Wn.App. at 152

2. Petitioner placed the merits of whether the evidentiary presumption was rebutted at issue.

Petitioner argues that City and Department's motion for a determination of the legal standard did not ask for a ruling on whether the City rebutted the presumption. Mot. at p. 7. Thus, Petitioner argues the issue was not properly before the Court and he did not have proper notice. However, in framing the issues before the trial court Petitioner's own request for relief was as follows:

V. RELIEF REQUESTED

1. Should the City of Bellevue be allowed to avoid a jury trial in a case where there are genuine issues of material fact? **No.**
2. Did the Board of Industrial Insurance Appeals commit reversible error when it overruled the Industrial Appeals Judge who found that the malignant melanoma was work related and that the City of Bellevue had not rebutted the presumption? **Yes.**
3. *Did the City of Bellevue rebut the statutory presumption in RCW 51.32.185?* **No.**
4. Should portions of Dr. Coleman's testimony [sic] should be stricken? **No.**

(Italics Added)

Similarly, as discussed above, Petitioner's opposition argued the merits of whether the City's evidence rebutted the evidentiary presumption. See Plaintiff's Response in Opposition pp. 10-13. (Appendix C)

Specifically, Petitioner's opposition argued that their expert Dr. Coleman opined that Petitioner's occupation was a proximate cause of his melanoma. *Id.* at p. 11. Petitioner also argued that the City's experts testified they do not know all of the causes of melanoma. *Id.* at pp. 11-12. Petitioner additionally affirmatively asked the Court to dismiss the City's appeal. Pl's Response at p. 10. Petitioner thus placed the merits of whether the City rebutted evidentiary presumption at issue and cannot now claim he lacked sufficient notice to raise a due process concern.

Moreover, Petitioner moved for reconsideration of the court's ruling that the City had rebutted the evidentiary presumption. Petitioner thus being fully aware of the basis of the Court's ruling, had the opportunity to again point to the portions of the Board record that he believed illustrated the City had not rebutted the presumption. In sum, in deciding the City had rebutted the evidentiary presumption the trial court had before it both Petitioner's arguments and specific citations to the Board record that Petitioner believed illustrated the City had not rebutted the presumption. Petitioner cannot now claim he lacked notice simply because the court disagreed with his arguments.

A. The Trial Courts Ruling Does Not Render Further Proceeding Useless.

Petitioner contends the upcoming trial would be “useless because it misplaces the burden of proof and omits the statutory presumption that his melanoma is occupational.” Mot. at p. 9-10. The fallacy in Petitioner’s argument is that because the City was the prevailing party before the Board it does not have any burden of proof at trial. See RCW 51.52.115 (“[i]n all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same.”) Moreover, even with the trial court’s evidentiary ruling Petitioner is still entitled to a jury trial to consider whether his melanoma is an occupation disease. See *Raum*, 171 Wn.App. at 152. A jury may side with Petitioner and find that his melanoma is related to his work. Consequently, Petitioner’s loss of an evidentiary ruling does not render the upcoming trial “useless”.

B. The Trial Court interlocutory evidentiary ruling does not affect Petitioner’s ability to act outside the litigation.

In order to justify review under RAP 2.3(b)(2), Petitioner has the burden to show “probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” Here, Petitioner contends that the superior court’s decision

“limits his freedom to prosecute his case with benefit of the statutory presumption.” Mot. at p. 10. However, an evidentiary ruling that simply alters the status of the litigation is insufficient to invoke discretionary review under RAP 2.3(b)(2).

Recently in *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014) the Court noted that RAP 2.3(b)(2) was originally intended to apply “primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right.” *Howland*, 180 Wn.App. at 206-207 quoting *Geoffrey Crooks, Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev., 1541, 1545–46. (1986). Thus, the intent was to address instances where a court’s ruling has an effect outside the courtroom, or outside the context of the case. Against this backdrop, the Court stated:

[W]here a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)

Id. at 207.

Applying this logic to Petitioner’s claim, the trial court’s decision finding the City had rebutted the evidentiary presumption only affects the contours of this litigation. It does not affect the status quo or substantially limit

Petitioners freedom to act in his day-to-day life. Petitioner therefore cannot meet the criteria for discretionary review under RAP 2.3(b)(2).

VI. CONCLUSION

For the forgoing reasons Respondent the Court should deny Petitioner's motions for direct review and discretionary review.

DATED this 2nd day of July, 2015.

Respectfully submitted,

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

Chad R. Barnes, WSBA No. 30480
Assistant City Attorney
Attorney for Respondent City of Bellevue

OFFICE RECEPTIONIST, CLERK

To: KThibodeau@bellevuewa.gov
Cc: CBarnes@bellevuewa.gov; KHohu@bellevuewa.gov; ron.m@rm-law.us; anas@atg.wa.gov; matt.j@rm-law.us; tim.f@rm-law.us
Subject: RE: Supreme Court Filing

Rec'd 7/2/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: KThibodeau@bellevuewa.gov [mailto:KThibodeau@bellevuewa.gov]
Sent: Thursday, July 02, 2015 12:35 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: CBarnes@bellevuewa.gov; KHohu@bellevuewa.gov; ron.m@rm-law.us; anas@atg.wa.gov; matt.j@rm-law.us; tim.f@rm-law.us
Subject: Supreme Court Filing

Case: Delmis Spivey v. City of Bellevue and Department of Labor and Industries
Case Number: 91680-2
KCSC No.: 14-2-29233-3 SEA
Filing by: Chad R. Barnes
425-452-2061
WSBA No.: 30480
CBarnes@bellevuewa.gov

Documents:

1. Respondent City of Bellevue's Opposition to Petitioner's Request for Judicial Notice
2. Respondent City of Bellevue's Combined Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Direct Review
3. Declaration of Service

Appendices will be mailed today via U.S. Mail to the Supreme Court.

Please let me know if you have any difficulty opening the attachments.

Thank you,

Kelly Thibodeau
Legal Secretary
City of Bellevue
City Attorney's Office
(425) 452 6830
kthibodeau@bellevuewa.gov

E-MAIL CONFIDENTIALITY NOTICE: The contents of this e-mail message and any attachments are intended solely for the addressee(s) and may contain confidential and/or legally privileged information. If you are not an intended recipient of this message or if this message has been addressed to you in error, please immediately notify the sender and delete this message and any attachments. Use, dissemination, distribution, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

**CITY OF
BELLEVUE**



P.O. Box 90012 • Bellevue, WA • 98009-9012

Received
Washington State Supreme Court

E

JUL 06 2015

Ronald R. Carpenter
Clerk

by h

July 2, 2015

Washington Supreme Court
State of Washington
P. O. Box 40929
Olympia, WA 98504-0929

Re: *Spivey v. Bellevue*
Supreme Court Cause No.: 91680-2

Dear Clerk of Court:

Enclosed is the Appendices for the Respondent City of Bellevue's Combined Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Direct Review that was filed on July 2, 2015 in the above mentioned case. Please do not hesitate to contact me if you have any questions. Thank you.

Sincerely,

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

Chad R. Barnes
Assistant City Attorney

Enclosure

APPENDICES

Appendix A: Order Granting In Part Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix B: Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix C: Plaintiff's Response in Opposition to City's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony

Appendix D: Department's Reply to City of Bellevue's Motion re RCW 51.32.185 and to Motion to Strike Portions of Spivey's Brief and It's Reply to Spivey's Response to the City of Bellevue's Motion

Appendix E: Delmis Spivey Testimony (Excerpts)

Appendix F: Kenneth Coleman, M.D. Testimony (Excerpts)

Appendix G: Janie Leonhardt, M.D. Testimony (Excerpts)

Appendix H: Noel Weiss, M.D. Testimony (Excerpts)

Appendix I: Andy Chien, M.D. Testimony (Excerpts)

Appendix J: John Hackett, M.D. Testimony (Excerpts)

Appendix K: Decision and Order

APPENDIX A

The Honorable Samuel Chung
Hearing Date: Friday, March 27, 2015 at 9:00 a.m.
(With Oral Argument)

FILED
KING COUNTY, WASHINGTON

MAR 27 2015

SUPERIOR COURT CLERK
BY Kirstin Grant
DEPUTY

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

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE and
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

Cause No. 14-2-29233-3

~~[PROPOSED]~~ ORDER GRANTING *In part*
RESPONDENT CITY OF BELLEVUE'S
MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW AND
TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

THIS MATTER having come on regularly before the undersigned judge of
the above-entitled court; all parties having appeared through their attorneys of
record; the court having heard arguments of counsel and reviewed the following:

1. Respondent City of Bellevue's Motion for Determination of Legal
Standard on Review and to Strike Portions of Dr. Coleman's Testimony;

2. Declaration of Chad R. Barnes with attached exhibits;

3. Plaintiff's response in opposition to *City's Motion*; and

4. Declaration of Jon Meyer's; and

5. City of Bellevue's Reply in support of Motion

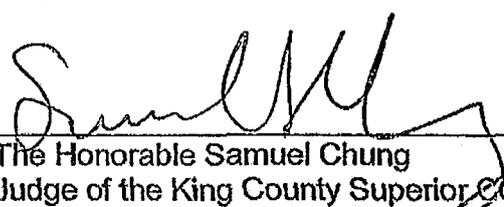
and the Court being fully advised in the premises, now, therefore, it is hereby

~~[PROPOSED]~~ ORDER GRANTING RESPONDENT
CITY OF BELLEVUE'S MOTION FOR
DETERMINATION OF LEGAL STANDARD ON
REVIEW AND TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY - PAGE 1

CITY OF BELLEVUE
450 110th Avenue NE
Bellevue, WA 98004
425-452-6829

1 ORDERED, ADJUDGED, AND DECREED that Respondent City of
2 Bellevue's Motion for Determination of Legal Standard on Review ~~and to Strike~~
3 ~~Portions of Dr. Coleman's Testimony~~ is GRANTED and that ~~(1) Determination of~~
4 ~~whether the City met its burden of production~~ ^{has} to rebut the presumption of
5 occupational disease within the meaning of RCW 51.32.185 ~~is a question of law to~~
6 ~~be decided by the judge~~ ^{and the Court denies the City's motion to strike} and (2) ~~Portions of Dr. Coleman's Testimony for which a~~
7 ~~proper foundation was not established or that were based on hearsay and~~
8 ~~improper leading questions be stricken as follows:~~

9
10
11
12
13
14 DONE IN OPEN COURT this 27th day of March, 2015.

15
16 
17 The Honorable Samuel Chung
18 Judge of the King County Superior Court

19
20 Presented by:
21 CITY OF BELLEVUE
22 OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

Approved as to Form, Notice of
Presentation Waived:

Ron Meyers & Associates, PLLC

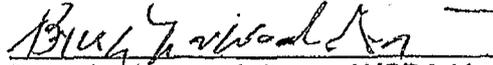
23
24 
25 Chad R. Barnes, WSBA No. 30480
Assistant City Attorney

Ron Meyers, WSBA No. 13169
Attorney for Appellant Spivey

1 Attorney for Respondent City of
2 Bellevue

Approved as to Form, Notice of
Presentation Waived:

3 Department of Labor & Industries

4 

5 Beverly Norwood Goetz, WSBA No. 8434
6 Attorney for Respondent Department of
7 Labor and Industries

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPENDIX B

The Honorable Samuel Chung
Hearing Date: March 27, 2015 at 9:00 a.m.
(With Oral Argument)

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

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE and
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

Cause No. 14-2-29233-3

RESPONDENT CITY OF BELLEVUE'S
MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW AND
TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

INTRODUCTION

This is a workers' compensation appeal under RCW Title 51, the Industrial Insurance Act. Appellant, Delmis Spivey, ("Spivey") has appealed the decision by the Board of Industrial Insurance Appeals ("Board"), dated October 9, 2014. The Board's order affirmed the Department of Labor and Industries decision finding that Appellant Spivey's malignant melanoma on his upper back is not an occupational disease.

1 The Board's entire record is contained in the Certified Appeal Board Record
2 on file with this Court. The trial in King County Superior Court will be limited to a
3 reading of the testimony presented at the Board hearing to a jury.

4 I. RELIEF REQUESTED

5 Respondent City of Bellevue requests an order determining that whether the
6 City met its burden of production to rebut the presumption of occupational disease
7 within the meaning of RCW 51.32.185 is a question of law to be decided by the
8 judge.

9 The City further requests an order striking portions Dr. Coleman's testimony
10 for which a proper foundation was not established or that were based on hearsay
11 and improper leading questions.

12 II. STATEMENT OF FACTS

13 Procedural History

14 Appellant, Delmis Spivey filed a claim for an occupational injury with the
15 Department of Labor and Industries ("Department"). Spivey's claim for benefits
16 was rejected by the Department as not being an occupational disease as
17 contemplated by RCW 51.32.185 and RCW 51.08.140. Spivey appealed the
18 Department's denial of his claim to the Board of Industrial Insurance Appeals. A
19 hearing was conducted and upon completion of the hearing an Industrial Appeals
20 Judge issued a Proposed Decision and Order on July 2, 2014 in favor of Spivey.

21 The City filed a Petition for Review of the hearing examiner's proposed
22 decision which was accepted by the Board on September 3, 2014. The full Board
23 of Industrial Insurance Appeals considered the City's arguments and reversed the
24
25

1 hearing examiner's decision. The Board's final Decision and Order affirmed the
2 order of the Department and concluded that the City had rebutted, by a
3 preponderance of the evidence, the statutory presumption embodied in
4 RCW 51.32.185 that Spivey's melanoma was an occupational disease. The Board
5 found that Spivey's melanoma was not an occupational disease within the
6 meaning of RCW 51.08.140.

7 Spivey has appealed the final Decision and Order of the Board to this Court.
8 Spivey argues that the melanoma on his back was the result of his work as a
9 firefighter. He further contends he is entitled to an evidentiary presumption of
10 occupational disease pursuant to RCW 51.32.185. The City does not dispute
11 RCW 51.32.185 is applicable in this matter. However, it is the City's position that it
12 has met its burden of production under RCW 51.32.185 by introducing evidence
13 through both Spivey's own doctors and the City's experts that Spivey's melanoma
14 was the result of ultraviolet exposure from the sun and genetic factors. Thus, any
15 presumption in RCW 51.32.185 is negated, and the burden of proof to establish
16 that his melanoma is an occupation disease rests with Spivey.
17

18 Summary of Testimony Presented by the City

19 Delmis Spivey is a career firefighter who began working full-time with the
20 City of Bellevue in approximately 1995. When not working he enjoys a variety of
21 out-door recreational activities including coaching Junior and High School football
22 (over ten years as a coach), hunting, fishing, and bike riding for exercise and for a
23 while as a commuter. Spivey testimony 4/2/14 Tr. p. 159-162.
24
25

1 While working for the Bellevue Fire Department, Mr. Spivey admitted he
2 could not think of any incident where he was not wearing his SCBA (Self
3 Contained Breathing Apparatus) and personal protective equipment in the course
4 of fighting a fire. See Spivey testimony at 4/22/14 Tr. p. 164-165. Mr. Spivey also
5 testified that he has a number of recognized risk factors for melanoma including, a
6 predominately English background, freckles over his body, and a history of
7 sunburns as a kid that were severe enough to use Solarcane. Id. at p. 153-157.

8 During a routine dermatological exam on December 22, 2011, his
9 dermatologist Dr. Janie Leonhardt noted many lentigines (areas of pigmentation)
10 over his head, neck, trunk and extremities. Leonhardt Dep. p. 27, lines 4-23.
11 Lentigines, or lentigos, also known as "sun freckles" are the result of cumulative
12 sun exposure over a person's lifetime. Id at p. 28-29 lines 22-1; p. 33-34, lines 19-
13 1. Due to its size and coloration, Dr. Leonhardt performed a shave biopsy of an
14 atypical lentigo on Mr. Spivey's upper back below his collar line. The pathologist at
15 Virginia Mason confirmed the biopsy was of "sun-damaged skin" and represented
16 an evolving melanoma. Id. at p. 41-42 lines 7-5.

18 Dr. Leonhardt testified in this matter that the medical literature supports the
19 relationship between ultraviolet radiation exposure (sun) and the development of
20 melanoma. Id at p. 52 lines 2-4. Dr. Leonhardt further testified that she was not
21 aware of any scientific literature or medical evidence that would support a causal
22 link between development of melanoma and the inhalation of a substance or the
23 presence of a substance on a person's skin. Leonhardt Dep. p. 46 line 5 – p. 47
24 line 20.
25

1 Dr. John Hackett performed a medical exam of Mr. Spivey and reviewed his
2 medical records, and deposition. Dr. Hackett noted that UV light is the medically
3 recognized risk factor that is most strongly associated with the development of
4 melanoma. Hackett Dep. p. 9 lines 13-16. He further testified sun exposure is the
5 most common form of UV exposure. In Mr. Spivey's case he testified on a more
6 probable than not basis the melanoma on Mr. Spivey's upper back was the result
7 of ultraviolet light exposure and not work related. Id. at p. 27 lines 14-23. His
8 opinion was supported in part by the fact that the skin where the lesion developed
9 had evidence of sun damage on biopsy. Hackett Dep. p. 27 line 14 – p. 28 line 19.

10 Dr. Noel Weiss an epidemiologist from the University of Washington also
11 testified regarding the associations between UV exposure and melanoma and the
12 lack of scientific evidence to support chemical exposure as a potential cause for
13 melanoma. Dr. Weiss testified that on a more probable than not basis, based on
14 his review of scientific studies addressing firefighters and the development of
15 certain cancers it would be incorrect to infer firefighters are at an increased risk for
16 the development of melanoma. Weiss testimony 4/3/14 Tr. p. 24 line 9 – p. 25 line
17 14. Similarly, he testified that he is not aware of any studies that would indicate
18 that the inhalation of a substance including, diesel fumes, can lead to the
19 development of melanoma. Weiss testimony 4/3/2014 Tr. p. 28 line 7 – p. 30
20 line 3. Ultimately, Dr. Weiss testified that there is no causal association between
21 the exposure sustained as a firefighter and the development of melanoma. He
22 believes more likely than not that Mr. Spivey's illness was not related to his
23 firefighting. Id. at p. 86 lines 1-16.
24
25

1 Dr. Andy Chien is a dermatologist and melanoma researcher for the
2 University of Washington. He is a peer reviewer for 10-12 scientific journals and
3 has published articles on the risk factors for melanoma. Chien testimony 4/3/14
4 Tr. p. 92 lines 19 – p. 93 lines 7.

5 Dr. Chien testified that the two most strongly accepted causes of malignant
6 melanoma are genetics and ultraviolet light. Id. at p. 108 lines 4-12. He explained
7 that 85% of the gene mutations associated with the development of melanoma are
8 attributable to an ultraviolet light signature. Chien testimony 4/3/14 Tr. p. 97 line
9 16 – p. 99 line 11. Even a one-time use of a tanning bed increases the risk of
10 developing melanoma. Id. at p. 113 lines 6-16. Addressing, Mr. Spivey's theory
11 that exposure to toxic substances in the course of firefighting caused his
12 melanoma, Dr. Chien explained, there is no medical research to indicate that the
13 inhalation of a substance including smoke, soot, diesel fumes, or "polycyclic
14 aromatic hydrocarbon" can lead to the development of malignant melanoma.
15 Chien 4/3/14 Tr. p. 113 lines 24 – p. 115 lines 8. Dr. Chien also addressed
16 whether it was possible to develop melanoma due to absorption through the skin.
17 Dr. Chien testified, there is no evidence the exposure to soot, ash, or diesel fumes
18 on a person's skin can lead to the development of melanoma. Chien 4/3/14 Tr.
19 p. 115 lines 9-18
20

21 III. STATEMENT OF THE ISSUES

- 22 1. Is a decision whether the City met its burden of product to rebut the
23 presumption of occupation disease within RCW 51.32.185 a question
24 of law to be decided by the judge?
25

- 1 2. Should portions of Dr. Coleman's testimony be stricken due to a lack
2 of foundation and/or improper use of the learned treatises exception to
3 the hearsay rule under ER 803(a)(18).

4 IV. EVIDENCE RELIED UPON

- 5 1. Declaration of Chad Barnes, with attached portions of the Board of
6 Industrial Insurance Appeals record.

7 V. LEGAL ANALYSIS

- 8 A. Whether the City met its burden of product to rebut the presumption
9 of occupation disease within RCW 51.32.185 is a question of law to
10 be decided by the judge.

11 Appellant Review of Board's Order

12 RCW 51.52.115 provides the Superior Court authority to review decisions of
13 the Board. Although the Superior Court's review of the Board's decision is de
14 novo, the Superior Court acts in an appellate capacity. RCW 51.52.115.
15 However, the findings and decision of the Board of Industrial Insurance Appeals
16 are presumed to be correct. WPI 155.03. The Board's decision shall be reversed
17 only if the Board misconstrued the law or found facts inconsistent with the
18 preponderance of the evidence. RCW 51.52.115; *McClelland v. ITT Rayonier*,
19 65 Wn.App. 386, 828 P.2d 1138 (1992).

20 Burden of Proof

21 In any worker's compensation appeal where the issue is a worker's
22 entitlement to benefits, the ultimate burden of proof is at all times with the worker.
23 *Olympic Brewing Co. v. Dept. of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d
24 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52
25

1 Wn.2d 33, 323 P.2d 241 (1958). In this case, Appellate Spivey bears the burden
2 of proof to establish the Board's decision should be overturned. WPI 155.03;
3 RCW 51.52.115.

4 Definition of Occupational Disease

5 RCW 51.08.140 defines "occupational disease" as "such disease or
6 infection as arises naturally and proximately out of employment." The leading case
7 interpreting this statute is Dennis v. Department of Labor and Industries, 109
8 Wn.2d 467, 745 P.2d 1295 (1987). In Dennis the Washington Supreme Court held
9 that:

10 ...a worker must establish that his or her occupational disease
11 came about as a matter of course as a natural consequence or
12 incident of distinctive conditions of his or her particular employment.
13 The conditions need not be peculiar to, nor unique to, the workers'
14 particular employment. Moreover, the focus is upon conditions
15 giving rise to the occupational disease, or the disease-based
16 disability resulting from work-related aggravation of a non work-
17 related disease, and not upon whether the disease itself is common
18 to that particular employment. The worker, in attempting to satisfy
19 the "naturally" requirement, must show that his or her particular
20 work conditions more probably caused his or her disease or
21 disease-based disability than conditions in everyday life or all
22 employments in general; the disease or disease-based disability
23 must be a natural incident of conditions of that worker's particular
24 employment. Finally, the conditions causing the disease or
25 disease-based disability must be conditions of employment, that is,
conditions of the workers' particular occupation as opposed to
conditions coincidentally occurring in his or her workplace.
(Emphasis in original)

Dennis, 109 Wn.2d at 481.

22 Occupational Disease and RCW 51.32.185's Rebuttal Evidentiary
23 Presumption

24 RCW 51.32.185(1) provides a rebuttable evidentiary presumption for
25 firefighters with certain medical conditions:

1 In the case of firefighters . . . there shall exist a *prima facie*
2 *presumption* that: (a) respiratory diseases; (b) any heart problems,
3 experienced within seventy-two hours of exposure to smoke,
4 fumes, or toxic substances, or experienced within twenty-four hours
of strenuous physical exertion due to firefighting activities; (c)
cancer; and (d) infectious diseases are occupational diseases
under RCW 51.08.140.

5 The statute also contains a rebuttal provision:

6 This presumption of occupational disease may be rebutted by a
7 preponderance of the evidence. Such evidence may include, but is
8 not limited to, use of tobacco products, physical fitness and weight,
9 lifestyle, heredity factors, and exposure from other employment or
nonemployment activities.

10 RCW 51.32.185(1).

11 In *Raum v City of Bellevue*, 171 Wn.App. 124, 286 P.3d 695 (2012), review
12 denied. 176 Wn.2d 1040 (2013), Division I of the Court of Appeals addressed the
13 operation of the rebuttable evidentiary presumption of RCW 51.32.185. The court
14 held that “if RCW 51.32.185’s rebuttable presumption applies, that burden shifts to
15 the employer unless *or until* the employer rebuts the presumption.” *Id.* at 142
16 (*emphasis added*).

17 Notably, “[t]he sole purpose of a presumption is to establish which party has
18 the burden of going forward with evidence on an issue.” *Taufen v. Estate of Kirpes*,
19 155 Wn.App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk*
20 *Sewer Sys.*, 35 Wn.App. 840, 843, 670 P.2d (1983)). As the *Indian Trail* Court
21 pointed out, “its efficacy is lost when the other party adduces credible evidence to
22 the contrary. Presumptions are the “bats of the law, flitting in the twilight but
23 disappearing in the sunshine of actual facts.” *Indian Trail*, 35 Wn.App. at 843
24 (*quoting Mackowik v. Kansas City, St. J. & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256,
25

1 262(1906)) To continue to apply the presumption is "but to play with shadows and
2 reject substance." *Mackowik*, 94 S.W. at 263.

3 RCW 51.32.185 creates a burden of production verses an ultimate burden
4 of persuasion. The use of the term "prima facie presumption" within the statute
5 contemplates that once contrary evidence is introduced (i.e. production) the
6 burden of proof returns to the claimant. This was recognized by the court in *Raum*,
7 where the court stated:

8 RCW 51.32.185's presumption is not conclusive and may be
9 rebutted by a "preponderance of the evidence." RCW 51.32.185(1).
10 If the employer rebuts the presumption, the burden of proof returns
11 to the worker to show he is entitled to benefits, i.e., that he suffers
12 from an "occupational disease" as defined in RCW 51.08.140. *If*
13 *both parties present competent medical testimony, the jury must*
14 *weigh the evidence to determine whether the worker's condition*
15 *"arises naturally and proximately out of employment."*
16 RCW 51.08.140

17 *Raum*, 171 Wn.App. at 152.

18 Expressed differently, once the City produces "competent medical
19 testimony" calling into question whether the claimant's condition qualifies as an
20 occupational disease, it has met its burden of production to rebut the presumption.
21 At that point, the presumption disappears and it is the jury's duty to weigh the
22 evidence and determine if the claimant has met its burden to prove their condition
23 arose naturally and proximately out of employment.

24 Whether a burden of production is met is decided by a judge, while the
25 issue of whether the burden of persuasion is met is decided by the trier of fact. See
Carle v. McChord Credit Union, 63 Wn.App. 93, 827 P.2d 1070 (1995); 14
A Washington Practice: Civil Procedure § 24;5 (2d ed. 2013) ("Sufficiency of the

1 evidence to take a case to the jury is a question of law.”) *Grimwood v. Univ. of*
2 *Puget Sound, Inc.*, 110 Wn.2d 355, 362, 364, 753 P.2d 517 (1988) (Discussing the
3 burden of production in age discrimination cases).

4 As Spivey appealed the Board’s decision to superior court, he bears the
5 burden of proving by a preponderance of the evidence that the Board erred when it
6 rejected his claim. See *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d
7 570 (1999). This is because, as the appealing party at superior court, Spivey
8 carries the burden of persuasion. See RCW 51.52.115(“the burden of proof shall
9 be upon the party attacking [the Board’s decision]”); *Harrison Mem’l Hosp. v.*
10 *Gagnon*, 110 Wn.App. 475, 484, 40 p.3d 1221 (2002) (“RCW 51.52.115 and the
11 applicable cases plainly allocate the burden of persuasion in superior court to
12 whoever is attacking the findings and decision of the board.”). Therefore,
13 submitting whether the City met its burden of production to the jury as a factual
14 question, runs contrary to RCW 51.52.115 because it places an evidentiary burden
15 on the City on appeal. As the prevailing party before the Board the City does not
16 have a burden of proof on appeal. Similarly, interjecting whether the City met its
17 burden of production at the Board level to rebut a presumption of occupational
18 disease is immaterial on appeal because Spivey bears the ultimate burden of
19 persuasion. As the court in *La Vera v. Dep’t of Labor and Indus.*, 45 Wn.2d 413,
20 275 P.2d 426 (1954) recognized because the appeal procedure is statutory and
21 defines that the party attacking the Board’s decision has the ultimate burden “the
22 question of burden of proof at the board level is immaterial . . . [s]uperimposing of
23
24
25

1 this procedural ramification would serve only to add complexity and confusion to a
2 fact-finding task which is already most difficult." *Id.* at 414-415.

3 In this case, whether the City met its burden of production to rebut the
4 presumption of occupation disease within RCW 51.32.185 a question of law that
5 should be decided by the judge. Although, the superior court reviewing a decision
6 under the Industrial Insurance Act considers the issues de novo, relying on the
7 certified board record, the findings and decision of the Board are presumed to be
8 correct. RCW 51.52.115; *Malang v. Dep't of Labor and Indus.*, 139 Wash.App. 677,
9 683, 162 P.3d 450 (2007); WPI 155.03. The Board's decision shall be reversed
10 only if the Board misconstrued the law or found facts inconsistent with the
11 preponderance of the evidence. RCW 51.52.115; *McClelland v. ITT Rayonier*,
12 65 Wn.App. 386, 828 P.2d 1138 (1992). Here, the Board found that "The statutory
13 presumption that Delmis P. Spivey has an occupational disease has been rebutted
14 within the meaning of RCW 51.32.185." *Decision and Order pg. 7*. This legal
15 conclusion, that the City has met its burden of production as defined by
16 RCW 51.32.185, should be decided by the judge in this case as a matter of law
17 before the case is submitted to the jury.
18

19 B. Portions of Dr. Coleman's testimony should be stricken.

20 Kenneth Coleman, M.D. J.D.'s (Dr. Coleman) perpetuation deposition was
21 taken on March 10, 2014. In large part, his testimony concerned a number of
22 publications that he was supplied by Appellant's counsel generally related to
23 firefighters, cancers, and toxic exposures. From a number of these articles
24 *Appellant's counsel read select portions* and only then sought Dr. Coleman's
25

1 opinion regarding whether the articles supported a causal link between Appellant
2 Spivey's development of melanoma and his occupation as a firefighter. However,
3 on cross-examination, Dr. Coleman testified that he does not have a subscription
4 to any of the journals or publications that were referenced, with the exception of
5 one textbook. Coleman Dep. at Pg. 30. The articles were provided to him by
6 Appellant's attorney. Coleman Dep. at Pg. 36. Most telling, Dr. Coleman conceded
7 that he did not do any independent investigation himself to determine if the
8 journals or publications were peer-reviewed. Coleman Dep. at Pg. 39.

9 Foundation

10 Under ER 803(a)(18) statements contained in published treatises and
11 pamphlets on the subject of medicine, *if established as authority*, are made
12 exceptions to the hearsay rule when used in cross or direct examination of an
13 expert witness. The published works may be established as authoritative by the
14 testimony or admission of the witness, by other expert testimony, or by judicial
15 notice. ER 803(a)(18). *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986).
16 However, it is not sufficient to show that particular witness regards the publication
17 as reliable. To establish a proper foundation, the proponent of the publication
18 must offer testimony to the effect that the publication is generally regarded as
19 authoritative among the audience to who it is directed. See 5C Wash. Prac.,
20 Evidenc Law and Practice §803.67 (5th ed.); *Schnedier v. Revici*, 817 F.2d 987 (2d
21 Cir. 1987) (Excluding medical article where proper foundation was not laid and
22 noting "*Fed.R.Evid. 803(18) advisory committee note*. Failure, therefore, to lay a
23 foundation as to the authoritative nature of a treatise requires its exclusion from
24
25

1 evidence because the court has no basis on which to view it as trustworthy.") In
2 this case, Appellant's counsel did not lay a proper foundation for the admission of
3 any of the articles that he read into the record and for which he then sought
4 Dr. Coleman's acquiescence. Dr. Coleman admitted that he did not do any
5 independent investigation himself to determine if the journals or publications were
6 peer-reviewed.

7 Dr. Coleman also does not have the necessary qualifications to
8 independently opine whether the publications and articles are regarding as
9 authoritative within their specialized fields. Simply put, Dr. Coleman is a part-time
10 family practice doctor; he is not a dermatologist, oncologist, or epidemiologist.
11 Dr. Coleman does not have any specialized training in biostatistics, industrial
12 hygiene, environmental medicine, occupational medicine, the diagnosis of
13 melanoma, the treatment of melanoma, or the study of melanoma. Consequently,
14 he lacks the necessary professional qualifications and expertise to testify that the
15 articles he reviewed, and responded to questions about, are generally regarded as
16 authoritative among their particular medical fields or technical specialties.
17 Therefore, there is no foundation for the reference to, or quoting from, the journals
18 and articles on which Dr. Coleman testified. Dr. Coleman's testimony regarding
19 the articles he reviewed and specific quotations read into the record by Appellant's
20 counsel should be stricken.

21
22 Improper use of ER 803(a)18.

23 During Dr. Coleman's direct examination, counsel for Appellant Spivey read
24 verbatim lengthy sections from several articles and then simply sought
25

1 Dr. Coleman's acknowledgement that Dr. Coleman relied on the information read
2 to him in forming his opinions. See Coleman Dep. pp. 19-25. This form of
3 questioning constitutes attorney testimony since it is Appellant's counsel that is
4 offering the contents of the article and is improper.

5 ER 803(a)18 provides:

6 To the extent called to the attention of an expert witness upon cross
7 examination or relied upon by the expert witness in direct
8 examination, statements contained in published treatises,
9 periodicals, or pamphlets on a subject of history, medicine, or other
10 science or art, established as a reliable authority by the testimony
or admission of the witness or by other expert testimony or by
judicial notice. If admitted, the statements may be read into
evidence but may not be received as exhibits.

11 The rule provides that portions of an article may be read to a jury. However, the
12 procedure differs between direct examination and cross-examination. The rule
13 contemplates that if "called to the attention of an expert witness upon cross
14 examination" portions of learned treatises could be read into evidence. In contrast,
15 on direct exam the expert witness may rely upon portions of a learned treatise.
16 Notably, for direct examination the rule does not contain the same proviso that
17 portions of the treatise can be "called to the attention" of the expert. The difference
18 being that, during a direct examination, reading a section of a learned treatise is
19 the equivalent of asking a leading question and substituting attorney testimony for
20 the testimony of the expert. In contrast, on cross-examination counsel may ask
21 leading questions to develop testimony. Here, during direct examination
22 Appellant's counsel read verbatim portions of articles to Dr. Coleman and then
23 sought his agreement with the propositions read. This is an improper use of
24
25

1 ER 803(a)18, and thus constitutes hearsay. The leading questions should be
2 stricken from the record.

3 Testimony to Be Stricken

4 Respondent requests the Court strike Dr. Coleman's testimony on the basis
5 found and/or an improper use of ER 803(a)18 as follows:

6 Coleman Perpetuation Deposition:

7	Page 5 line 23 to Page 11 line 21.	Recitation of articles reviewed
8		without foundation.
9	Page 12 line 24 to Page 14 line 22	Article read by Counsel to Dr.
10		Coleman and questions related to
11	Page 15 line 8 to Page 16 line 23	the article.
12		Article read by Counsel to Dr.
13	Page 16 line 24 to Page 18 line 1	Coleman and questions related to
14		the article.
15	Page 18 line 2 to Page 19 line 10	Article read by Counsel to Dr.
16		Coleman and questions related to
17	Page 19 line 11 to Page 20 line 8	the article.
18		Article read by Counsel to Dr.
19	Page 20 line 9 to Page 21 line 7	Coleman and questions related to
20		the article
21		Colman and questions related to
22		the article

22 * Highlighted portions of the testimony Respondent requests be stricken are
23 attached as Exhibit No. 2 to the Declaration of Chad Barnes.

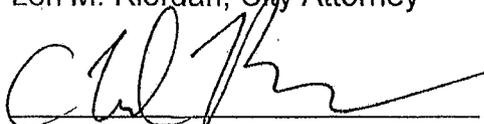
VI. CONCLUSION

1
2 Whether the City rebutted the evidentiary presumption with RCW 51.32.185
3 is a question of law that should be decided by the judge. Allowing the jury to
4 decide whether the City has met its burden of production as a factual question for
5 the jury places a burden of proof on the Respondent in this matter contrary to
6 RCW 51.52.115. Where as here the City prevailed before the Board, the City does
7 not have any burden of proof at trial. It is Appellant Spivey's burden of persuasion
8 to overturn the Board's decision. Respondent requests that following the
9 introduction of evidence¹ the Court determine as a question of law whether the City
10 met its burden of production to rebut the evidentiary presumption in
11 RCW 51.32.185.

12
13 The City further requests those portions of Dr. Coleman's testimony based
14 on the publication and articles read into the record by Appellant's counsel be
15 stricken.

16 DATED this 27th day of February, 2015.

17 CITY OF BELLEVUE
18 OFFICE OF THE CITY ATTORNEY
19 Lori M. Riordan, City Attorney

20 
21 Chad R. Barnes
22 Washington State Bar No. 30480
23 Assistant City Attorney
24 Attorney for Respondent City of Bellevue

24
25 ¹ City reserves the right to request evidence be taken in such an order that the Judge can
evaluate the City's evidence independent of Spivey's evidence to determine if the presumption has
been rebutted.

APPENDIX C

RECEIVED
CITY OF BELLEVUE
LEGAL DEPT

MAR 10 2015

AM 7 8 9 10 11 12 1 2 3 4 5 6 PM



The Honorable Samuel Chung, Dept. 15
Hearing Date: Friday, March 27, 2013, at 9:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DELMIS SPIVEY,
Plaintiff,
v.
CITY OF BELLEVUE and DEPARTMENT
OF LABOR AND INDUSTRIES,
Defendants.

Cause No.: 14-2-29233-3 SEA

PLAINTIFF'S RESPONSE IN OPPOSITION TO
CITY'S MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW AND
MOTION TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

I. Preamble

"Certain occupations are associated with an increased risk of melanoma. **Firefighters, ... are consistently found to be at the highest risk for melanoma in studies.**"

*"Risk Factors for the Development of Primary Cutaneous Melanoma",
Dermatology Clinic pg 363-368 (2012), Russak and Rigel.*

RCW 51.04.010 Declaration of police power — Jurisdiction of courts abolished.
... The state of Washington, therefore, exercising herein its police and sovereign power, declares that ... **sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault**

RCW 51.12.010 Employments included — Declaration of policy.
There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.
This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

[bold emphasis added]

Plaintiff Delmis Spivey respectfully requests that the Court deny the Defendant City of Bellevue's (City) Motions for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony. BIIA Judge Wayne B. Lucia correctly allowed Delmis Spivey's presumptive malignant melanoma claim and found that the City did not rebut the presumption.

PLAINTIFF'S RESPONSE IN OPPOSITION TO CITY'S
MOTION FOR DETERMINATION OF LEGAL
STANDARD ON REVIEW AND TO STRIKE PORTIONS
OF DR. COLEMAN'S TESTIMONY** Page 1 of 19

RON MEYERS & ASSOCIATES PLLC
8765 Tallon Ln NE Ste A, Olympia, WA 98516
360-459-5600 www.ronmeverslaw.net

1 24 developed a treatable malignant melanoma on his back. RCW 51.32.185 creates a legal
2 25 presumption the claimant's melanoma arose naturally and proximately because of the distinctive
3 26 conditions of his employment as a firefighter for the SIE. The evidence introduced by the SIE was
4 27 not sufficient to overcome the statutory presumption by preponderance. Mr. Spivey's malignant
5 28 melanoma condition arose naturally and proximately from his employment conditions. The
6 29 Department order is REVERSED AND REMANDED.
7 30
8 31
9 32

10 The medical literature establishing causation between firefighting and malignant melanoma, the
11 lay witness testimony, the attending physicians' testimony, and the testimony of the medical experts
12 provide substantial evidence that a cause of Del Spivey's malignant melanoma is his career work as a
13 City of Bellevue firefighter. There is no preponderance of rebutting evidence to the contrary.

14 II. Statement of Facts

15 This claim arises out of an injury, occupational disease and/or presumptive occupational disease
16 for the diagnosed condition of malignant melanoma.

17 Malignant melanoma is a presumptive occupational disease pursuant to RCW 51.32.185.

18 ER 401 - DEFINITION OF "RELEVANT EVIDENCE"

19 "Relevant evidence" means evidence having any tendency to make the existence of any fact that
20 is of consequence to the determination of the action more probable or less probable than it
21 would be without the evidence. [emphasis added]

22 Malignant melanoma is a form of skin cancer presumed to be occupational for firefighters. Skin
23 cancer among firefighters is a firefighter occupational disease – but not presumptively so. Such cancers
24 include, but are not limited to, basal cell cancer, squamous cell cancer, and lymphoma of the skin. Each
25 case of firefighter skin cancer is relevant to all other firefighter occupational claims of skin cancer
26 because such occurrences make the occupation of firefighting a more likely cause of the skin cancer.

A skin cancer cluster has been identified in the City of Bellevue Fire Department, including at
least four other firefighters. The City of Bellevue continues to discriminate against occupational disease
claims involving firefighters and continues to reject and litigate firefighter skin cancer claims.

An occupational cluster of firefighter skin cancer is evidenced by the identification of firefighter

1 skin cancer cases in Yakima, Seattle, Bellevue, Tacoma, Everett and other fire departments throughout
2 the state of Washington. Some of the firefighter skin cancer cases involve areas of the body not typically
3 exposed to sunlight.

4 The commonality in these skin cancer cases is the occupation of firefighting with exposure to
5 smoke, fumes, and toxic substances, including known and suspected carcinogens, sun exposures during
6 work, disruptions of the circadian rhythm and other factors such as increased body heat and respiration
7 that increase the exposure risks. Additionally, the cause of skin cancer is not known in a high percentage
8 of all skin cancer cases, so firefighter occupational exposures, and the number of firefighters diagnosed
9 with skin cancer, is relevant to causation in all such cases.

10 Skin, lung and bladder cancers are among the types of cancer most often linked with high-level
11 exposure to workplace carcinogens. Other cancers such as leukemia, lymphoma, testicular, and brain
12 cancer can also occur in clusters. Most well-documented cancer clusters have been found in the
13 workplace, where exposures to certain compounds or other factors tend to be higher and last longer.
14 Also, the group of exposed people is better defined and easier to trace in workplace groups. In fact, the
15 links between cancer and many cancer-causing agents (called carcinogens) were first found in studies
16 of workers. *Source: The American Cancer Society.*

17 III. Relief Requested

- 18 1. Should the City of Bellevue be allowed to avoid a jury trial in a case where there are
19 genuine issues of material fact? **No.**
- 20 2. Did the Board of Industrial Insurance Appeals commit reversible error when it overruled
21 the Industrial Appeals Judge who found that the malignant melanoma was work related
22 and that the City of Bellevue had not rebutted the presumption? **Yes.**
- 23 3. Did the City of Bellevue rebut the statutory presumption in RCW 51.32.185? **No.**
- 24 4. Should portions of Dr. Coleman's testimony should be stricken? **No.**

25 III. Evidence Relied Upon

26 This response is based on the Declaration of Ron Meyers and exhibits thereto, if any, the BIIA
record, legal authority and argument set forth below, and the prior decisions, pleadings, and other papers

1 filed in this matter, and the exhibits thereto, if any.

2 **IV. Legal Authority and Argument**

3 **1. Legal Standard on Review**

4 The legal standard is not in question – review by the superior court is de novo. The presumption
5 must apply until the presumption is rebutted by a preponderance of evidence. The City in its case before
6 the Board did not rebut the presumption.

7 The City of Bellevue’s experts could not identify all causes of malignant melanoma and
8 therefore could not rule out firefighting as a proximate cause. The City ‘s experts could not segregate
9 sunlight exposures at work or away from work and could not rule out sunlight during work as a
10 proximate cause of malignant melanoma.

11 Upon the filing by the City of Bellevue of a Petition for Review, the Board of Industrial
12 Insurance Appeals reviewed the evidentiary rulings and found that no prejudicial error was committed
13 and affirmed those rulings. CABR 1. The Board simply granted review because it somehow disagreed
14 with the IAJ’s findings that the City of Bellevue did not rebut the presumption. CABR 1.

15 **2. Whether a disease arises out of and is caused by conditions of employment are**
16 **questions of fact.**

17 This case involved the strong statutory presumption set forth in RCW 51.32.185, that Delmis
18 Spivey’s malignant melanoma is presumed to be “occupational.” The term “occupational” means that
19 Delmis Spivey’s malignant melanoma arose naturally out of employment and that his employment was
20 a one of the proximate causes thereof. RCW 51.08.140. These are questions of fact. By virtue of RCW
21 51.32.185(1), and the definition of “occupational” in RCW 51.08.140, Del Spivey’s malignant
22 melanoma (a) was presumed to arise naturally out of his job and (b) was presumed to be proximately
23 cause by his job (i.e. “Occupational”). These questions of fact were established by the presumption
24 unless overcome by a preponderance of evidence.

25 It is not the role of the jury, not the judge, to weigh the City’s evidence and decide whether the
26 City proved by a preponderance of admissible evidence that Del Spivey’s cancer did not arise naturally

1 and proximately out of his employment. Whether Del Spivey's cancer arose naturally out of and was
2 caused by conditions of his employment are questions of fact. "Proximate cause is generally a question
3 of fact." *White v. Twp. of Winthrop*, 128 Wash.App. 588, 595, 116 P.3d 1034 (2005). Whether a disease
4 "arises naturally from conditions of employment" is factual as well.

5 RCW 51.32.185 (the statutory presumption) expressly states that the presumption can be
6 rebutted by a preponderance of the evidence. *RCW 51.32.185(1)*. Triers of fact consider and weigh
7 evidence and make decisions based on a preponderance of that evidence.

8 The Board issued a finding of fact that Del Spivey's malignant melanoma did not arise naturally
9 and proximately out of his employment. CABR 6. It was presumed at the Board-level that Del Spivey's
10 cancer arose naturally and proximately out of conditions of his employment (i.e. was "occupational").
11 The Board found in its "findings of fact" section of the Decision and Order that his cancer did not arise
12 naturally and proximately out of his employment (which necessarily means that the Board found that
13 the City rebutted the presumption). CABR 6.

14 On appeal in the Superior Court, Del Spivey should have the benefit of the presumption and the
15 City of Bellevue should have the ultimate burden to prove that the Board was right in deciding that the
16 City rebutted the presumption. The Board committed reversible error when it took the presumption
17 away from him. The Board also committed error in *Larson v City of Bellevue*, another recent malignant
18 melanoma claim. The jury corrected the Board's error. The City has appealed to Division I of the
19 Washington State Court of Appeals (Cause No. 71101-6-1).

20 It is undisputed that Del Spivey was an eligible firefighter with one of the diseases enumerated
21 in RCW 51.32.185, was entitled to the presumption, and that the City had to rebut that presumption.
22 On appeal to the Superior Court, the presumption does not vanish.

23 The City wants to re-structure an injured worker's constitutional rights to a trial-by-jury, in that
24 the judge – not the jury – would determine if the evidence presented by one party (the City) established
25 on a more likely than not basis that the plaintiff's disease arose naturally out of his employment. It is
26 the jury's job to decide whether the Board was correct in finding that the City rebutted the presumption

1 of occupational disease.

2 It is clear that the City did not rebut firefighting as a proximate cause of malignant melanoma.

3 The Court could make that ruling.

4 **3. The operation of RCW 51.32.185 places the burden on the City to rebut the**
5 **presumption of causation. Whether the City has overcome the presumption by a**
6 **preponderance of admissible evidence is for the jury to decide.**

7 The operation of the statutory presumption of RCW 51.32.185 requires the City of Bellevue to
8 rebut the causation that is presumed. What is presumed is the fact that the firefighter's disease arose
9 naturally out of his job and the fact that the disease was proximately caused by his job (i.e. the disease
10 was "occupational").

11 The operation of the statutory presumption requires that the City of Bellevue rebut these facts
12 by a preponderance of the evidence.

13 The idea advanced by the City that all the City has is a "burden of production" is incorrect.
14 "RCW 51.32.185, however, shifts the burden of disproving such occupational disease to the employer
15 once the firefighter shows that he has a respiratory, infectious, or other qualifying disease under this
16 statute." *Gorre v. City of Tacoma*, 108 Wash.App. 729, 324 P.3d 716, 730, footnote 33, (2014):

17 "Under the plain language of the RCW 51.32.185(1), once the firefighter shows that he
18 has one of these types of diseases, triggering the statutory presumption that the disease
19 is an "occupational disease," the burden shifts to the employer to rebut the presumption
20 by a preponderance of the evidence by showing that the origin or aggravator of the
firefighter's disease did not arise naturally and proximately out of his employment."
Gorre v. City of Tacoma, 108 Wash.App. 729, 324 P.3d 716, 730, footnote 33 (2014)
[emphasis added].

21 "If the employer cannot meet this burden, for example, if the cause of the disease cannot
22 be identified by a preponderance of the evidence or even if there is no known association
23 between the disease and firefighting, the firefighter employee maintains the benefit of
the occupational disease presumption." *Id. at 730-731* [emphasis added].

24 "... the province of the jury is to determine the facts of the case from the evidence adduced, in
25 accordance with the instructions given by the court." *Hastings v. Dep't of Labor & Indus.*, 24 Wash.2d
26 1, 13, 163 P.2d 142 (1945).

1 In a case involving a claim for life insurance policy proceeds where the insurer was disputing
2 coverage by claiming death-by-suicide the Supreme Court stated:

3 “When the plaintiff proved the contract of insurance and the death of the insured her
4 case was made. The defendant then perforce assumed the burden of proving suicide by
5 a preponderance of the evidence. Was there evidence or lack of evidence from which
6 the jury could in good reason find that the defendant has failed to carry this burden.”
7 *Burrier v. Mut. Life Ins. Co. of New York*, 63 Wn.2d 266, 270, 387 P.2d 58 (1963)
8 [emphasis added].

9 The Court stated, “The jury are the final arbiters as to the weight of the evidence necessary to
10 overcome the presumption.” *id at 281* [emphasis added].

11 In a case involving a claim for wrongful death, where the body was never found, the
12 presumption of death was at issue in a dispute over whether the three year statute of limitations had run.

13 “In Washington, the presumption of death attaches where a party has been absent for seven years
14 without tidings of his or her existence. The law presumes life during the first seven years of absence.”

15 *Nelson v. Schubert*, 98 Wash.App. 754, 759, 994 P.2d 225 (2000). As to rebutting the presumption, the
16 Court held

17 “The presumption of death arising from seven years’ unexplained absence is always
18 rebuttable. Jurors are the final arbiters as to the weights of the evidence necessary to
19 overcome the presumption.” *Nelson v. Schubert*, 98 Wash.App. 754, 759, 994 P.2d 225
20 (2000) [emphasis added].

21 The issue of whether the City rebutted by a preponderance of evidence the facts presumed by
22 RCW 51.32.185(1) is properly a jury issue – unless the Court rules that the City did not rebut the
23 presumption by establishing that firefighter exposures to smoke, fumes and toxic substances—including
24 work place sunshine – is not a proximate cause of malignant melanoma.

25 **4. The Purpose Of The Industrial Insurance Act Is Remedial In Nature And Shall Be**
26 **Liberaly Construed In Favor Of The Injured Worker.**

27 The Industrial Insurance Act is the product of a compromise between employers and workers.
28 Under the Industrial Insurance Act, employers accept limited liability for claims that might not
29 otherwise be compensable under the common law. In exchange, workers forfeit common law remedies.

1 *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). RCW 51.04.010 provides that
2 “sure and certain relief for workers, injured in their work, and their families and dependents is hereby
3 provided regardless of questions of fault and to the exclusion of every other remedy.”

4 The Washington Supreme Court has stated that the “guiding principle in construing the
5 Industrial Insurance Act is remedial in nature and shall be liberally construed in order to achieve its
6 purpose of “reducing to a minimum the suffering and economic loss arising from injuries and/or death
7 occurring in the course of employment.” RCW 51.12.010. “All doubts about the meaning of the [IIA]
8 must be resolved in favor of workers.” *Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467, 470
9 (1987); *Boeing Co. v. Heidi*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

10 **5. Judicial Notice.**

11 The Claimant requested at the beginning of his case in chief that judicial notice be taken of the
12 legislature’s intent in drafting and passing RCW 51.32.185. The legislative intent has accompanied the
13 statute since 1987 – almost a quarter of a century ago – without challenge.

14 **Rule ER 201 Judicial Notice of Adjudicative Facts**

15 (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

16 (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in
17 that it is either (1) generally known within the territorial jurisdiction of the trial court or (2)
18 capable of accurate and ready determination by resort to sources whose accuracy cannot
19 reasonably be questioned.

20 (c) When Discretionary. A court may take judicial notice, whether requested or not.

21 (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with
22 the necessary information.

23 (e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be
24 heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the
25 absence of prior notification, the request may be made after judicial notice has been taken.

26 (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

6. **Legislative Intent For The Presumptive Occupational Disease Statute.**

“The legislature finds that the employment of firefighters exposes them to smoke, fumes, and
toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher
rate of respiratory disease than the general public. The legislature therefore finds that respiratory
disease should be presumed to be occupationally related for industrial insurance purposes for
firefighters.”

Legislative Intent, Session Laws 1987 Chapter 515 § 1.

1 In analyzing the presumptive occupational disease statute, it is clear the legislature made a
2 finding in 1987 that career exposures to smoke, fumes and toxic substances cause firefighters to have
3 a higher rate of certain diseases than the general public. The legislature has mandated that due to those
4 exposures that damage health – certain diseases and cancers including “malignant melanoma” – are
5 presumed to be occupational diseases for firefighters. The public policy has not changed.

6 The fact that several City of Bellevue firefighters – firefighters who have worked together for
7 years responding to the same incidents and experiencing the same exposures – have recently been
8 diagnosed with skin cancer is relevant. That several City of Bellevue firefighters have skin cancer is
9 evidence of occupational causation. The City of Bellevue has an ongoing – growing – skin cancer
10 cluster that endangers all firefighters – not just these firefighters who have been working together for
11 years.

12 **7. The Presumptive Occupational Disease Statute, RCW 51.32.185.**

13 In order for a firefighter to gain the protections of the presumption of occupational disease and
14 the shifting of the burden of proof onto the City, the statute must be applied at the beginning of the
15 claim. Under the presumptive disease statute, when a firefighter applies for Title 51 benefits for
16 occupational disease, certain diagnosed disease conditions: (1) are presumed to be occupational, and,
17 (2) shift the burden of disproving the condition is an occupational condition onto the City.

18 **RCW 51.32.185 Occupational diseases — Presumption of occupational disease for**
19 **firefighters — Limitations — Exception — Rules.**

20 (1) In the case of firefighters as defined in RCW 41.26.030(4) (a), (b), and © who are covered
21 under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully
22 compensated basis as a firefighter of a private sector employer's fire department that includes
23 over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory
24 disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke,
25 fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical
26 exertion due to firefighting activities; **(c) cancer;** and (d) infectious diseases **are occupational**
diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by
a preponderance of the evidence. Such evidence may include, but is not limited to, use of
tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from
other employment or nonemployment activities.

...
(3) The presumption established in subsection (1)(c) of this section shall only apply to any
active or former firefighter who has cancer that develops or manifests itself after the firefighter

1 has served at least ten years and who was given a qualifying medical examination upon
2 becoming a firefighter that showed no evidence of cancer. The presumption within subsection
3 (1)(c) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty,
4 primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder
5 cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

6 There is no preponderance of relevant, admissible evidence with which to rebut the presumption
7 in Del Spivey's favor. He is a non-smoker. His physical fitness is not an issue. His weight is not an
8 issue. Heredity is not an issue. Exposure from non-firefighter employment or non-employment activities
9 is not an issue. He has been a firefighter since 1986. The City's appeal should be dismissed.

10 The City's experts were unfamiliar with the exposures of a firefighter. The City's evidence did
11 not rebut Del Spivey's presumptive occupational disease arising from his hundreds of individual and
12 cumulative exposures to smoke, fumes and toxic and chemical substances. From (1) his diesel fume
13 exposures in fire stations, (2) diesel fume exposures at fire response calls and emergency medical calls,
14 (3) every fire that he has worked – not just those that left him coughing up black phlegm and blowing
15 black mucous from his nose for days afterward, (4) the second hand smoke he was exposed to in fire
16 stations from 1987 through 1994, (5) exposures to chlorine and solvents used in cleaning the station and
17 equipment – the cumulative effect is undeniable. The Legislature has identified an occupational
18 causation between malignant melanoma skin cancer consistent with a lengthy career of injurious
19 exposures to smoke, fumes and toxic and chemical substances.

20 The legislature mandated into law a causal connection between the dangerous public service
21 profession of firefighting, and various diseases including respiratory disease, certain cancers such as
22 malignant melanoma, infectious diseases, and any heart problems experienced within certain time
23 periods after exposures. This law means the firefighter does not have to prove causation; the causal
24 connection has been made and is mandated by RCW 51.32.185. The firefighter only needs to present
25 with a covered diagnosis that falls within the statute.

26 **8. The City failed to provide a preponderance of credible, admissible evidence
rebutting the presumption of firefighter malignant melanoma.**

The City, by simply presenting other potential speculative causes of disease or injuries, or

PLAINTIFF'S RESPONSE IN OPPOSITION TO CITY'S MOTION FOR DETERMINATION OF LEGAL STANDARD ON REVIEW AND TO STRIKE PORTIONS OF DR. COLEMAN'S TESTIMONY** Page 10 of 19	RON MEYERS & ASSOCIATES PLLC 8765 Tallon Ln NE Ste A, Olympia, WA 98516 360-459-5600 www.ronmeyerslaw.net
--	---

1 denying the existence of disease or injury, has not presented a preponderance of credible and admissible
2 evidence that firefighting is not a proximate cause of his malignant melanoma. In fact, it is unclear how
3 the City could prove, by a preponderance of admissible evidence, that none of Del Spivey's exposures
4 were a proximate cause of his malignant melanoma – especially given that several of the firefighters
5 within his shift or crew have also recently been diagnosed with skin cancer – including malignant
6 melanoma.

7 Dr. Kenneth Coleman, plaintiff's expert witness, testified "one can never determine the precise
8 cause of a malignant melanoma." Deposition of Dr. Kenneth Coleman, 3/10/14, pg 11, lines 22-24. Dr.
9 Coleman also testified that the fact that at least three other City of Bellevue firefighters, who worked
10 together and fought many of the same fires together, have developed skin cancer, two of which are
11 malignant melanoma, supports more likely than not the occupation of firefighter as a cause. Deposition
12 of Dr. Kenneth Coleman, 3/10/14, pg 23, lines 10-14, lines 23-25. Dr. Coleman also opined on a more
13 likely than not basis that Del Spivey's occupation as a firefighter was a cause of his malignant
14 melanoma. Deposition of Dr. Coleman, 3-10/14, pg 40, line 2, lines 16-19, pg 41, lines 4-12. Dr
15 Coleman was familiar with relevant peer reviewed articles that found a causal connection between
16 firefighting and malignant melanoma.

17 The City's experts do not know all of the causes of cancer. The City's experts know that not all
18 causes of cancer have been identified. Therefore, firefighting cannot be ruled out as a cause of Del
19 Spivey's, and the other City of Bellevue firefighter's, malignant melanoma. The presumption has not
20 been rebutted.

21 Dr. Noel Weiss, expert epidemiologist witness for the City of Bellevue, testified that in most
22 cases of cancer the causes are unknown. April 3, 2014 Hearing Transcript, pg 46, lines 25-26, pg 56,
23 lines 2-8, pg 63, lines 8-10. Dr. Weiss did not offer an opinion that Del Spivey's malignant melanoma
24 was not caused by his workplace exposures. April 3, 2014 Hearing Transcript, pg 83, lines 3-4. Dr.
25 Weiss testified that he does not know if firefighting increases the risk of developing melanoma. April
26 3, 2014 Hearing Transcript, pg 85, lines 13-16. He did not rebut the presumption.

1 Dr. Andy Chien, expert witness for the City of Bellevue, testified that he does not know all of
2 the factors that cause malignant melanoma, April 3, 2014 Hearing Transcript, pg. 148, lines 7-11, and
3 that cause is unknown for 15% of melanoma cancer cases. April 3, 2014 Hearing Transcript, pg 99,
4 lines 8-11, pg 131, lines 8-11. He also testified to at least two causes of melanoma – genetics and
5 ultraviolet exposure, April 3, 2014 Hearing Transcript, pg 108, lines 4-7, and that higher education and
6 higher socioeconomic status are also risk factors for melanoma. April 3, 2014 Hearing Transcript, pg.
7 150, lines 16-19, pg 151, lines 6-8. Dr. Chien admitted that he does not know enough about firefighters
8 duties or exposures to draw conclusions regarding the exposures of firefighters. April 3, 2014 Hearing
9 Transcript, pg 145, lines 2-11. He did know that sunshine was a cause but could not parse out any
10 difference between workplace sunshine and non-work sunshine. He did not rebut the presumption.

11 Dr. John Hackett, City of Bellevue witness, testified that there are some chemical exposures that
12 can cause malignant melanoma. Deposition of Dr. John Hackett, March 12, 2014, pg. 67, lines 14-20. He
13 also knew that sunshine was a cause of malignant melanoma but could not parse out any difference
14 between workplace sunshine and non-work sunshine. He did not rebut the presumption.

15 The City's Fire Chief, Michael Eisner testified that firefighters would never be 100% protected
16 from exposures to smoke, fumes or toxic substances. Deposition of Michael Eisner, March 13, 2014,
17 pg 37, lines 1-6. Chief Eisner also testified that firefighter exposures are widely known to result in
18 illnesses or injuries and that some of those exposures are carcinogens. Declaration of Michael Eisner,
19 March 13, 2014, pg. 39, lines 8-14, pg 56, lines 14-16. His testimony appears to support the
20 presumption. That testimony certainly does nothing to rebut the presumption.

21 Dr. Janie Leonhardt, plaintiff's treating physician, testified that she did not know enough about
22 Mr. Spivey's occupation to form an opinion as to whether or not Mr. Spivey's malignant melanoma was
23 caused by his workplace conditions. Deposition of Dr. Janie Leonhardt, March 28, 2014, pg. 46, lines
24 5-9, pg 47, lines 15-20, pg. 48, lines 1-7, pg 52, lines 10-16, pg. 76, lines 10-14. She did not rebut the
25 presumption.

26 Additionally, the cluster of City of Bellevue firefighters with skin cancer – who worked with

1 Del Spivey – is also relevant evidence supporting the causal connection between firefighting and
2 malignant melanoma. A cancer cluster is defined as a greater-than-expected number of cancer cases that
3 occurs within a group of people in a geographic area over a period of time.
4 <http://www.cdc.gov/NCEH/clusters/default.htm>

5 These City of Bellevue firefighters worked on the same calls, spent 24 hour shifts in the same
6 stations and used the same diesel apparatus for years and years and years. Most cancer clusters caused
7 by a shared exposure have not been found in the communities where people live. Rather, they have been
8 seen in the workplace, where exposures to certain compounds or other factors tend to be higher and last
9 longer. Also, the group of exposed people is better defined and easier to trace in workplace groups. In
10 fact, the links between cancer and many cancer-causing agents (called carcinogens) were first found in
11 studies of workers. Lung, skin, and bladder cancers are the types of cancer most often linked with
12 high-level exposure to workplace.

13 <http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/c>
14 [ancer-clusters](http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/c).

15 The City's witnesses have presented speculative potential causes for his malignant melanoma.
16 The City has failed to rebut the presumption of malignant melanoma by a preponderance of credible,
17 relevant and admissible evidence.

18 Rank speculation, conjecture or conclusory statements do not overcome the presumption of
19 occupational disease. The City must overcome the presumption with something much, much more than
20 wishful thinking or deceptive arguments. Speculation by the City's medical experts, or disagreeing with
21 the attending physician's diagnosis is not a preponderance of competent, admissible testimony as a
22 matter of law. ER 702; ER 703; *Miller v. Likins*, 109 Wash. App. 140 (2001).

23 The City of Bellevue has not: (1) established a non-occupational cause – of Del Spivey's
24 malignant melanoma skin cancer, (2) excluded his firefighting exposures as the cause of his malignant
25 melanoma, nor did it, (2) eliminate firefighting as a proximate cause of his malignant melanoma. The
26 City did not meet the conditions required to overcome the presumptive occupational disease statute.

1 **9. A “Preponderance Of The Evidence” Is A Judicial Standard.**

2 A “preponderance of the evidence” is a judicial standard requiring that all of the evidence
3 establish the proposition at issue is more probably true than not true. See, *Presnell v. Safeway Stores,*
4 *Inc.*, 60 Wn.2d 671 (1962); *Dependency of H.W.*, 92 Wash. App. 420 (1998); *In re Sego*, 82 Wn.2d 736,
5 739 n. 2 (1973).

6 In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011 (2002), the Court ruled that the
7 claimant’s Hepatitis C was an occupational disease and that the evidence was sufficient to support an
8 inference on a more probable than not basis that the claimant acquired hepatitis while working at the
9 hospital. This was true even though the claimant had a history of drug use, had numerous body
10 piercings, numerous tattoos, and had worked as an emergency medical technician in the Navy prior to
11 employment at the hospital.

12 Here, as in *Harrison*, the emphasis is not on what else could have caused Del Spivey’s skin
13 cancer, but on whether employment was a proximate cause and whether the City can prove otherwise.
14 The City cannot and the City did not eliminate firefighting as a proximate cause of his skin cancer. In
15 fact, the one piece of literature advanced by the City, *Risk Factors for the Development of Primary*
16 *“Cutaneous” Melanoma*, establishes that firefighters are at the highest risk for occupational malignant
17 melanoma.

18 **10. The Occupational Disease Statute, RCW 51.08.140, Injury Statute RCW 51.08.100,**
19 **and Aggravation.**

20 **A. Arising Naturally and Proximately Out of Employment.**

21 The occupational disease statute, RCW 51.08.140 is another avenue for establishing an
22 occupational disease claim. It requires somewhat more from the firefighter than a diagnosis of certain
23 conditions falling within the presumptive occupational disease statute. It does not shift the burden on
24 to the City as does the presumptive disease statute. It does not create a presumption in favor of the
25 firefighter as does the presumptive disease statute. Even so – the hundreds of exposures to smoke,
26 fumes, toxic and chemical substances that Del Spivey has experienced during his career meet the

1 requirements for a finding of coverage under this statute, too.

2 **RCW 51.08.140 "Occupational disease."**

3 "Occupational disease" means such disease or infection as arises naturally and proximately out
4 of employment under the mandatory or elective adoption provisions of this title.

5 **11. Persuasive Authority.**

6 Failures of employers or state agencies to apply mandatory legislative presumptive disease
7 statutes like RCW 51.32.185 have not been tolerated by the Appellate Courts and Supreme Courts of
8 other jurisdictions. In such jurisdictions, as in our jurisdiction, the burden of proof never starts with the
9 claimant, but rather falls squarely on the shoulders of the employer or the government agency.

10 In *Jackson v. Workers' Compensation Appeals Bd.*, 133 Cal. App. 45h 965, 969, 35 Cal. Rptr.
11 3d 256 (3d Dist. 2005), the Court reviewed a similar presumption statute in a worker's compensation
12 case, including a physician's testimony that there was nothing specific to the deceased correctional
13 officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack. The
14 Court found such testimony insufficient to rebut the statutory presumption that the correctional officer's
15 heart problems arose out of and in the course of his employment.

16 Many other cases agree that a presumptive statute cannot be overcome by expert testimony that
17 simply challenges the premise of the presumption. Instead, to overcome the presumption, an employer
18 must produce clear medical evidence of a cause for the disease, outside of claimant's employment.
19 Idiopathic or unknown causes are not sufficient. *City of Frederick et al. v. Shankle*, 136 Md. App. 339,
20 765 A.2d 1008 (2001). See: *Worden v. County of Houston*, 356 N.W.2d 693, 695-96 (Minn. 1984);
21 *Cook v. City of Waynesboro*, 300 S.E.2d 746, 748 (Va. 1983); *Superior v. Dep't of Indus. Labor &*
22 *Human Relations*, 267 N.W.2d 637, 641 (Wis. 1978); *Cunningham v. City of Manchester Fire Dep't.*,
23 525 A.2d 714, 718 (N.H. 1987).

24 Specifically in *Cunningham*, the court addressed a situation where a doctor attacked the premise
25 of the presumptive disease statute. The doctor stated that the claimant's heart disease was not related
26 to employment, and pointed to the uncertainty in the medical community regarding the causation of
heart disease. The doctor also referenced studies that show an absence of a correlation between

1 firefighting and heart problems. The doctor opined there was no medical evidence that the claimant's
2 employment as a firefighter played any role in the development of his heart disease. The Court in
3 *Cunningham* determined that although the medical community may disagree as to the role of
4 firefighting in the development of heart problems, the legislature had made a decision to presume a
5 causal connection.

6 The City's hired experts may disagree with the legislature – but that does not rebut the
7 presumption. The City's experts may testify against the great weight of persuasive authority – but that
8 does not rebut the presumption, either. The City's experts may even disagree with the testimony of the
9 attending physician where those attending health care providers are entitled to special consideration –
10 but that is not nearly enough to rebut the presumption. Simply stated, the City wants to ignore the law
11 – but that does not rebut the strong public policy that has favored firefighters for over a quarter of a
12 century.

13 **12. Testimony of Dr. Kenneth Coleman, MD**

14 **RCW 51.52.104**

15 Such petition for review shall set forth in detail the grounds therefore and the party or
16 parties filing the same shall be deemed to have waived all objections or irregularities not
specifically set forth therein.

17 Kenneth Coleman, MD, JD, testified in this case. He also testified in the prior malignant
18 melanoma case of Captain William Larson (another City of Bellevue firefighter who worked closely
19 with Del Spivey). Although Larson's malignant melanoma claim was rejected by the City of Bellevue
20 and by the Board – the claim was recently allowed by a King County Superior Court jury following his
21 appeal of the rejection. Dr. Coleman has also testified in at least one other firefighter malignant
22 melanoma case in western Washington.

23 Unlike the other expert witnesses in these skin cancers cases, Dr. Coleman has conducted an
24 extensive review of the many peer reviewed published articles supporting the established causative link
25 between occupational exposures and malignant melanoma – especially in firefighters. Articles and
26 documents reviewed include:

1 *Cancer Incidence Among Firefighters in Seattle and Tacoma, Washington.* Cancer Causes
Control, Volume 5, 1994.

2 *Registry-Based Case-Control Study of Cancer in California Firefighters.* American Journal of
3 Industrial Medicine, 2007.

4 *Cancer Incidence in Florida Professional Firefighters, 1981-1999.* Journal of Occupational and
Environmental Medicine, Volume 48, 2006.

5 *Cancer Incidence Among Massachusetts Firefighters, 1982-1986.* American Journal of
6 Industrial Medicine at 19, pp 17-54, 1990.

7 *Cancer Incidence Among Male Massachusetts Firefighters, 1987-2003.* American Journal of
Industrial Medicine, Volume 51, pp 329-335, 208.

8 *Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies.* Journal of
9 Occupational and Environmental Medicine, Volume 48, Number 11, 2006.

10 *Organic Chemicals and Malignant Melanoma.* American Journal of Industrial Medicine.
American Journal of Industrial Medicine, 1983.

11 *Nonsunlight Risk Factors for Malignant Melanoma, Part 1: Chemical Agents, Physical
12 Conditions, and Occupation.* International Journal of Dermatology, Volume 33, Number 6,
1994.

13 *Environmental Factors and the Etiology of Melanoma.* Cancer Causes and Control, Volume 4,
14 pp 59-62, 1993.

15 *Nonsolar Factors in Melanoma Risk.* Clinics in Dermatology, 1992, Volume 10, pp 51-63.

16 *Melanoma and Occupation: Results of a Case-Control Study in The Netherlands.* British
Journal of Industrial Medicine, 1993.

17 *Textbook of Clinical Occupational and Environmental Medicine.* Medical Text, 1994.

18 *Firefighter Cancer in the New Fire Environment.* NFPA Conference & Expo Handout, 2012.

19 *Melanoma Epidemiology, Risk Factors, and Clinical Phenotypes.* Advances in Malignant
20 Melanoma- Clinical Research and Perspectives, 2011.

21 *Characterization of Firefighter Exposure During Fire Overhaul.* AIHAJ 61:636-641, 2000.

22 *Melanoma in Fire Firefighters Science Document.* IAFF Division of Occupational Health Safety
and Medicine.

23 *Chemicals Released During Burning.* Zender Environmental Health and Research Group
24 Handout, 2005.

25 *Fire Fighter Exposure to Carcinogens.* IAFF Division of Occupational Health Safety and
26 Medicine.

1 Plaintiff's expert, Kenneth Coleman, MD, testified on the basis of reasonable medical
2 probability that a proximate cause of Plaintiff's malignant melanoma was his work as a firefighter.

3 He also based his opinion on peer-reviewed literature supporting causation that contains facts
4 or data generally accepted by medical professionals dealing with the issue of causation in cancer cases
5 [ER 703].

6 ER 803(a)(18):

7 **Learned Treatises.** To the extent called to the attention of an expert witness upon cross
8 examination or relied upon by the expert witness in direct examination, statements contained
9 in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other
10 science or art, established as a reliable authority by the testimony or admission of the witness
11 or by other expert testimony or by judicial notice. If admitted, the statements may be read into
12 evidence but may not be received as exhibits.

13 The City did not make objection to Dr. Coleman's testimony in its Petition for Review and under
14 RCW 51.52.104 has waived its objections to Dr. Coleman's testimony. Nor was the admissibility of
15 Dr. Coleman's testimony addressed in the Decision and Order of the Board, in fact, all evidentiary
16 rulings were reviewed and no error found. The City's argument is specious. It is without merit.

17 The only issue addressed by the City in its Petition for Review was:

18 **I. ISSUE**

- 19 1. Whether the Industrial Appeals Judge erred in finding and concluding that
20 Mr. Spivey developed a malignant melanoma on his upper back as an
21 occupational disease within the meaning of RCW 51.32.185 and RCW
22 51.08.140.

23 The testimony of Dr. Coleman that the City has moved to exclude was offered at the board level,
24 in a board proceeding, and then subsequently included in the record filed by the board in the Superior
25 Court. He is well qualified to testify as an expert and was the most knowledgeable witness regarding
26 the peer reviewed articles that have shown a relationship between malignant melanoma and occupations
such as firefighting for many years.

As stated above, the testimony and evidence that is properly before the Superior Court on an
industrial insurance appeal is that offered before the board or included in the record filed by the board

1 in the superior court . RCW 51.52.115.

2 **II. CONCLUSION**

3 The Employer's Motion for Determination of Legal Standard on Review and Motion to Strike
4 Portions of Dr. Coleman's Testimony should BOTH be denied.

5 The Court is permitted by RCW 51.52.115 to consider testimony and evidence that was offered
6 before the Board or included in the record filed by the Board in the Superior Court. Even so, the jury
7 is the fact finder, unless the Court determines as a legal finding that the City of Bellevue failed to rebut
8 the presumption. The evidence supports that conclusion.

9 DATED: March 6th, 2015.

10 **RON MEYERS & ASSOCIATES PLLC**

11 
12 By: _____
13 Ron Meyers, WSBA No. 13169
14 Matthew Johnson, WSBA No. 27976
15 Tim Friedman, WSBA No. 37983
16 Attorneys for Plaintiff Firefighter Spivey
17
18
19
20
21
22
23
24
25
26

APPENDIX D

The Honorable Samuel Chung
Motion Hearing March 27, 2015
Trial Date May 26, 2015
RECEIVED
CITY OF BELLEVUE
LEGAL DEPT

MAR 19 2015
AM 7:59:10 PM 12:45:10

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

NO. 14-2-29233-3 SEA

DEPARTMENT'S REPLY TO CITY
OF BELLEVUE'S MOTION RE RCW
51.32.185 AND TO MOTION TO
STRIKE PORTIONS OF SPIVEY'S
BRIEF AND ITS REPLY TO
SPIVEY'S RESPONSE TO THE CITY
OF BELLEVUE'S MOTION

1. Relief requested

The Department joins in the City of Bellevue's (the City) request for judicial review of the Board of Industrial Insurance Appeals' conclusion that, as a matter of law, it had met its burden of production with respect to the RCW 51.32.185 rebuttable evidentiary presumption and that the sole issue for the trier of fact was whether Spivey's malignant melanoma arose naturally and proximately out of distinctive conditions of his employment as a firefighter and emergency medical technician, as opposed to conditions found in all employment or in non-employment.

//
//

DEPARTMENT'S REPLY TO CITY OF BELLEVUE'S
MOTION RE RCW 51.32.185 AND TO MOTION TO
STRIKE PORTIONS OF SPIVEY'S BRIEF AND ITS
REPLY TO SPIVEY'S RESPONSE TO THE CITY OF
BELLEVUE'S MOTION

COPY

1 **2. Statement of facts**

2 The statement of facts are adequately set out in the October 9, 2013 Board decision,
3 proposed decision and order as referenced in the Board decision, and in the City's motion.¹
4 Board Record (BR) at 1-2, 61-63; City of Bellevue motion at 2-4. The Department will not
5 re-recite those facts.

6 **3. Statement of the issues**

7 Is whether the City met its burden of production in rebutting the RCW 51.32.185
8 evidentiary presumption a question of law to be decided by the judge?

9 Should Spivey's references to the proposed decision and order be stricken because an
10 industrial appeals judge's decision has no standing until adopted by the full Board?
11

12 **4. Evidence relied on**

13 The evidence relied on is contained the certified appeal board record pertinent excerpts
14 of which are attached to the declaration of Chad Barnes and the City of Bellevue's motion.
15

16 **5. Authority**

17 The Department joins in the City's legal analysis at pages 8-12 of the City's motion.

- 18 a. **A prima facie presumption places a burden of production on a defendant**
19 **and the court, not the jury, determines whether the defendant's has met**
20 **its burden of production, shifting the burden of persuasion back to the**
21 **plaintiff**

22 "In the case of firefighters . . . , there shall exist a *prima facie* presumption that:
23 [certain conditions]. . . (c) cancer . . . are occupational diseases under RCW 51.08.140." This
24 legislatively-created presumption, RCW 51.32.185, relieves a firefighters from having to
25 prove that his or her condition arose "naturally and proximately" out of distinctive

26 ¹ The certified appeal board record will be cited "BR" and the large Bates stamped number.

1 employment conditions, i.e. that but for a workplace exposure the disease would not have
2 been contracted. *Raum v. City of Bellevue*, 171 Wn. App. 124, 152, 286 P.3d 695 (2012); *City*
3 *of Bremerton v. Shreeve*, 55 Wn. App. 334, 339-340, 777 P.2d 568 (1989). A rebuttable
4 presumption thus aids a worker in establishing eligibility for benefits, but it cannot circumvent
5 the facts of a given case. See, e.g., *City of Bellevue v. Kinsman*, 34 Wn. App. 786, 789, 664
6 P.2d 1253 (1983).

8 RCW 51.32.185 thus relieves a firefighter from producing evidence to support a claim
9 of occupational disease with respect to certain disease conditions, including cancer, contracted
10 by firefighters, instead providing that, for firefighters, the existence of certain conditions are
11 prima facie occupational diseases and requiring the Department, or self-insured employer, to
12 produce evidence to rebut the prima facie presumption by a preponderance of evidence. This
13 presumption involves the burden of production because the statute specifies that it is a “prima
14 facie” presumption. RCW 51.32.185. It is thus the trial judge that determines whether a
15 burden of production is met, not the jury. See *Carle v. McChord Credit Union*, 65 Wn. App.
16 93, 102, 827 P.2d 1070 (1992).

18 This type of analysis is also called a “McDonnell Douglas” analysis because it involves
19 a three-step, burden-shifting protocol articulated by the United States Supreme Court in
20 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668
21 (1973) and followed by our Supreme Court in *Hegwine v. Longview Fibre Co., Inc.*, 162
22 Wn.2d 340, 354, 172 P.2d 688 (2007). The application of this analysis is appropriate because
23 discrimination claims are statutory, and can arise out of an initial administrative decision, like
24
25
26

1 workers' compensation claims. See Chapter 49.60 RCW. See also *Hill v. BCTI Income*
2 *Fund-I*, 144 Wn.2d 175, 181, 23 P.3d 440 (2001).

3 Under this three-step process the worker's burden of making a prima occupational
4 disease claim is met courtesy of RCW 51.32.185. The rebuttable presumption takes hold and
5 the burden shifts to the employer to produce evidence of a non-work cause of the worker's
6 condition. If this "intermediate production burden" is met the *presumption* established by
7 having the prima facie evidence is rebutted and 'having fulfilled its role of forcing the
8 defendant to come forward with some response, [the presumption] simply drops out of the
9 picture.' " Cites omitted. *Id.*

11 The Board of Industrial Insurance Appeals likewise concluded, as a matter of law, that
12 the City had rebutted the RCW 51.32.185 presumption that Spivey's melanoma was an
13 occupational disease, i.e., met its burden production. BR 7. The superior court is an appellate
14 court with respect to appeals from the Board. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51
15 P.3d 793 (2002). As an appellate court. the superior court reviews issues of law de novo. See,
16 e.g., *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 352, 646 P.2d 113 (1982)
17 (issues of law responsibility of judicial branch to resolve). The Court, like the Board, must
18 determine whether the City met its burden of production. If the Court concludes, based solely
19 on the City's evidence, that the Board erred in its conclusion that the City met its burden of
20 production and rebutted the presumption, then the presumption applies and this case must be
21 remanded to the Department to allow the claim because RCW 51.32.185(3) specifically
22 enumerates cancer as an occupational disease. There would be no need to ask the jury
23 whether Spivey met his burden of persuasion. *Raum*, 171 Wn. App. at 152; *Hill v. BCTI*

1 *Income Fund-I*, 144 Wn.2d at 181 (if defendant fails to meet burden of producing admissible
2 evidence plaintiff is entitled to an order establishing right to relief as a matter of law, because
3 no issue of fact remains in the case). If the Court concludes that the occupational disease
4 presumption was rebutted Spivey may still ask a jury to overturn the Board's *findings of fact*
5 and determine that his malignant melanoma arose naturally and proximately out of distinctive
6 conditions of his City of Bellevue employment, and not as the result of sun exposure in non-
7 work activities. As the *Raum* Court held:

9 RCW 51.32.185's presumption is not conclusive and may be rebutted by a
10 "preponderance of the evidence." RCW 51.32.185(1). If the employer rebuts
11 the presumption, the burden of proof returns to the worker to show he is entitled
12 to benefits, i.e., that he suffers from an "occupational disease" as defined in
RCW 51.08.140. *If both parties present competent medical testimony, the jury
must weigh the evidence to determine whether the worker's condition "arises
naturally and proximately out of employment."* RCW 51.08.140.

13 *Raum*, 171 Wn. App. at 152 (emphasis added); *see also Hill v. BCTI Income Fund-I*, 144
14 Wn.2d at 182.

15 **b. Spivey, not the City, bears the burden of proving that the Board's finding**
16 **of fact that his cancer was not an occupational disease, by a preponderance**
17 **of evidence**

18 Under the Industrial Insurance Act workers always bear the burden of establishing
19 eligibility for benefits. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505,
20 208 P.2d 1181(1949) rev'd on other grounds. If the jury were asked to determine whether the
21 City rebutted the presumption it would impermissibly place the burden of proof on the City. In
22 an appeal to superior court the burden of proving that the Board's decision is incorrect is on the
23 appealing party, Spivey. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5,
24 977 P.2d 570 (1999).

1 Spivey impermissibly conflates the rebuttable presumption of RCW 51.32.185 with the
2 definition of occupational disease in RCW 51.08.140. Plaintiff's Response at 4. He correctly
3 states that whether Spivey's cancer arose naturally and proximately out of his employment is a
4 question of fact. Plaintiff's Response at 4-5. See Board finding of fact 12.² BR at 6. But
5 Spivey misstates the burden of proof. It is Spivey's burden to prove, by a preponderance of
6 evidence that Board finding of fact 12 is incorrect. Spivey confuses the preponderance of
7 evidence standard he has to meet as part of his burden of persuasion, with the burden of
8 production regarding the rebuttable presumption the City had to meet at the Board, which
9 decision the judge reviews here. The fact that RCW 51.32.185 allows the applicable burden
10 of production to be satisfied by a preponderance of the evidence does not transform the
11 question of whether the burden of production was met into a jury question. It merely provides
12 guidance to the trial judge as to what standard to use in determining whether the employer has
13 met the burden of production. Here the jury may consider only the Board's *findings*, not the
14 Board's conclusions of law. See also *Laschied v. City of Kennewick*, 137 Wn. App. 633, 642,
15 644, 154 P.3d 307 (2007).

18 Spivey asserts, Plaintiff's Response at 5, that on appeal to superior court he "should
19 have the benefit of the presumption." But he does have the benefit of the presumption because
20 the Court reviews de novo the Board's legal conclusion that the City properly rebutted the
21 presumption. If the Court concludes, as a matter of law, that the City *did not* rebut the
22 presumption, then Spivey's claim must be allowed. There will be no need for a jury to
23

24
25 ² Board finding of fact 12 reads: "Mr. Spivey's malignant melanoma is not a condition that arose
26 naturally and proximately out of the distinctive conditions of his employment as a firefighter with the City of
Bellevue. BR 6.

1 determine whether Spivey's cancer arose naturally and proximately out of distinctive
2 conditions of his employment as opposed to exposures coincidentally occurring in all
3 employment or in non-employment.

4 **c. A majority of Washington courts and commentators agree that a prima**
5 **facie presumption overcome by proper evidence ceases to exist**

6 *Bradley v. S.L. Savidge, Inc.*, 13 Wn. 2d 28, 123 P.2d 780, 787 (1942) provided and
7 early, and exhaustive analysis. It held that when a presumption "is overcome by proper
8 evidence it ceases to exist and cannot be further considered by the court or jury, or used by
9 counsel in argument." *Id.* at 42. In *Bradley* the trial court found as a matter of law that the
10 presumed fact (that the driver of the car was the agent of the car's owner) did not exist and
11 properly withdrew the issue from the jury when the defendant introduced competent evidence
12 that clearly rebutted the presumption—the presumption disappeared entirely from the case. *Id.*
13 at 63-64. The plaintiff, in whose favor the presumption operated, then bore the burden of
14 establishing, by a preponderance of the evidence, the presumed fact, that the driver did indeed
15 have the owner's permission to drive the car, i.e., was the owner's agent. *Id.* Although the
16 *Bradley* Court required the rebutting evidence to be "inimpeached, clear and convincing,"
17 under RCW 51.32.185 the evidence must only preponderate. Here, the trial court must
18 determine whether a preponderance of the evidence rebuts the presumed fact, i.e., that Spivey's
19 cancer is an occupational disease. If a preponderance of the evidence does so, the occupational
20 disease presumed fact ceases to exist and is properly withdrawn from the jury. The burden
21 becomes Spivey's to prove, by a preponderance of evidence, that Board finding of fact 12, is
22 incorrect. Spivey must prove that his cancer arose naturally and proximately from distinctive
23 conditions of his employment and not as the result non-employment conditions or exposures.
24
25
26

1 Of course, here, the jury is required to give a presumption of correctness to the Board's
2 findings in this regard. The jury must weigh the evidence, but, if Spivey is to prevail, the
3 evidence must preponderate in his favor. It cannot be evenly balanced. RCW 51.52.115; *Ruse*,
4 138 Wn.2d at 5. By appealing the Board's decision Spivey assumed the burden of producing
5 "sufficient, substantial, facts, as distinguished from a mere scintilla of evidence" which
6 overcome the presumption of correctness enjoyed by the Board's decision and warrant
7 reversing that decision. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038
8 (1955). Spivey must prove, by a preponderance of evidence, that Board finding of fact 12 is
9 incotrect, i.e. that his malignant melanoma *did* arise naturally and proximately out of the
10 distinctive conditions of his employment as a firefighter for the City of Bellevue. BR at 6.

12 Most Washington cases operate on the "Thayer rule" that once contrary evidence is
13 introduced the presumption disappears. 5 Karl B. Tegland, *Washington Practice: Evidence*
14 *Law and Practice* §301.14 (5th ed. data base updated 2014). The Court in *Burrier v. Mut. Life*
15 *Ins. Co. of New York*, 63 Wn.2d 266, 387 p.2d 58 (1963), cited by Spivey, readily
16 acknowledged that where, as here, the defendant had to rebut the presumption of accidental
17 death, to instruct the jury with respect to a rebuttable presumption "saddled the defendant with
18 a double burden." *Id.* At 274. The *Burrier* Court also made it clear that instructing the jury on
19 the presumption was disfavored by courts and commentators by a wide margin. *Id.* at n.1. Per
20 6 *Washington Practice* WPI 24.05 at 274 (6th ed. 2012) the *Burrier* opinion could be read to
21 say that it only applies to the presumption against suicide. *Nelson v. Schubert*, 98 Wn. App.
22 754, 994 P.2d 225 (2000), the only other case cited by Spivey, only cites to *Burrier* in a
23 footnote, and it is not known whether there was a challenge to the instruction that was given
24
25
26

1 there, regarding the presumption of death after seven years. *Id.* at 763. Neither *Burrier*, nor
2 *Nelson*, overcome the weight of authority favoring the rule that when a presumption is
3 overcome by proper evidence it ceases to exist.

4 **d. Spivey does not demonstrate a failure on the part of the City to overcome**
5 **the presumption**

6 Spivey asserts that the City was required to show that sun exposure away from work,
7 rather than sun exposure at work, proximately caused his cancer in order to rebut the
8 presumption. Plaintiff's Response at 4. Presumably, this is to show the trial court that the City
9 has not rebutted the RCW 51.32.185 presumption. Spivey's assertion, however, is incorrect.
10 Spivey's sun exposure, whether at work, or in recreation, cannot be a cause of an *occupational*
11 disease because it is not a distinctive condition of his firefighter employment but rather a sun
12 exposure which can occur in all employment and in nonemployment. RCW 51.08.140; *Potter*
13 *v. Dep't of Labor and Indus.*, 172 Wn. App. 301, 315-16, 289 P.3d 727 (2012) (no evidence
14 that exposure encountered in employment exposed worker to greater risk of contracting disease
15 than non-work environment).
16

17
18 The out-of-state cases Spivey cites are of little relevance since most states use private
19 insurance carriers to cover workers compensation and state statutes vary widely. Nor do any of
20 the cases address the issue to be decided here, whether the trial court must determine whether
21 the City rebutted the RCW 51.32.185 prima facie occupational disease presumption so that the
22 presumption "disappears" leaving the burden of Spivey, as the appealing party to prove that his
23 cancer is an occupational disease as defined by RCW 51.08.140.
24

25 To the extent that the cases are meant as authority for the proposition that the City has
26 not rebutted the RCW 51.32.185 presumption, they do not do so. *Jackson v. Workers'*

1 | *Compensation Appeals Bd.*, 35 Cal. Rptr.3d 256, 259 (2005) construes a statute providing that
2 | “injury” includes a “disputable presumption” that “heart trouble which develops or manifests
3 | itself” during specific employment is work-related. It was passed to do away with the dispute
4 | among medical experts regarding what causes “heart trouble” by requiring proof of an actual
5 | contemporaneous nonwork-related event. In *City of Frederick v Shankle*, 136 Md. App. 339,
6 | 366, 765 A.2d 1008 (2001) an expert’s testimony that he disagreed with the premise behind a
7 | presumption that heart disease was caused by stress, i.e., employment as a police officer, was
8 | ruled inadmissible but only because he did not also testify that the officer had any of the four to
9 | six risk factors for cardio-vascular disease. Spivey misstates the actual holding in *Cunningham*
10 | *v. City of Manchester Fire Department*, 129 N.H. 232, 238, 525 A.2d 714 (1987) the court also
11 | noted that the presumption could be rebutted by “producing evidence that one or more non-
12 | occupationally-related factors were more probably the cause of the plaintiff’s heart disease than
13 | his firefighter occupation.” The employers did meet the burden of rebutting the presumption
14 | in *Worden v. Houston County*, 356 N.W.2 693 (Minn. 1984) and *Cook v. City of Waynesboro*
15 | *Police Dept.*, 225 Va. 23, 300 S.E.2d 746 (1983). Lastly, *Superior v. Dep’t of Industry, Labor*
16 | *and Human Relations*, 84 Wis.2d 663, 267 N.W.2d 637 (1978) involved only the admissibility
17 | of a pre-employment physical to demonstrate that a deceased fireman had no preexisting heart
18 | disease and thus qualified for the presumption of occupational disease.
19 |
20 |

21 |
22 | Without citation to the record Spivey asserts that the City’s expert testimony “simply
23 | challenges the premise of the presumption.” Plaintiff’s Response at 15. This may be an
24 | attempt to make these out-of-state cases applicable, but there is no support for it in the record
25 | as the expert witnesses testified that Spivey’s sun exposure is the cause of his malignant
26 |

1 melanoma. Alternatively it might be an argument that the RCW 51.32.185 presumption is a
2 conclusive one, which is clearly not the case. It is a rebuttable one.

3 e. **RCW 51.32.185 is clear on its face and need not be “liberally construed”**

4 Spivey’s “liberal construction” argument is not clear. There is no issue of statutory
5 interpretation here. It is “fundamental” that the doctrine of liberal construction does not apply
6 when the intent of the legislature is clear from the plain reading of the statute. *Elliot v. Dep’t*
7 *of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009), citing *Johnson v. Dep’t of*
8 *Labor and Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949). *See also Harris v. Dep’t of Labor*
9 *& Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (rejecting a request for liberal
10 construction of RCW 51.32.225 because the statute is unambiguous) and *Lowry v. Dep’t of*
11 *Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (declining to apply the liberal
12 construction doctrine in a workers’ compensation case where the statute is unambiguous, “the
13 so-called construction would in fact be legislation”). It would be error for the Court to
14 consider legislative intent. Spivey seems to argue that the RCW 51.32.185 presumption is a
15 conclusive one. On its face, however, RCW 51.32.185 is not conclusive, but rebuttable.
16
17

18 Contrary to Spivey’s argument, Plaintiff’s Response at 10, once rebutted the “mandated
19 causal connection” disappears and Spivey *does have to prove causation* – that per RCW
20 51.08.140 his cancer arose naturally and proximately out of distinctive conditions of
21 employment. Here, the Board determined that the City’s medical testimony was more
22 persuasive than Spivey’s medical testimony. It will be up to a jury to determine if Spivey’s
23 proof preponderates over that of the City’s, unless the Court determines that the City failed to
24
25
26

1 rebut the presumption that Spivey's cancer was an occupational disease – in which
2 circumstance the jury will not hear either party's testimony.

3 Spivey cites to *Dennis v. Dep't of Labor and Indus.*, 109 Wn.2d 467, 470-71, 745 P.2d
4 1295 (1987) in support of his liberal construction argument. But *Dennis* merely concluded that
5 the occupational disease proximate cause requirement was no different than the industrial
6 injury proximate cause requirement – proximate cause could be satisfied if a pre-existing
7 condition was made worse by a work exposure just as it could a work injury. Spivey's citation
8 to *Boeing Co. v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002) is also in apropos. The
9 Supreme Court in *Heidy* rejected Boeing's expert testimony explanation for rating hearing loss
10 resolving "doubts" about its "uncertain science" in favor of the worker. There are no doubts
11 about "uncertain science" unless one accepts Spivey's contention that any firefighter with
12 cancer automatically has an occupational disease. But that flies in the face of the clear
13 language of the statute which makes such a conclusion rebuttable, and not subject to "liberal
14 interpretation."
15

16
17 **f. It is error to refer to a proposed decision and order**

18 Finally, Spivey's reference to the proposed decision and order is error and should be
19 stricken and an order in limine entered that no party may refer to the proposed decision and
20 order. An industrial appeals judge's rejected decision is not the Board's decision. Only the
21 Board's decision is at issue. *Stratton v. Dep't of Labor and Indus.*, 1 Wn. App. 77, 79, 459
22 P.2d 651(1969). The industrial appeals judge's rejected proposal has no standing. *Id.* An
23 industrial appeals judge is merely an employee of the Board. Pursuant to RCW 51.52.104, his
24
25
26

1 or her proposed decisions and orders are not the decisions and orders of the Board. They do
2 not acquire that dignity until the Board formally adopts them. *Id.*

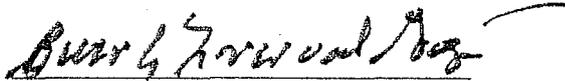
3 **6. Conclusion**

4 The trial court must determine whether the Board's conclusion of law, that the City
5 properly rebutted the RCW 51.32.185 prima facie presumption, is correct. If the Board's
6 conclusion of law is correct, then Spivey bears the burden of persuading the jury that his cancer
7 meets the RCW 51.08.140 definition of occupational disease. If the Board's conclusion of law
8 is not correct then the court must remand Spivey's claim to the Department and order the
9 Department to allow it. The Department will present a separate proposed order.
10

11 The court should also enter an order in limine striking all references to the proposed
12 decision and order, and directing the parties not to refer to it. A proposed order in limine
13 accompanies the Department's response.
14

15 DATED this 16~~th~~ day of March, 2015.

16 Robert W. Ferguson
17 Attorney General

18 
19 Beverly Norwood Goetz WSBA #8434
20 Senior Counsel

APPENDIX E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I N D E X

IN RE: DELMIS P. SPIVEY
CLAIM NO. SG-05442

DOCKET NO. 1318842
Seattle, Washington
April 2, 2014

T E S T I M O N Y

Page No.

WILFRED LARSON	
Direct Examination (Clmt.)	62
Judge Examination	67
Direct Examination Continued (Clmt.)	69
Cross-Examination (Empl.)	76
Redirect Examination (Clmt.)	80
WILLIAM SANTANGELO	
Direct Examination (Clmt.)	83
Judge Examination	88
Direct Examination Continued (Clmt.)	89
Cross-Examination (Empl.)	97
Redirect Examination (Clmt.)	98
BLANE SINGLETON	
Direct Examination (Clmt.)	101
Cross-Examination (Empl.)	109
Redirect Examination (Clmt.)	114
DOUG HALBERT	
Direct Examination (Clmt.)	119
VALERIE SPIVEY	
Direct Examination (Clmt.)	129
(DELMIS P. SPIVEY)	
Direct Examination (Clmt.)	133
Cross-Examination (Empl.)	152
Redirect Examination (Clmt.)	170/183
Recross Examination (Empl.)	184

E X H I B I T S

	ID	AD	REJ
No.1 Risk Factors for the Development	6		11

1 think it smacks of racial profiling.

2 JUDGE SWANSON: I am going to overrule the objection, and note
3 that, Mr. Barnes, I am assuming it will get linked up in some
4 way or another?

5 MR. BARNES: It will. It has been through the testimony of our
6 IME doctor, Dr. Hackett, which he's already had his
7 perpetuation deposition taken. Additionally Dr. Leonhardt
8 had provided the article -- talked about the article, and
9 then the doctors that will be testifying tomorrow.

10 JUDGE SWANSON: Okay. Go ahead.

11 Q. (By Mr. Barnes) So would you agree that your ethnic background
12 is predominately English, a little bit of Dutch?

13 MR. MEYERS: Objection; continuing objection. We could be here
14 all night. I want that objection made with respect to every
15 one of the questions that go to ethnic or background or
16 genetics or anything like that. There could be more than one
17 proximate cause to an industrial injury or occupational
18 disease. And pointing out one of them doesn't eliminate the
19 other. It also goes back to this issue of racial profiling.

20 JUDGE SWANSON: Okay. Go ahead, Counsel.

21 MR. BARNES: We are certainly not racial profiling Mr. Spivey.
22 Even the article that Your Honor has there as Exhibit No. 1
23 talks about the different risk factors in patients with
24 melanoma. That's what I am going to draw out. That's what
25 these questions are designed to draw out, the different risk
26 factors for the development of melanoma, recognized risk

1 factors.

2 JUDGE SWANSON: Okay. As I indicated earlier, I will be reviewing
3 the testimony to make sure there's kind of linked up. At
4 this point I am going to overrule the objection and you may
5 continue with your question.

6 MR. MEYERS: May I have the continuing objection so we can get
7 done today, Your Honor?

8 JUDGE SWANSON: Yes.

9 A. As I understand it, I am of mixed ethnicity. My family has told
10 me that English and Dutch was part of that. But also that's
11 southeast Native American could be possibly be part of that. So
12 Europe and -- but of yeah, mixed.

13 Q. (By Mr. Barnes) Would you agree that you do have freckles over
14 your body?

15 MR. MEYERS: Objection; relevance, foundation.

16 JUDGE SWANSON: And this will get linked up.

17 MR. BARNES: This also goes to freckles are one of the recognized
18 risk factors for the development of melanoma through UV sun
19 exposure.

20 JUDGE SWANSON: I will overrule. You may answer.

21 A. Yeah, I do have them.

22 Q. (By Mr. Barnes) Would you agree that you have over 25 plus moles
23 over your body?

24 MR. MEYERS: Objection; foundation, speculation, medical
25 testimony.

26 JUDGE SWANSON: Okay. I will overrule at this point.

1 A. I am not sure.

2 Q. (By Mr. Barnes) Do you remember answering interrogatories in this
3 case?

4 A. I remember sitting for a long time answering questions during the
5 interrogatories.

6 Q. Interrogator No. 8 I am going to read to you and make sure that I
7 read correctly. The City asked you, "Do you have any of the
8 follow characteristics?" This is Interrogatory No. 8(G). "Have
9 more then 25 moles?" And your answer here for G was, "Yes." Did
10 I read the question or the interrogatory No. 8 and your response
11 correctly there, Mr. Spivey?

12 A. I guess I did answer it that way.

13 MR. MEYERS: I would cite the rule of completeness and ask that
14 every response and every question in Interrogatory No. 8 be
15 made part of the record at this time.

16 JUDGE SWANSON: I am going to deny that request.

17 MR. MEYERS: And I am going to ask to put in colloquy at this
18 time.

19 MR. BARNES: I would -- Mr. Meyers is welcome to do that on
20 cross-examination. But I will go forward with my
21 questioning, unless Your Honor needs to make it at this
22 point. If we would like to cross examine that on that point,
23 he is more than welcome to.

24 JUDGE SWANSON: Okay. Good point. If you want to cross examine
25 on all of that information, then you may.

26 Q. (By Mr. Barnes) Now, like most kids, you would agree that you had

1 at least a few sunburns as a kid?

2 A. I was exposed to the sun as a kid, yes.

3 Q. And that would include getting occasionally sunburned?

4 A. Yes.

5 MR. MEYERS: Objection; speculation.

6 JUDGE SWANSON: Overruled.

7 MR. MEYERS: Interrogatory No. 10 cites otherwise.

8 JUDGE SWANSON: Overruled.

9 MR. BARNES: Thank you, Your Honor.

~~10 Q. (By Mr. Barnes) And those occasions you would get a sunburn-you
11 probably sprayed it with something like a Solarcaine?~~

~~12 MR. MEYERS: Objection; assumes facts not in evidence.~~

~~13 JUDGE SWANSON: I will sustain.~~

14 Q. (By Mr. Barnes) There were occasions that you received a sunburn
15 as a child and it was severe enough that you wanted to use a
16 product like Solarcaine; is that correct?

17 MR. MEYERS: Objection; foundation, speculation.

18 JUDGE SWANSON: Overruled.

19 A. As a kid, I don't recall. I know that I, you know --

20 MR. BARNES: Your Honor, I have the sealed deposition transcript
21 of Del Spivey, the discovery deposition, that was taken on
22 December 13, 2013. At this time I would move to submit the
23 deposition so it may be used for impeachment purposes.

24 MR. MEYERS: No objection. In the rule of completeness I will be
25 offering the rest of that deposition.

26 JUDGE SWANSON: Okay. Granted.

1 Q. (By Mr. Barnes) I am going to unseal your discovery deposition
2 that was taken on December 13, 2013, Mr. Spivey. At that point do
3 you recall having your deposition taken on that day?

4 A. Yes.

5 Q. And you were asked a question -- I am going to read the question
6 and then I am going to ask you to verify that I read the question
7 and your response correctly. It appears at Page 77 at your
8 deposition transcript. You were asked, Question: "Do you recall
9 ever receiving a sunburn where you needed to apply some sort of
10 after-burn medication, over-the-counter or otherwise?" Your
11 answer was, "I probably had like a Solarcaine or something spray
12 on it." Did I read it as it appears at Page 77 line 19 through
13 line 23 correctly?

14 MR. MEYERS: Objection; speculation, move to strike.

15 JUDGE SWANSON: Overruled.

16 A. You read it correctly.

17 Q. (By Mr. Barnes) And there were also times that you would apply
18 something like an aloe product because you dry out in the sun; is
19 that correct?

20 MR. MEYERS: Objection; relevance.

21 JUDGE SWANSON: Overruled.

22 A. I probably did that also.

23 ~~Q. (By Mr. Barnes) Believe it or not we have been going for a while .~~
24 ~~and I don't think anybody has ever asked you where is your~~
25 ~~melanoma at, Mr. Spivey, or where was your melanoma?~~

26 ~~MR. MEYERS: Objection; form of the question, move to strike,~~

1 time, four days off in a row, where you can pursue your regular
2 recreational hobbies, agreed?

3 A. Yes.

4 Q. I understand one of things that you like to do is you are a coach
5 for Bothell High School football; is that right?

6 A. Correct.

7 Q. You have been doing that since 2005?

8 A. Sounds about right.

9 Q. And before -- even before that you also coached JV football for
10 Bothell; is that --

11 A. No.

12 Q. Oh, I am sorry. Who did you coach before 2005?

13 A. The Bothell Junior football, which is little guys.

14 Q. Sorry. I misspoke. I understand that your role with the Bothell
15 High School football team that you have done that ever since 2005
16 up to the present time; is that correct?

17 A. Correct.

18 Q. And predominately you have been the offensive line coach?

19 A. One of the offensive line coaches.

20 Q. And that means you would attend the football practices with the
21 kids?

22 A. Yes.

23 Q. You would be outdoors with the kids?

24 A. Yes.

25 Q. And generally your practice schedule starts in roughly the end of
26 May or beginning of June for spring practices?

1 A. Yes.

2 Q. And you are going to spend roughly between two and a half to three
3 hours outdoors for each one of those practices during spring ball?

4 A. Yes.

5 Q. Roughly there's been about 15 practices during spring ball?

6 A. Yes.

7 Q. After spring ball, I understand there's a summer ball camp that
8 happens in late June or early July, just depends upon the year?

9 A. Correct.

10 Q. You are going to participate in that summer ball camp?

11 A. Generally I have.

12 Q. That's generally about a three-day camp, four to five hours a day?

13 A. Yes.

14 Q. These are football drills outside?

15 A. Yes.

16 Q. Then after the summer camp, you start into your regular football
17 practices. They start in mid August?

18 A. Correct.

19 Q. Generally you start with two a day, you have morning practice and
20 then afternoon practice?

21 A. Yes.

22 Q. Those are also going to run two and a half to three hours at a
23 time?

24 A. Because of two days we run it a little bit lighter, but yes.

25 Q. Kids get tuckered out?

26 A. (Nods head).

1 MR. MEYERS: Objection; relevance.
2 JUDGE SWANSON: Was that a yes?
3 A. Yes.
4 JUDGE SWANSON: I will overrule.
5 Q. (By Mr. Barnes) Then you are going to go into a regular practice
6 session, which during the year you are going to spend two and a
7 half hours a day on a practice day with the kids where you are
8 outside running drills?
9 A. Yes.
10 Q. And aside from the time that you spend outside helping out with
11 youth football, either the earlier kids or now Bothell High
12 School, I understand you are also an avid hunter?
13 A. Yes.
14 Q. Have been out at least each of the last ten years hunting?
15 A. Yes.
16 Q. You like to go out for modern rifle, you go out for deer?
17 A. Yes.
18 Q. You also go out for elk?
19 A. Yes.
20 Q. You are going to do that generally sometimes west of the Cascades,
21 you like to the Packwood area for different game at times?
22 A. I have --
23 MR. MEYERS: Objection; relevance.
24 JUDGE SWANSON: Okay. I am going to overrule.
25 A. I have hunted in the Packwood area.
26 Q. (By Mr. Barnes) You also hunt east of Cascade as well around the

1 Naches area?

2 A. Correct.

3 Q. You also go out to around Cle Elum?

4 A. Correct.

5 Q. Obviously, this is all an outdoor activity?

6 A. Yes.

7 Q. You also spend a fair amount of time fishing, more if you can do

8 it, less if you can't?

9 A. I have spent time fishing. I don't -- I probably get out once or

10 twice a year now.

11 Q. I understand you like salmon, Steelhead and trout fishing?

12 A. Yes.

13 Q. And each, I guess, one of those three times or three different

14 types, if you will, you try to get out at least once, maybe twice,

15 just depending upon scheduling, correct?

16 A. Yes.

17 Q. I understand you also took up bike riding kind of later in life?

18 A. Yes.

19 Q. And that was a combination both for exercise and for a while it

20 was part of your daily commute?

21 A. Yes.

22 Q. And you ride roughly an hour and a half three days a week as part

23 of your commute?

24 A. Sure.

25 Q. And you were doing that back in roughly the 2012 time frame before

26 your diagnosis?

1 Q. If you reach a -- what has been coded as an active fire and
2 there's evidence of actual combustion, smoke, what have you, heat
3 sources, at that point you are then required, if you are going to
4 encounter those substances, to wear your SCBA?

5 A. Yes.

6 ~~Q. If you think back through your career at the City of Bellevue,
7 Mr. Spivey, you cannot come up with any instance where you were
8 exposed to toxic fumes or substances in the course of fighting a
9 fire and you were not wearing your SCBA, correct?~~

10 MR. MEYERS: Objection; foundation, mischaracterizes prior
11 testimony regarding overhaul.

12 JUDGE SWANSON: I will sustain.

13 Q. (By Mr. Barnes) In the course of your career at the City of
14 Bellevue, can you think of any incident where you were exposed to
15 toxic fumes or substances and you were not wearing your SCBA?

16 A. Sure, outdoors.

17 Q. You were actually asked this question during your deposition; do
18 you recall that?

19 A. I remember something similar to that and --

20 Q. I am going to read to you the question that you were asked on
21 December 12th during your deposition. It appears at Page No. 68.
22 I will ask you if I read that question and your response.

23 MR. BARNES: For the record there is an objection here by
24 Mr. Meyers for form as well.

25 Q. (By Mr. Barnes) Page 68 appearing at line No. 19 by myself,
26 "Thinking back through your career at the City of Bellevue, can

1 you think of any incident where you were exposed to toxic fumes or
2 substances in the course of fighting a fire and you were not
3 wearing your SCBA?" Mr. Meyers then objects to form. And the
4 question was -- Answer: "Nothing comes to mind." Did I read
5 actually what appears at page 68 between lines No. 19 and 25?

6 A. Yes.

7 Q. Similarly, you have never responded to a fire, since working for
8 the City of Bellevue, where you were not wearing your personal
9 protective gear; isn't that right?

10 MR. MEYERS: Objection; form, time, what portion of response?

11 JUDGE SWANSON: I will overrule.

12 A. When I am wearing my PPE when I go to do the job.

13 Q. (By Mr. Barnes) My question was, you have never responded to a
14 fire since working for the City of Bellevue where you were not
15 wearing your personal protective gear; is that correct?

16 A. I guess I would need -- I want more specifics.

17 Q. I am going to ask you again on your deposition of December 13,
18 2013, appearing at page 70, I am going to read to you the question
19 and your response as it appears here at page No. 17 beginning
20 No. 7 through line 10. Question by myself, "Have you ever
21 responded to a fire, since working for the City of Bellevue, where
22 you were not working your personal protective gear?" And the
23 answer as it appears here is "no;" is that correct?

24 A. Yes.

25 Q. The City of Bellevue has a special unit that will respond to
26 hazards materials incidents; is that right?

APPENDIX F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re: DELMIS SPIVEY)
Claim No. SG-05442) Docket No. 13 18842

PRESERVATION DEPOSITION OF KENNETH COLEMAN, M.D.
MONDAY, MARCH 10, 2014

APPEARANCES

For the Claimant: RON MEYERS
RON MEYERS & ASSOCIATES
8765 Tallon Lane Northeast, Suite A
Lacey, Washington 98516

For the Employer: CHAD BARNES
BELLEVUE CITY ATTORNEY'S OFFICE
450 110th Avenue Northeast
Bellevue, Washington 98004

Also present: MINDY LEACH, Litigation Paralegal, RON
MEYERS & ASSOCIATES

Reported by: Dianne Wilson, RPR, CCR
License No. 2198

1 worked some of the same shifts, responded to some of the
2 same fires, responded to some of the same exposures.
3 Would that have additional influence in formulating your
4 opinion on causation regarding malignant melanoma and
5 occupation as a professional firefighter for the City of
6 Bellevue Fire Department for Del Spivey?

7 MR. BARNES: Objection; foundation, incomplete
8 hypothetical, beyond the scope of this witness.

9 A Well, frankly, the literature is what it is in relation
10 to any individual firefighter. When you have more than
11 one firefighter in the same environment with the same
12 diagnosis of malignant melanoma, then it certainly does
13 not -- then it certainly supports, as opposed to
14 negating, any potential cause for the malignant melanoma.

15 Q (By Mr. Meyers) Do those facts that I have asked you to
16 assume in the hypotheticals regarding the other City of
17 Bellevue firefighters have any tendency to make the
18 existence of this causation more probable than it would
19 be without that additional evidence?

20 MR. BARNES: Objection; foundation, relevance,
21 incomplete hypothetical, lack of personal knowledge,
22 beyond the scope of the witness.

23 A The existence of other malignant melanoma in persons
24 exposed to the same environment would be an additional
25 supportive factor in tending to make the causation -- as

1 a causation here more -- It would tend to be supportive
2 of the -- what I've already said the literature says in
3 terms of the firefighting exposure being a cause of -- or
4 associated as a factor in the causation of malignant
5 melanoma.

6 MR. MEYERS: Dr. Coleman, I don't have anything
7 further at this time. I may have additional questions
8 after cross-examination. Thank you.

9 MR. BARNES: Good morning, Dr. Coleman. Again,
10 my name is Chad Barnes. I represent the City of Bellevue
11 in this case.

12 If you can't hear me, ask me to keep my voice up.
13 I'm going to practice asking questions from this
14 distance.

15 CROSS-EXAMINATION

16 BY MR. BARNES:

17 Q I understand that you have your own legal practice. Is
18 that correct, Doctor?

19 A That's correct.

20 Q Okay. And predominantly you handle medical malpractice
21 cases in your legal practice?

22 A That is correct.

23 Q And that legal practice is in Spokane, correct?

24 A Correct.

25 Q In addition to that legal practice, you also keep up with

1 at least some medical practice; is that right, Doctor?

2 A That's correct.

3 Q And I understand you do that through -- is it Dayton
4 Hospital?

5 A Actually I'm on the staff of Dayton, but I'm not going
6 there currently because they haven't had a need. They
7 filled their vacancies, so to speak, with full-time
8 people.

9 Q Okay.

10 A So I was going there as a sub. I'm still on staff there,
11 could get called, but primarily I go to Ritzville now.

12 Q And in Ritzville you testified that there's a clinic
13 location that you go to there; is that correct?

14 A That's correct. I do primarily the ER coverage there and
15 I do some clinic coverage.

16 Q Is it fair to say you don't have your own patient base or
17 your own patient load? You are not a family physician
18 for anybody; is that correct?

19 A That is correct.

20 Q In other words, you would fill in as there's a need in
21 the ER department?

22 A And in the clinic.

23 Q Okay. So in other words, if another family practice --
24 excuse me -- family physician needed somebody to cover a
25 shift for them or to examine a patient, you could do that

1 accurate so far?

2 A That his occupation was a cause.

3 Q Correct. And that's because in those articles that you
4 researched and reviewed, the articles talked about the
5 occupation as a whole -- firefighting, that is -- has
6 experienced an increase in certain types of cancers, one
7 of those being malignant melanoma in some studies. Is
8 that accurate, Doctor?

9 A Yes.

10 MR. MEYERS: Objection. It mischaracterize the
11 exhibits in total, move to strike.

12 A But I think that I said when you take the literature in
13 total that there is an association with a variety of
14 cancers, as you said, not just malignant melanoma.

15 Q (By Mr. Barnes) Okay.

16 A That is the basis for my opinion that in this situation
17 with Mr. Spivey with his malignant melanoma that a cause,
18 a contributing factor, to his malignant melanoma has to
19 be his exposure as a fireman.

20 Q So in other words, Doctor, firefighters as an occupation
21 have experienced, for whatever reason, known or unknown,
22 an increase in certain types of cancers, one of those
23 being malignant melanoma; is that correct?

24 A That's correct.

25 Q And because Mr. Spivey is a firefighter, you are drawing

1 the correlation that he therefore developed malignant
2 melanoma as an occupational exposure; is that right?

3 MR. MEYERS: Objection to form.

4 A It was a cause, but we have no way to know all of the
5 causes that are related to his malignant melanoma. We
6 never will know. But we know that he was -- that a cause
7 must be his exposure, based upon the literature.

8 Q (By Mr. Barnes) So in other words, firefighting can have
9 an increased cause of certain cancers and because
10 Mr. Spivey is firefighter therefore you would say his
11 firefighting was a cause of his melanoma?

12 A That is correct.

13 Q In the literature that you reviewed, Doctor, does the
14 literature ever differentiate between firefighters who
15 perform medical calls versus firefighters who are
16 assigned to, say, an engine company or actively fighting
17 fires?

18 MR. MEYERS: Objection to form.

19 A I did not see a differentiation.

20 Q (By Mr. Barnes) Does the literature that you reviewed
21 attempt to quantify for any particular firefighter or
22 individual an environmental exposure by job duty?

23 A I did not see that differentiation.

24 Q Does the literature attempt to quantify any environmental
25 exposure by the type of fire a firefighter is likely to

APPENDIX G

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In re:)
 DELMIS SPIVEY)
)
) Docket Number 13 18842
)
 Claim No. SG-05442)

DEPOSITION UPON ORAL EXAMINATION OF

JANIE LEONHARDT, M.D.

3:04 P.M.

MARCH 28, 2014

222 - 112th AVENUE NE

BELLEVUE, WASHINGTON



REPORTED BY: SALLY J. HANDS, CCR No. 2191



YAMAGUCHI OBIEN MANGIO
 court reporting, video and videoconferencing
 800.831.6973 206.622.6875
 production@yomreporting.com
 www.yomreporting.com

1 findings regarded to lentigos -- did I pronounce that
2 correctly, Doctor?

3 A. Yes.

4 Q. First, what is a lentigo?

5 A. It is a spot where there is increased pigment
6 production.

7 Q. What is the recognized cause for the
8 development of a lentigo?

9 MR. MEYERS: Objection. Relevance.

10 A. Chronic sun exposure. Ultraviolet radiation
11 exposure.

12 Q. (BY MR. BARNES) Is there a more common, or
13 layman's term, for lentigo, Doctor?

14 A. Sun freckle.

15 Q. You also noted during the exam -- well, first,
16 where did you note on Mr. Spivey that there were
17 lentigos located?

18 A. Head, neck, trunk, and upper extremities.

19 Q. And did you make any notation as to the amount
20 of lentigos that you found, Doctor?

21 A. Yes.

22 Q. What was that?

23 A. Many.

24 MR. MEYERS: Objection. Foundation.

25 Vague. Move to strike.



1 Q. (BY MR. BARNES) As part of the physical exam,
2 did you make any notations regarding any moles or nevi
3 on Mr. Spivey?

4 A. Yes.

5 Q. And what was -- what were your findings there?

6 A. Scattered nevi in fairly uniform size, color,
7 and shape.

8 (Reporter interruption for clarification.)

9 THE WITNESS: In fairly uniform size,
10 color, and shape.

11 Q. (BY MR. BARNES) Doctor, are lentigos thought
12 to be an indication of cumulative sun exposure over the
13 course of a person's life?

14 A. Yes.

15 MR. MEYERS: Objection. Improper
16 foundation. Improper question to the medical
17 professional. Move to strike.

18 (Reporter interruption for clarification.)

19 MR. MEYERS: Improper question to the
20 medical expert or doctor. Foundation.

21 Q. (BY MR. BARNES) I'll rephrase the question.
22 Doctor, in the course of your training as a
23 dermatologist, do you have an understanding as to what
24 the common cause of a lentigo is?

25 MR. MEYERS: Objection. Foundation.



1 A. As stated in my physical examination, many
2 lentigines over the head, neck, trunk, and extremities.

3 Q. And lentigines, as a general proposition,
4 are -- excuse me -- are lentigines, lentigos, as a
5 general proposition, suggestive of UV damaged skin,
6 Doctor?

7 MR. MEYERS: Objection. Leading.
8 Objection; foundation.

9 A. They are thought to be caused by ultraviolet
10 radiation.

11 Q. (BY MR. BARNES) So, Doctor, can you make any
12 assumption that if you see a lentigo on a patient, does
13 that give you any information regarding their chronic
14 sun exposure over the course of their life?

15 MR. MEYERS: Objection. Foundation.
16 Speculation.

17 A. Lentigos are thought to be caused by
18 ultraviolet radiation.

19 Q. (BY MR. BARNES) So if you see lentigos on a
20 patient's upper back, for instance, would the thought
21 be that that patient, over the course of their life,
22 has had some chronic sun exposure?

23 MR. MEYERS: Objection. Foundation.
24 Speculation. Attorney testimony, and leading.

25 A. Lentigos are thought to be caused by chronic



1 ultraviolet radiation.

2 Q. (BY MR. BARNES) Doctor, do you have an
3 opinion as to what caused Mr. Spivey's lentigos that
4 you observed on his upper central back?

5 MR. MEYERS: Objection. Relevance.

6 A. Lentigos are thought to be caused by
7 ultraviolet radiation.

8 MR. MEYERS: Objection to the form of
9 the question. It doesn't meet the requirement for
10 medical testimony.

11 (Reporter interruption for clarification.)

12 MR. MEYERS: It doesn't meet the
13 requirement for medical testimony.

14 Q. (BY MR. BARNES) Doctor, at times, I'm going
15 to ask you for an opinion during today's deposition, as
16 I just did. When I ask you to express an opinion, I
17 would like you to express the opinion on what's called
18 a more-probable-than-not basis. Do you understand
19 testifying on that basis, Doctor? What that means, in
20 other words?

21 A. I believe so.

22 Q. Okay. Just to make sure we're on the same
23 page, Doctor. It means you are testifying upon a
24 more-probable-than-not basis or the proposition is more
25 likely than not. Understood, Doctor?



1 MR. MEYERS: Objection. Foundation --

2 A. There are two --

3 MR. MEYERS: -- medical testimony of a
4 nontestifying doctor.

5 A. Do you mean --

6 MR. MEYERS: Move to strike.

7 Q. (BY MR. BARNES) Sure. That's a good point,
8 Doctor. I was actually referring to the pathology that
9 was taken for the biopsy that was done on December 22,
10 2011. It appears at the bottom of Exhibit Number 4 and
11 on the second page of Exhibit Number 4.

12 A. I quote the microscopic description section:
13 Demonstrate a shave biopsy of the sun-damaged skin with
14 an atypical proliferation of melanocytes at the
15 dermal-epidermal junction.

16 MR. MEYERS: Objection. Medical
17 testimony. Double hearsay. It is the opinion of a
18 nontestifying expert. Move to strike.

19 Q. (BY MR. BARNES) The characterization of a
20 biopsy as -- of sun-damaged skin, is that consistent
21 with your observations when you took the biopsy,
22 Doctor?

23 MR. MEYERS: Objection. Foundation.
24 Speculation.

25 A. The -- in my physical exam there were many



1 lentigines over the head, neck, trunk, and extremities.

2 Q. (BY MR. BARNES) Including the lentigine [sic]
3 that you biopsied that was discussed here in the
4 pathology report, Doctor?

5 A. Including the area of biopsy.

6 Q. I'm going to hand you what will be marked
7 Exhibit Number 5, Doctor.

8 (Deposition Exhibit 5 was marked
9 for identification.)

10 Q. (BY MR. BARNES) Do you recognize Exhibit
11 Number 5, Doctor?

12 A. Yes, I do.

13 Q. What is it?

14 A. It is a dictation I dictated from patient
15 visit Delmis Spivey, visit date 9/21/2012.

16 Q. And was this dictation made in the regular
17 course of your practice?

18 A. Yes.

19 MR. BARNES: Move to admit Exhibit
20 Number 5.

21 MR. MEYERS: Objection, based on
22 foundation, relevance, hearsay, double hearsay.

23 Thank you.

24 Q. (BY MR. BARNES) When you saw Mr. Spivey back
25 on September 21st, 2012, this would have been after his



1 matters. Again, I want you to express those opinions
2 on a more-probable-than-not basis, Doctor. Do you
3 understand what I'm asking you there?

4 A. I believe so.

5 Q. Do you have an opinion whether Mr. Spivey's
6 potentially being exposed to smoke as a firefighter was
7 the cause of his melanoma, Doctor?

8 MR. MEYERS: Objection. Foundation.

9 A. I do not.

10 Q. (BY MR. BARNES) Are you aware of any
11 scientific evidence that would suggest the inhalation
12 of smoke can lead to the development of cutaneous
13 melanoma, Doctor?

14 A. I am not.

15 Q. Okay. Are you aware of any scientific or
16 medical evidence that would suggest the exposure to
17 toxic substances may develop into cutaneous melanoma?

18 A. It is not listed on the risk factors for
19 development of primary cutaneous melanoma.

20 Q. Are you aware of any scientific literature or
21 medical evidence that would suggest the presence of
22 soot, ash, or the other residuals of fire on a person's
23 skin may lead to the development of cutaneous melanoma?

24 A. It is not listed in the risk factors for the
25 development of primary cutaneous melanoma.



1 literature.

2 A. What I can say is that medical literature
3 supports the relationship between ultraviolet radiation
4 exposure and the development of melanoma.

5 Q. (BY MR. BARNES) Why did you include that last
6 sentence in your February 11th, 2013, letter, Doctor?

7 A. I can't remember.

8 MR. MEYERS: Foundation. Move to
9 strike.

10 Q. (BY MR. BARNES) Doctor, on a
11 more-probable-than-not basis, did Del Spivey's
12 occupation as firefighter have any role in his
13 development of melanoma?

14 MR. MEYERS: Objection. Foundation.

15 A. I don't feel I know enough about Mr. Spivey's
16 job or occupation to answer that question.

17 MR. BARNES: Okay. Thank you, Doctor.
18 That's all I have.

19 CROSS EXAMINATION

20 BY MR. MEYERS:

21 Q. Doctor, thank you for your patience so far.
22 I'd like you to take a look at Exhibit Number 3, which
23 was one of the two chart notes that you created before
24 the malignant melanoma was surgically treated. The
25 chart note of 12/22/2011. Do you have that?



APPENDIX H

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I N D E X

IN RE: DELMIS P. SPIVEY DOCKET NO. 13 18842
CLAIM NO. SG-05442 Seattle, Washington
April 3, 2014

T E S T I M O N Y

Page No.

NOEL WEISS, MD	
Direct Examination (Employer)	14
Cross Examination (Claimant)	41
Redirect Examination (Employer)	82
Recross Examination (Claimant)	86
ANDY CHIEN, MD	
Direct Examination (Employer)	88
Cross Examination (Claimant)	121
Redirect Examination (Employer)	149
Recross Examination (Claimant)	156

E X H I B I T S

ID AD REJ

No. 2 (Claimant's First Interrogatories & Request for Production)	3	156
Nos. 3-21 (Exhibit Nos. 1-19 are renumbered)	5	156

1 that body of literature on firefighters and the development of
2 certain cancers?

3 A. Well, there I'm not quite sure what your question is.

4 For an individual cancer, you know, there could be up to
5 several dozen studies. In some instances across the studies
6 there's a close -- there's a fair degree of consistency in the
7 findings. Others there's some wobble and some variability. It
8 depends on the cancer.

9 Q. Let me ask you it ask this way just to make sure we're on the
10 same page then, Doctor. Based upon your review of studies
11 dating back two decades to the present time, do you have an
12 expert medical opinion on a more-probable-than-not basis as
13 whether the results of any of those studies indicate that a
14 firefighter is at an increased risk of developing certain types
15 of cancer?

16 MR. MEYERS: Objection, foundation, speculation.

17 JUDGE SWANSON: Overruled.

18 A. At the present time I believe that it would not be correct to
19 infer that firefighting has the ability to increase the risk of
20 any form of malignancy.

21 Q. (BY MR. BARNES) Why do you hold that opinion, Doctor?

22 A. It's because I have examined the data from these several dozen
23 studies and feel that even though there are some suggestions of
24 associations, that for a variety of reasons, mostly they lack
25 consistency in the lack of strength of associations, that the
26 data falls short of what's needed for me to make an inference

1 A. I did mention age, but beyond that, it's the other things I
2 referred to -- hair color, skin tone. You mentioned the
3 presence of these moles. That would be another one. Sun
4 exposure is likely another factor. Tanning, tanning salons and
5 tanning beds would be another risk factor.

6 Q. Doctor, bear with me for just a second.

7 Are you aware of any studies that would indicate that the
8 inhalation of a substance can lead to the development of
9 melanoma?

10 A. I'm not aware of any.

11 Q. Are you aware of any studies that would indicate that the
12 inhalation of, say, diesel fumes can lead to the development of
13 melanoma?

14 A. I have reviewed studies on that question.

15 Q. Okay. How many studies have you reviewed?

16 A. Well, the two large ones, one in Europe and one in North
17 America. I think they're probably representative. I haven't
18 looked -- tried to comb all the literature, but these seem to
19 be both relatively recent and very large.

20 Q. Can you explain that in a little more detail? What -- Well,
21 let's take the studies in turn. What's the first study that
22 you looked at, if you recall the title or what it involved?

23 A. I don't remember the title. It was a European study, and they
24 identified across and through a number of countries. I'm
25 sorry. I'm misstating that. In one country, Sweden, they took
26 the records from the 1960 census in which a person's occupation

1 and industry was ascertained.

2 And from that they -- industrial hygienists that were part
3 of the investigative team made an assessment as to the
4 likelihood that a person's job would have entailed benzene --
5 Sorry. I got the exposure mixed up -- diesel exposure.

6 They then followed these people for the next 20 years with
7 the records of the Swedish Cancer Registry and looked to see if
8 the incidence of various cancers, including melanoma, differed
9 between the individuals who would have had -- presumed to have
10 diesel exposure versus the other Swedes who participated in the
11 1960 census.

12 In that study the results were that the group with the
13 diesel exposure had about a 10 percent smaller incidence of
14 melanoma, but a difference that is small itself and within the
15 limits of chance given no true association.

16 Q. You mentioned another study that you looked at?

17 A. The other study was a case-control study where a -- These are
18 Canadian workers. I think the study was done in Quebec --
19 where they identified persons who developed melanoma among
20 other cancers, and they obtained detailed work histories from
21 these people. And from that they estimated exposure to a
22 variety of substances, including diesel was one of the
23 analyses.

24 And they found that persons with melanoma, their
25 likelihood of being exposed to diesel was very much the same as
26 other persons who were controls, the ones who did not have

1 melanoma. So the results of these two studies are really quite
2 consistent, suggesting that diesel exposure is very unlikely to
3 be a risk factor for the development of melanoma.

4 Q. In reviewing the scientific literature on the development of
5 the melanoma, is there any evidence that exposure to, say,
6 soot, ash, or the chemical constituents of a fire on person's
7 skin can lead to a development of melanoma?

8 A. The only means I have of assessing that is looking more broadly
9 as to whether firefighters in general have an altered risk of
10 melanoma. Among the studies of firefighters it is -- what's
11 not included are the specific exposures of individual
12 firefighters. We don't know which ones would have had ash or
13 soot on their skin. So all I can do to answer your question is
14 invoke the general experience of firefighters, realizing that
15 may not fully capture this particular subset of the exposures
16 that firefighters would sustain.

17 Q. I understand, Doctor.

18 I want to ask you about a couple of articles that you
19 reviewed in greater detail, Doctor. I understand that in the
20 course of this case that you reviewed an article called,
21 "Cancer Incidence Among Firefighters in Seattle and Tacoma,
22 Washington," a 1993 study. Do you recall that?

23 A. Yes.

24 Q. Did you have any role in the formulation of that study, Doctor?

25 A. Yes. This was the second of the two graduate students with
26 whom I worked on firefighter studies. This one is a man named

1 Q. Can you say on a more-probable-than-not basis that the exposure
2 to smoke fumes and toxic substances and other career exposures
3 in Del Spivey's career with the City of Bellevue and his prior
4 career as a firefighter are not a cause of his malignant
5 melanoma?

6 MR. BARNES: Objection, foundation, assumes facts not in
7 evidence, especially given Mr. Spivey's testimony
8 yesterday that he couldn't recall any time when he
9 suffered an exposure.

10 JUDGE SWANSON: I guess, I guess in this case I'm going to
11 overrule and let the witness answer.

12 A. Even if I were assume for the moment that there truly was a
13 causal association between the exposure sustained as a
14 firefighter and the development of malignant melanoma, I would
15 still believe that it's more likely than not Mr. Spivey's
16 illness was not related to his firefighting.

17 Q. (BY MR. MEYERS) Do you know how much sun exposure Del Spivey
18 received in his 20 plus years doing the occupation of
19 firefighter?

20 MR. BARNES: Objection, relevance, at this point we're at
21 Dennis v. Labor & Industries. The inquiry is into the
22 specific aspects of Del Spivey's occupation, not the
23 occupation as a whole.

24 And beyond that the Dennis case also discusses that
25 in proving the causation and the natural prong of that
26 argument that exposures incidental to the job is not

renewed
Object

APPENDIX I

1 reviewers who are charged with evaluating the data, the quality
2 of the data, the interpretations of the data, and then
3 determining whether or not it meets a certain benchmark for
4 publication in a journal.

5 Q. The articles that you've written, what subjects are those on?
6 A. They've ranged from cardiac calcium channels to fruit fly
7 genetics, which I did my undergrad and graduate research on.
8 And most recently on signal transduction in melanoma and also
9 some other dermatologic clinical articles as well.

10 Q. If you can explain it in laymen's terms what's signal induction
11 (sic) in melanoma?
12 A. Signal transduction. Signal transduction is basically how a
13 melanoma cell is wired to respond to different signals in the
14 environment that may cause it to do things like to grow or to
15 spread to other tissues. And it's basically how -- trying to
16 understand how melanoma cells work at the most molecular level
17 to find ways to interfere with that through the development of
18 different therapies.

19 Q. You mentioned in a scientific article or journal that's peer
20 reviewed it's looked at by reviewers. Have you ever been a
21 reviewer for a periodic -- or a science journal? Excuse me.
22 A. Yes.

23 Q. Which journal is that?
24 A. I've been peer reviewer for lots of journals, probably at least
25 around 10 to 12 journals in the last five years.

26 Q. Have you ever written anything on the risk factors for

1 melanoma?

2 A. Yes.

3 Q. What was it?

4 A. I wrote a review on management of melanoma for primary care
5 providers that was published in Mayo Clinic Proceedings.

6 Q. In this case did I contact you and ask you to review some
7 materials in this case and provide opinions?

8 A. Yes.

9 Q. Could you give me a thumbnail sketch of the materials that you
10 recall that you've reviewed in forming your opinions in this
11 case, Doctor?

12 A. Do you want me to -- are you talking about material -- the
13 materials that you gave me or other materials that I may have
14 found in the course of my own research?

15 Q. Both, both, anything that you believe that you've relied upon
16 in forming your opinions in this case?

17 A. So most of them are peer-reviewed journal articles that I found
18 through online searches at the PubMed repository. That's the
19 database for medical literature that's funded by the
20 government.

21 Q. I'm going to ask you some general questions about melanoma,
22 Doctor. First, at its most basic level, what is a melanoma in
23 situ?

24 A. A melanoma in situ is the earliest form of melanoma. In situ
25 means it hasn't spread from the uppermost layers of the skin
26 into the deeper parts of the skin.

1 Q. (BY MR. BARNES) What about the presence of freckles on
2 somebody; does that play any role in being a risk factor for
3 the development of melanoma?
4 A. I think when you look at studies statistically, it's listed as
5 a risk factor, and it probably represents a surrogate indicator
6 of how much sun exposure a person has had.
7 Q. Does the number of -- I understand the terms -- dysplastic nevi
8 or moles, does that have any predictive qualifications for
9 somebody's development of melanoma?
10 A. So dysplastic moles or atypical moles -- If you look at studies
11 the risk of melanoma goes up linearly with the number of moles
12 that you have, particularly if the moles are dysplastic,
13 meaning that they look either atypical on a clinical exam or
14 atypical under a microscope when you look at them after a
15 biopsy.
16 Q. In the course of your study and research have you had the
17 opportunity to learn about the processes by which melanoma
18 develops in an individual?
19 A. Yes.
20 Q. How does that work?
21 A. There are certain, there are certain genes that are very
22 important for melanoma. And when you look at -- More recently
23 people have been able to perform comprehensive DNA sequencing
24 of melanoma genomes. Meaning that they take a person's
25 melanoma, and they sequence every single piece of DNA in that
26 cancer. And then they compare it to a normal cell from that

1 A. I think, you know, the risk of anyone doing something on the
2 water for ultraviolet exposure is always higher than if they're
3 not on the water at any given elevation.

4 Q. (BY MR. BARNES) Doctor, has medical science reached any
5 conclusions as to the cause of malignant melanoma?

6 A. I think the two most strongly accepted causes are genetics and
7 ultraviolet light.

8 Q. Why do you hold that opinion, Doctor?

9 A. Because, because those two risk factors have been borne out in
10 numerous studies overtime, and the burden of evidence there is
11 fairly overwhelming with regards to those two factors as being
12 paramount to melanoma.

13 Q. How does a person's genetics affect their predisposition for
14 developing melanoma?

15 A. I think it would affect it two ways. In one case you might
16 have a genetic defect that predisposes you to getting melanoma
17 because you have a familial mutation in a specific gene that by
18 itself will decrease the threshold for getting melanoma in the
19 face of getting new mutations. So there's some genes that have
20 been linked to what's called familial melanomas, and if you're
21 born with that gene, you're going to be more susceptible.

22 In the second case your genetics can determine what type
23 of skin type you have, and that's clearly going to play an
24 important role in your risk for melanoma. And that can be
25 multifactorial. There could be lots of different genetic
26 factors involved, such as, your hair color, your eye color,

1 JUDGE SWANSON: Overruled.

2 A. I think that there is clear evidence linking tanning bed usage
3 to melanoma.

4 And I'm not sure what the other part of the question is
5 but...

6 Q. (BY MR. BARNES) Let me ask you this then, Doctor. Are you
7 aware of any research on use of tanning beds and the
8 development of melanoma?

9 A. Yes.

10 Q. What do you recall about that research?

11 A. There's numerous studies that have come out showing that
12 tanning bed usage is correlated with increased risk for
13 melanoma, and there's even studies that show that even one time
14 use of a tanning bed increases your risk for melanoma within a
15 population.

16 Q. So is there any -- is there any level of tanning bed usage that
17 would then be safe as far as it would not be a predictive risk
18 factor for the development of melanoma?

19 A. I think the only person where it might be not a significant
20 risk would be someone who is black or someone who had very dark
21 skin, but for an individual who is white, I think any level of
22 tanning bed usage is associated with a risk, an increased risk
23 for melanoma.

24 Q. Doctor, I'm going to ask you some questions for your opinions,
25 and I want to make sure you express those opinions on a
26 more-probable-than-not basis. Would you agree to do that,

1 Doctor?

2 A. Yes.

3 Q. Is there any medical research to indicate that the inhalation
4 of a substance can lead to the development of malignant
5 melanoma?

6 A. Not to my knowledge.

7 Q. Is there any medical research to indicate that the inhalation
8 of, say, a polycyclic aromatic hydrocarbon can lead to the
9 development of melanoma?

10 A. Not to my knowledge.

11 Q. Is there any evidence that the inhalation of just smoke in
12 general can lead to the development of melanoma?

13 A. Not in the research I -- not in the research I did. There's --
14 it's not that it hasn't been looked at, but there hasn't been
15 an association that was found.

16 Q. What do you mean when you say, "It's not that it hasn't been
17 looked at," Doctor?

18 A. I'd say people have looked to see -- People have been looking
19 at occupational risks for melanoma. And they've looked at
20 various types of chemical exposures, including compounds you
21 usually find as products of combustion, like, polycyclic
22 aromatic hydrocarbons or soot, and they've not found an
23 increase incidence. And sometimes -- there's at least two
24 studies on soot that have found a decrease incidence of
25 melanoma within people who were exposed to those compounds.

26 Q. Doctor, is there any evidence that the inhalation of diesel

1 fumes or the constituent parts of -- strike that. That was
2 going to come out horribly, Doctor.

3 Is there any evidence that the inhalation of diesel fumes
4 can lead to the development of melanoma?

5 A. Not to my knowledge. It's been looked at, but I didn't see any
6 increased risk for melanoma in some of the populations, such
7 as, like, diesel locomotive operators. They didn't see a huge
8 incident risk.

9 Q. I've asked you about inhalation, Doctor. I want to change
10 these questions now to exposure just to transdermally, or on
11 the skin, say, absorption through the skin, Doctor. Is there
12 any evidence to exposure to soot or ash can lead to the
13 development of melanoma if it's found on a person's skin?

14 A. Not to my knowledge.

15 Q. Is there any evidence that exposure to diesel fumes, the
16 constituents of which may land or come in contact with
17 somebody's skin can lead to the development of melanoma?

18 A. Not to my knowledge.

19 Q. Doctor, are there medical studies which examine whether a
20 firefighter has an increased risk of developing melanoma?

21 A. I'd say there's like -- there's studies have shown that
22 melanoma is diagnosed at a higher rate in firefighters compared
23 to the general population.

24 Q. ~~But that doesn't necessarily mean that it was caused by an~~
25 ~~inhalation or an exposure?~~

26 MR. MEYERS: Objection, leading.

APPENDIX J

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In re: DELMIS SPIVEY)

Claim No: SG-05442)

) Docket No.
) 13 18842
)
)
)

DEPOSITION UPON ORAL EXAMINATION OF

JOHN HACKETT, M.D.

12:03 P.M.

MARCH 12, 2014

1001 BROADWAY, SUITE 300

SEATTLE, WASHINGTON



REPORTED BY: PATSY D. JACOY, CCR 2348



YAMAGUCHI OBIEN MANGIO
court reporting, video and videoconferencing
800.831.6973 206.622.6875
production@yomreporting.com
www.yomreporting.com

1 skin and ultraviolet light.

2 Q. And how does medical science go about
3 determining the risk factors or causes of a disease
4 like cutaneous melanoma?

5 A. It's a review of lots and lots of cases and a
6 fairly rigid statistical analysis that is
7 peer-reviewed.

8 Q. Is there a particular field of medicine or
9 field of science that deals with reviewing those
10 studies and trying to draw inferences from them?

11 A. Several: Public health, pathology,
12 dermatology, oncology.

13 Q. Is there a medically recognized risk factor
14 that's most strongly associated with the development of
15 cutaneous melanoma?

16 A. Ultraviolet light.

17 Q. I got ahead of myself there a little bit,
18 Doctor, but I understand Del Spivey was diagnosed with
19 cutaneous melanoma; is that correct?

20 A. He was diagnosed with a melanoma in situ,
21 which is an emerging melanoma that hasn't gotten out of
22 the epidermis, it hasn't gotten out of the barn.

23 Q. And is that a type of cutaneous melanoma,
24 Doctor?

25 A. Yes.



1 A. Upper back, I believe. Upper back.

2 Q. Were there any findings that were significant
3 to you in determining the cause of Mr. Spivey's
4 melanoma once you had done the physical exam?

5 A. Not on examination.

6 Q. Can the presence of nevi, which I understand
7 to be moles, Doctor, can that be a risk factor for the
8 development of melanoma?

9 MR. MEYERS: Objection, attorney
10 testimony, leading, move to strike.

11 A. Yes and no. We all have moles. Occasionally
12 one will develop a malignancy. More often than not the
13 malignancy is a new event.

14 Q. (BY MR. BARNES) Following your review of
15 Mr. Spivey's medical records, after taking a personal
16 history from Mr. Spivey, your exam of Mr. Spivey, did
17 you form an opinion on a more-probable-than-not basis
18 within a reasonable degree of medical certainty as to
19 what caused Mr. Spivey's cutaneous melanoma in this
20 case?

21 A. Yes, I thought this was a tumor which probably
22 resulted from ultraviolet light exposure and I did not
23 feel it was work-related.

24 Q. And, Doctor, you're familiar with testifying
25 on a more-probable-than-not basis; is that right?



1 A. Yes.

2 Q. And in this case, is it your opinion on a
3 more-probable-than-not basis that Mr. Spivey's
4 cutaneous melanoma on his upper back developed as a
5 result of UV exposure?

6 MR. MEYERS: Objection, leading, move to
7 strike. Objection, asked and answered, move to strike.

8 A. Yes.

9 Q. (BY MR. BARNES) And as part of your prior
10 answer, Doctor, you said you believed -- you did not
11 believe, excuse me, that his occupation played a role
12 in the development of his cutaneous melanoma. Why is
13 that?

14 A. A number of reasons. I've never seen a
15 firefighter work with his shirt off.

16 MR. MEYERS: Objection, form,
17 speculation, move to strike.

18 A. The skin where the lesion developed had
19 evidence of sun damage on biopsy.

20 MR. BARNES: Thank you, Doctor, that's
21 all the questions I have at this point.

22

23

24

25



APPENDIX K

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: DELMIS P. SPIVEY)

DOCKET NO. 13 18842

2)
3 CLAIM NO. SG-05442)

DECISION AND ORDER

4
5 APPEARANCES:

6
7 Claimant, Delmis P. Spivey, by
8 Ron Meyers & Associates, PLLC, per
9 Ron Meyers

10
11 Self-Insured Employer, City of Bellevue, by
12 City of Bellevue, per
13 Chad R. Barnes

14
15 The claimant, Delmis P. Spivey, filed an appeal with the Board of Industrial Insurance
16 Appeals on July 29, 2013, from an order of the Department of Labor and Industries dated June 5,
17 2013. In this order, the Department rejected the claim as an occupational disease as contemplated
18 by RCW 51.52.185 and RCW 51.08.140, and as an industrial injury. The Department order is
19
20 **AFFIRMED.**

21
22
23 **DECISION**

24 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
25 review and decision. The claimant and employer filed timely Petitions for Review of a Proposed
26 Decision and Order issued on July 2, 2014, in which the industrial appeals judge reversed and
27 remanded the Department order dated June 5, 2013. The claimant also filed a Response to the
28 Employer's Petition for Review.
29

30
31 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
32 no prejudicial error was committed. The rulings are affirmed. We granted review because we
33 disagree with our hearing judge that the City of Bellevue (City) did not rebut the statutory
34 presumption. The City rebutted the statutory presumption by proving by a preponderance of
35 evidence that Mr. Spivey's malignant melanoma was caused by other exposure, not the toxic fumes
36 and substances as argued by Mr. Spivey. Mr. Spivey's melanoma was caused by sun exposure,
37 and a preponderance of evidence shows that sun exposure is not a distinctive condition of
38 employment.
39

40
41 The facts are adequately set forth in the Proposed Decision and Order. We will set forth
42 those facts most pertinent to our decision. Delmis Spivey began his firefighting career as a
43 volunteer on September 1, 1980. He has worked as a full-time firefighter with the City of Bellevue
44
45
46
47

1 since January 1, 1995. Mr. Spivey has performed a full range of firefighting activities including
2 emergency and non-emergency responses. When Mr. Spivey has responded to fire emergencies,
3 he wore his full personal protection equipment. When he responds to calls for EMS services or
4 performs other non-fire activities, he wears a daytime uniform of a t-shirt and pants, and a jacket
5 when appropriate. Mr. Spivey is also involved in off-work activities of coaching football, hunting,
6 fishing, and bike riding. Mr. Spivey wears a shirt and jacket when engaged in these non-work
7 activities.
8
9

10
11 Mr. Spivey's ethnic makeup is primarily English and Dutch, and possibly Native American.
12 He has freckles throughout his body and over 25 moles. He has no family history of melanoma.
13 He has had occasional sunburns in his lifetime. He has also used a tanning bed a couple of times
14 in his life. Mr. Spivey never smoked cigarettes, and he has not had an issue with physical fitness.
15
16

17 The air monitors worn by Mr. Spivey and other firefighters monitor oxygen, carbon monoxide,
18 hydrogen sulfide, and explosives, but they do not monitor other airborne chemicals. The firefighters
19 do not always wear their self-contained breathing apparatus. Often after a fire, their bodies are
20 covered with soot and when they blow through their noses and/or cough, they expectorate a black
21 gooey substance. The firefighters are also often exposed to diesel fumes from the fire truck while
22 at the station house and out on calls. During responses to fires, firefighters can be exposed to
23 several unknown substances. Mr. Spivey has experienced no physical symptoms within two hours
24 after diesel exhaust exposure, and he has never complained about toxic substance exposure.
25
26
27
28
29

30 In January 2011, Mr. Spivey visited Janie Leonhardt, M.D., who is certified in dermatology,
31 regarding a spot on his left chest area. Dr. Leonhardt found Mr. Spivey had sun freckles throughout
32 his body on his head, neck, trunk, and upper extremities, and a scattering of moles uniform in size,
33 color, and shape. On December 22, 2011, Dr. Leonhardt examined Mr. Spivey and discovered an
34 irregularly shaped, dark brown sun freckle on his back that after testing it was determined to be
35 melanoma.
36
37

38 If a firefighter meets certain factors, there is a rebuttable statutory presumption that his/her
39 melanoma arises naturally and proximately out of the distinctive conditions of employment.¹ Under
40 the statutory presumption, the initial burden is on the employer to rebut the presumption by a
41 preponderance of evidence.² If the employer does not rebut the presumption, it has failed to prove
42
43
44

45
46
47

¹ RCW 51.32.185.

² *City of Bellevue v. Michael A. Raum*, 171 Wn. App. 124 (2012)

1 that the worker's condition did not arise naturally and proximately out of the distinctive conditions of
2 employment. If the employer rebuts the presumption, the burden is on the worker to prove the
3 medical condition arose naturally and proximately out of the distinctive conditions of employment.
4 Mr. Spivey meets the statutory factors of RCW 51.32.185 necessary to apply the statutory
5 presumption. Subsection (3) provides that the presumption applies if a firefighter develops a listed
6 cancer after at least 10 years of service. Melanoma is one of the listed cancers. Because
7 Mr. Spivey has more than 10 years of experience and has been diagnosed with melanoma, the
8 presumption applies.
9

10
11
12
13 In deciding whether the employer has successfully rebutted the presumption, we look to the
14 history of the statutory presumption. The extension of the statutory presumption to conditions such
15 as malignant melanoma began out of a concern that firefighters are exposed to unknown levels of
16 potentially harmful chemicals and toxic substances while fighting fires. Therefore, assessment of
17 Mr. Spivey's Application for Benefits begins with the presumption that his melanoma is caused by
18 occupational exposure. However, the statute also states the presumption can be rebutted by a
19 preponderance of evidence that the medical condition was caused by other exposures. We find
20 that a preponderance of evidence shows Mr. Spivey's malignant melanoma was caused by sun
21 exposure, not his work activities and exposures.
22

23
24 Mr. Spivey's arguments in his questioning of experts, briefing, and testimony follow the
25 statutory presumption that his melanoma was caused by exposure to toxic substances exposed to
26 while working as a firefighter. Mr. Spivey's medical evidence was presented through Kenneth
27 Coleman, M.D. Dr. Coleman is an emergency room and family practice specialist, and an attorney.
28 Dr. Coleman testified from a general view that Mr. Spivey is a firefighter, and research shows a
29 causal link; therefore, Mr. Spivey's malignant melanoma must be related to work exposures.
30 Dr. Coleman's opinion is based solely on the fact that medical literature he reviewed says
31 melanoma **could** be related. Dr. Coleman did not meet with Mr. Spivey or review any of
32 Mr. Spivey's medical records. We would point out that Mr. Spivey has had no complaints about
33 exposures to toxic substances other than the expectoration of black substance when coughing or
34 blowing his nose after fire suppression, like other firefighters. Dr. Coleman also not has undergone
35 training or performed any research regarding the diagnosis of malignant melanoma or its causes
36 and risk factors. Dr. Coleman's research is limited to the articles suggested to him by Mr. Spivey's
37 counsel or articles found for this claim.
38
39
40
41
42
43
44
45
46
47

1 The City presented the testimony of dermatologists and epidemiologists who have experience
2 in diagnosing, treating, and/or researching melanoma and its causes and risk factors. Each of
3 these experts testified that melanoma is caused by sun exposure. To support the application of this
4 general proposition specifically to Mr. Spivey, the evidence shows he has other findings and factors
5 that show that his melanoma was more probably than not caused by sun exposure. One of the
6 City's experts was John Hackett, M.D. Dr. Hackett is a certified dermatologist who treats patients with
7 melanoma and performs and reviews biopsies in his normal course of practice. Dr. Hackett testified
8 that Mr. Spivey's biopsy showed evidence of sun damaged skin and a malignant change linked to
9 ultraviolet light and not exposure to toxic substances. Further, Mr. Spivey rarely used sun protection
10 prior to his melanoma diagnosis. Mr. Spivey has sun freckles throughout his body on his head,
11 neck, trunk, and upper extremities, and a scattering of moles, which are risk factors for developing
12 melanoma.
13
14
15
16
17
18

19 Mr. Spivey presented evidence that other firefighters in his station house have been
20 diagnosed with melanoma. Dr. Coleman opined this "cluster" of cancer diagnoses supports the
21 contention that Mr. Spivey's melanoma is related to his exposure to carcinogens as a firefighter.
22 However, Dr. Hackett opined the incident rate of this "cluster" is the same as for the general
23 population; therefore, it does not support a causal link.
24
25
26

27 To have probative value expert opinions must be based on "full knowledge of all material facts"
28 established by, or inferable from, the record, including opinions given based on a hypothetical question
29 or review of medical history.³ We find Dr. Coleman's opinions have little probative value and are less
30 persuasive than the expert opinions provided by the City based on melanoma research; treatment of
31 melanoma; Mr. Spivey's examination and test results; and Mr. Spivey's characteristics.
32
33

34 The statutory presumption is rebutted by a preponderance of evidence that Mr. Spivey's
35 melanoma was caused by sun exposure. Therefore, we turn our attention to whether the cause of
36 Mr. Spivey's malignant melanoma, sun exposure, is a distinctive condition of his employment. We
37 find a preponderance of evidence shows the sun exposure is not a distinctive condition of
38 employment.
39
40

41 The distinctive conditions of employment must be conditions of the worker's particular
42 employment, not "everyday life or all employments in general."⁴ Also, the work conditions causing
43
44
45

46 ³ *Saylor v. Department of Labor & Indus.*, 69 Wn.2d 893 (1966).

47 ⁴ *Dennis v. Department of Labor and Indus.*, 109 Wn.2d 467 (1987).

1 the medical condition must be actual conditions of employment, not conditions coincidental to the
2 employment.⁵
3

4 Sun exposure is a condition of everyday life. The evidence shows there is ultraviolet
5 exposure even on a cloudy day. Washington State has an incidence rate of melanoma ranked at
6 number five in the country, and our region is behind only Australia and New Zealand worldwide.
7 Our general population has a greater chance of a melanoma diagnosis. Further, the incidence rate
8 of melanoma is higher in individuals exposed to intermittent prolonged sun exposure, rather than
9 those exposed at higher rates such as farmers, gardeners, and fishermen. Workers in gardening
10 and farming, occupations one thinks of when thinking of sun exposure as a condition of
11 employment, have a lower incidence of melanoma.
12
13
14
15

16 The evidence does not show that Mr. Spivey is exposed to the sun in any manner as a
17 **condition of employment** as a firefighter more than throughout daily life. The evidence shows
18 that workers involved in more outdoor recreational activities have a higher degree of sun exposure
19 and are at a higher risk for melanoma. The risk is even higher when the outdoor activities occur in
20 higher elevations or while on the water, such as fishing.
21
22

23 Mr. Spivey has testified that he is engaged in several outdoor recreational activities, and his
24 body is covered similarly, if not more, as a firefighter than during his non-work activities. Mr. Spivey
25 engages in biking; hiking; hunting; yard work; football coaching; and fishing. These activities are
26 performed for several hours at a time while Mr. Spivey is off work. As for work exposure, from
27 January 1, 2000, through December 16, 2013, Mr. Spivey responded to 269 fire calls and only 130
28 required over 30 minutes at the scene.
29
30
31
32

33 The preponderance of evidence does not support a finding that Mr. Spivey's sun exposure is
34 a distinctive condition of employment. Instead, his intermittent prolonged sun exposure has more
35 probably than not occurred during his intermittent prolonged non-work activities.
36

37 The statutory presumption applies to Mr. Spivey. This presumption was rebutted by a
38 preponderance of evidence that Mr. Spivey's malignant melanoma more probably than not arose
39 naturally and proximately out of exposure from other activities, specifically sun exposure. A
40 preponderance of evidence shows Mr. Spivey's sun exposure is not a distinctive condition of
41 employment. The Department order to reject the claim is correct.
42
43
44
45

47 ⁵ *Dennis*, at 481.

FINDINGS OF FACT

1. On October 29, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Delmis P. Spivey is a career firefighter who began working full-time with the City of Bellevue on January 1, 1995, and meets the factors necessary to apply the statutory presumption of RCW 51.32.185.
3. Delmis P. Spivey developed malignant melanoma on his back in December 2011.
4. Delmis P. Spivey underwent a biopsy that showed findings that his melanoma was more likely caused by sun damage and other malignant changes linked to ultraviolet light.
5. Delmis P. Spivey rarely used sun protection prior to his melanoma diagnosis; he has sun freckles throughout his body on his trunk, head, neck, and upper extremities; and he has a scattering of moles throughout his body.
6. Delmis P. Spivey wears similar clothing for his on and off work outdoor activities unless he has on additional personal protection equipment when responding to fires.
7. Delmis P. Spivey has had no complaints about exposures to toxic substances other than the expectorating of the black substance when coughing or blowing his nose after fire suppression, like other firefighters.
8. During the period of January 1, 2000, through December 31, 2013, Mr. Spivey responded to 269 calls, and 130 required over 30 minutes on the scene.
9. Delmis P. Spivey's non-work activities are outdoor activities, including hiking, biking, yard work, coaching, hunting, and fishing. He performs these activities for several hours at a time.
10. Delmis P. Spivey's malignant melanoma is due to sun exposure, not exposures while performing firefighting activities.
11. Delmis P. Spivey's sun exposure was not a distinctive condition of employment.
12. Mr. Spivey's malignant melanoma is not a condition that arose naturally and proximately out of the distinctive conditions of his employment as a firefighter for the City of Bellevue.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

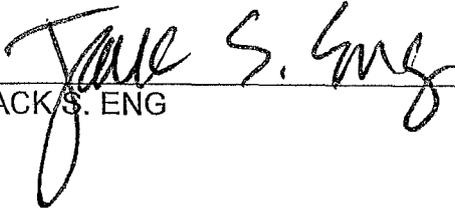
2. Delmis P. Spivey is presumed to have sustained an occupational disease within the meaning of RCW 51.32.185.
3. The statutory presumption that Delmis P. Spivey has an occupational disease has been rebutted within the meaning of RCW 51.32.185.
4. Delmis P. Spivey's disease diagnosed as malignant melanoma did not arise naturally and proximately out of distinctive conditions of employment as contemplated by RCW 51.08.140.
5. The Department order dated June 5, 2013, is correct and is affirmed.

Dated: October 9, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



JACK S. ENG Member

DELMIS P. SPIVEY
9626 NE 201 ST
BOTHELL, WA 98011-2335

CL1

AG1
OFFICE OF THE ATTORNEY GENERAL/TUMWATER
DOCKET MANAGER
PO BOX 40121
OLYMPIA, WA 98504-0121

RON MEYERS, ATTY
RON MEYERS & ASSOCIATES PLLC
8765 TALLON LN NE #A
LACEY, WA 98516

CA1

CITY OF BELLEVUE
PO BOX 90012
BELLEVUE, WA 98009-9012

EM1

CHAD R BARNES, ATTY
CITY OF BELLEVUE
PO BOX 90012
BELLEVUE, WA 98009

EA1

CITY OF BELLEVUE
EBERLE VIVIAN
206 RAILROAD AVE N
KENT, WA 98032

ELR1



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • www.bifa.wa.gov

Enclosed is the Board's final order in this appeal.

What if I disagree with the decision reached in the final order?

- Any party who disagrees with any portion of this decision may appeal to superior court.

How much time do I have to appeal to superior court?

- In **workers' compensation** and **WISHA** cases, your appeal to superior court must be filed within thirty (30) days from the date you receive the Board's final order.
- In **crime victim** and **tax assessment** cases, your appeal must be filed within 30 days from the date the order was mailed to you.

In what county do I file a superior court appeal?

- In a **workers' compensation** case, file the appeal either (1) in the county where the injured worker or beneficiary lives, or (2) in the county where the injury took place. If the worker's residence and the place of injury are outside Washington State, file the appeal in Thurston County Superior Court.
- In a **WISHA** case, file the appeal in the county where the alleged violation occurred.
- In a **crime victim** or **tax assessment** case, file the appeal either (1) in Thurston County, (2) in the county where you live or where your principal place of business is located, or (3) in any county where the property owned by the petitioner and affected by the contested decision is located.

Do I need to send copies of the appeal to anyone?

- Copies of the appeal **MUST** be mailed or hand-delivered to the Board, Department, and (if applicable) to the Self-Insured Employer:

Board of Industrial Insurance Appeals
2430 Chandler Court SW
P.O. Box 42401
Olympia, WA 98504-2401

Department of Labor and Industries
Office of the Director
P.O. Box 44001
Olympia, WA 98504-4001

Is there a form for filing an appeal in superior court?

- No. Each superior court has its own filing requirements. There is a directory available on the Washington Courts website to help you locate the appropriate superior court: http://www.courts.wa.gov/court_dir.

What evidence will the superior court consider?

- The case will be tried based on the record made before the Board. The record consists of transcripts, depositions, and exhibits offered during Board hearings.

Get more information about superior court appeals:

This letter is for informational purposes only. It doesn't contain all filing requirements for superior court appeals. If you file an appeal in superior court you are solely responsible for complying with all applicable laws, including the superior court local rules. More information can be found in the Revised Code of Washington (RCW) and Washington Administrative Code (WAC). These legal publications are available in law libraries and on the Washington State Legislature website: www.leg.wa.gov/LawsAndAgencyRules.

Most of these rules can be found in the Board's *Rules of Practice and Procedure*, a publication found on the Board's web site: www.bja.wa.gov.

- **Workers' Compensation** – See RCW 51.52.110 and WAC 263-12-170.
- **Washington Industrial Safety and Health Act (WISHA)** – See RCW 49.17.150.
- **Tax Assessment** – See RCW 51.48.131, RCW 51.52.112, and RCW 34.05.510-598.
- **Crime Victims** – See RCW 7.68.110 and RCW 34.05.510 – RCW 34.05.598.

Superior court local rules may be consulted on the Washington Courts website: http://www.courts.wa.gov/court_rules.

Attorney Fees:

This section applies **only** to injured workers, beneficiaries, and crime victims. It does **not** apply to employers or to WISHA or tax assessment cases.

- A worker/beneficiary/crime victim represented by an attorney who succeeds in their appeal may ask the Board to set the attorney fee. The request must be in writing and must be filed within one year of receipt of the Board's final order. The Board has authority to set the fee even though a fee agreement was made with the attorney. The responsibility for paying the fee, however, remains with the worker/beneficiary/crime victim.