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No. 91680-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

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DELMIS SPIVEY

Petitioner,

v.

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

Respondents.

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PETITIONER'S REPLY BRIEF

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ORIGINAL

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## ARGUMENT

### A. **Determining whether the City rebutted the presumption that Lt. Spivey's cancer is occupational is a question of fact.**

The City and Department contend that the determination of whether the City has rebutted the presumption of occupational disease is a question of law. The City argues that this is in accord with how the presumption was treated in another firefighter presumptive occupational disease case, *Raum v. City of Bellevue* case. *Respondent Brief, p.19*. To the contrary, in referring to jury instruction 13 and 14, the Appellate court in *Raum* stated: “They allowed Raum to argue that he was entitled to RCW 51.32.185's evidentiary presumption **and that the City failed to rebut the presumption.**” [Emphasis added]. *Raum v. City of Bellevue*, 171 Wash. App. 124, 144, 286 P.3d 695 (2012). Jury instructions allowing the jury to determine that the City failed to rebut the presumption of occupational disease clearly evidence that rebuttal was treated as a question of fact.

The City also attempts to diminish the significance that the legislature included a standard of proof in RCW 51.32.185 when it structured how rebuttal must be accomplished. However, this is not insignificant -- because the function of a standard of proof is to instruct **the fact finder**.

“The function of a standard of proof ... is to ‘**instruct the factfinder** concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions

for a particular type of adjudication.’” *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). [emphasis added].

*Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wash. 2d 1, 7–8, 256 P.3d 339 (2011). In a child relocation case involving a rebuttable statutory presumption that relocation of a child is permitted, the issue was whether the standard of proof to rebut the presumption was a preponderance of the evidence. *In re Marriage of Wehr*, 165 Wash. App. 610, 613, 267 P.3d 1045 (2011).

Quoting this Court in *Hardee v. Dep't of Soc. & Health Svcs*, the Appellate Court in *In re Marriage of Wehr* noted that the function of a standard of proof is to **instruct the factfinder** concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. *Id.*

The presumptive occupational disease statute, RCW 51.32.185, includes a standard of proof for rebutting the presumption, and so it follows that the legislature is instructing the **factfinder** as to the standard of proof required to be proven by the City to rebut the presumption of occupational disease.

The *factfinder* is instructed as to the standard of proof because the

*factfinder* determines if the rebutting party has met that standard. Juries are *factfinders*.

The right to have factual questions decided by the jury is crucial to the right to trial by jury.

The City and Department contend that RCW 51.32.185 merely requires a burden of production to rebut the statutory presumption. They rely on the term “prima facie” in RCW 51.32.185.

However, the Appellate Court in *Crane v. Department of Labor & Industries*, 177 Wash. App. 1005, (2013) (*unpublished opinion, cited as non-binding authority per GR 14.19(a)*), *Gorre v. City of Tacoma*, *Larson v. City of Bellevue*, and this Court in *Gorre v. City of Tacoma* have viewed the burden to rebut the presumption as a burden of persuasion.

The Appellate Court in *Crane* (unpublished) viewed the Department’s burden to rebut the presumption as a burden of persuasion:

Because Crane established he had a respiratory disease, he was entitled to the presumption of occupational disease. The burden then shifted to the Department to show by a preponderance of the evidence that although Crane had a respiratory disease, the respiratory disease did not meet the statutory definition of “occupational disease” under RCW 51.08.140.

*Crane* at page 3.

Dr. Stumpp was Board Certified in Occupational Medicine, and a medical expert for the Department. *Crane* page 2.

The Appellate Court held:

**Because Dr. Stumpp could not determine what caused the pulmonary emboli, and because there can be more than one proximate cause of a covered condition, the Department's evidence is not sufficient to rebut the presumption that Crane's disease arose naturally and proximately out of his employment as a firefighter. To hold otherwise would mean Dr. Stumpp's inability to rule out firefighting as a possible cause of Crane's disease nevertheless demonstrated by a preponderance of the evidence that Crane's disease did not arise naturally or proximately from firefighting**

*Id at 5.* [emphasis added].

In *Larson v. City of Bellevue*, which is now before this Court, the Appellate Court also viewed the Department's burden to rebut the presumption of RCW 51.32.185 as a burden of persuasion.

Thus, the statute requires a quality of proof to rebut the presumption and a weighing of all the evidence to determine if the evidence produced achieves the necessary level of persuasiveness. This presents a question of fact requiring an evaluation of the credibility of witnesses and the persuasiveness of evidence. Logically, this presumption shifts to the City the burden of proof as to the presumed fact of occupational disease.

*Larson v. City of Bellevue*, 188 Wash. App. 857, 872, 355 P.3d 331, 339 (2015), review granted, No. 92197-1, 2016 WL 4386142 (Wash. Feb. 10, 2016) overruled by *Clark Cty. v. McManus*, 185 Wash. 2d 466, 372 P.3d 764 (2016) on other grounds.

When the legislature amended RCW 51.32.185 in 2002 to add a presumption for melanoma, it made a finding that "[a] 1990 review of fire fighter epidemiology calculated a statistically

significant risk for melanoma among fire fighters”. Our governor vetoed the bill section containing this finding. But this legislative history makes clear the social purpose of the presumption. We agree with the New Hampshire Supreme Court's conclusion that the Morgan theory should be applied to the presumption to give it the force intended by the legislature.

*Id* at 874–75, overruled by *Clark Cty. v. McManus, supra*, on other grounds.

This Court, in *Gorre v. City of Tacoma*, another firefighter case involving

RCW 51.32.185, stated:

At issue instead is whether valley fever is a “respiratory disease” or an “infectious disease” under RCW 51.32.185(1)(a) or (d) that shifts the burden of **proving the disease's proximate cause** from Gorre to the employer City. [Emphasis added].

*Gorre v. City of Tacoma*, 184 Wash. 2d 30, 33, 357 P.3d 625 (2015).

The legislature provided a standard of proof within the statute that rebuttal must be by a preponderance of evidence. The legislature instructed the fact finder - and this supports that the burden is more than just a burden of production – but rather is a burden of persuasion. A burden of production is to be contrasted with the burden of rebutting by a preponderance of evidence necessary to sustain the burden of persuasion, a difference that was noted by this Court in *Wilmot* when discussing wrongful discharge due to retaliation:

If the plaintiff presents a prima facie case, the burden shifts to the employer. To satisfy the **burden of production**, the employer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge. 1 L. Larson, *Unjust Dismissal* § 6.05[6] (1988). The employer must produce relevant admissible evidence of another motivation, but **need**

**not do so by the preponderance of evidence necessary to sustain the burden of persuasion, because the employer does not have that burden, *Baldwin*, 112 Wash.2d at 136, 769 P.2d 298. [Emphasis added].**

*Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash. 2d 46, 70, 821 P.2d 18, 29 (1991).

Unlike the *Wilmot* case, the City in the present case *does* have the burden to rebut by a preponderance of evidence. RCW 51.32.185 requires rebuttal by a preponderance of admissible evidence.

Further, a reading of a statute that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results. See *Tingey v. Haisch*, 159 Wash. 2d 652, 664, 152 P.3d 1020 (2007). A reading of RCW 51.32.185 that the burden to rebut the presumption is merely a burden of production rather than a burden of persuasion does not make sense. The legislature enacted a statute that shifts the burden of proof in firefighter presumptive disease claims. When a party has a burden of proof on any proposition, it means that the jury must be **persuaded** considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true. See *WPI 155.03*. Moreover, a standard of proof is an instruction to the fact finder. See *Hardee v. State, Dep't of Soc. & Health Servs.* at 7–8, *supra*.

The City and Department rely on the use of the term “prima facie” in RCW 51.32.185. “Prima facie” was already a term used by the legislature in the context of the Industrial Insurance Act, prior to the enacting of RCW 51.32.185. *See RCW 51.52.115*. This Court, in the context of RCW 51.52.115 (part of the Industrial Insurance Act), interpreted “prima facie” as a presumption on appeal that the findings and decision of the board, based upon the fact presented to it, are correct until **the trier of fact finds from a fair preponderance of the evidence** that such findings and decision of the board are incorrect. *See Allison v. Dep't of Labor & Indus.*, 66 Wash. 2d 263, 268, 401 P.2d 982 (1965). At the time the *Allison* case was decided, RCW 51.32.185 did not exist. However, the legislature used the same term (“prima facie”) as it applied to the presumption in RCW 51.32.185 that the firefighter’s disease is occupational. The trier of fact must find from a fair preponderance of the evidence that the presumption is rebutted.

The presumption is not a fleeting tool that merely determines procedure in *producing* evidence – rather it *establishes* that malignant melanoma is occupational and the burden is on the City to disprove occupational causation and to further prove a non-occupational cause. The Industrial Insurance Act’s general rule that worker’s must **prove** they suffer from an occupational disease is **excepted** by the presumption of RCW

51.32.185. “RCW 51.32.185 is a narrow exception to the Act's general rule that workers must prove they suffer from an occupational disease.” *Gorre v. City of Tacoma*, 184 Wash. 2d 30, 47, 357 P.3d 625 (2015). The presumption proves that job conditions caused the occupational disease—and the City must disprove it to rebut it. “The statute is simply a shortcut for **proving** medical causation—i.e., that job conditions caused an occupational disease.” *Gorre v. City of Tacoma*, 184 Wash. 2d 30, 38, 357 P.3d 625 (2015). “At issue instead is whether valley fever is a “respiratory disease” or an “infectious disease” under RCW 51.32.185(1)(a) or (d) **that shifts the burden of proving the disease's proximate cause from Gorre to the employer City.**” [Emphasis added]. *Id at 33.*

The City and Department contend that the City has no burden of persuasion at the Superior Court on appeal from a Board decision involving RCW 51.32.185, and they rely on RCW 51.52.115, a *general* statute concerning burden of proof on appeals from Board decisions in general. However, RCW 51.32.185 was created more recently than RCW 51.52.115, and is specifically applicable to the burden of proof in firefighter presumptive disease claims. Even if RCW 51.52.115 and 51.32.185 did conflict:

Second, “[t]o resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.” *Tunstall*, 141 Wash.2d at 211, 5 P.3d 691.

*Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 210–11, 118 P.3d 311 (2005). Even Washington Practice recognizes that it is necessary to think of the burden of persuasion in terms of the burden as to a particular factual issue in a particular case – opposed to a broad outline always placing the burden on the plaintiff.

In broad outline, the burden of persuasion is on the plaintiff. In most cases, however, this is an overly simplified statement because of complications caused by affirmative defenses, counterclaims, third-party claims, presumptions, and the like. It is, thus, necessary to think of the burden of persuasion in terms of the burden as to a particular factual issue in a particular case.

*5 Wash. Prac., Evidence Law and Practice §301.2 (6<sup>th</sup> ed.)*. The Court may first try to reconcile RCW 51.32.115 and RCW 51.32.185. “When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them to give effect to each provision.” *Anderson v. State, Dep’t of Corr.*, 159 Wash.2d 849, 861, 154 P.3d 220 (2007). This is noteworthy, because the City and Department essentially advocate for removing the burden-shifting protection of RCW 51.32.185 at the Superior Court trial – which clearly destroys the affect and integrity of RCW 51.32.185. For example, the jury, reviewing the same evidence as the Board reviewed, cannot possibly make an informed decision as to whether the Board incorrectly decided that the City rebutted the presumption if the jury is not instructed as the City’s burden of proof on that issue.

The City and Department essentially advocate for injecting language into RCW 51.32.185 that the burden-shifting protection does not apply at the Superior Court appeal— but no such restrictions exist in the statute.

**B. The Superior Court erred when it went beyond the issues in the City and Department’s motion and beyond the relief proposed in the City and Department’s orders and ordered that the City rebutted the presumption. Lt. Spivey did not waive notice and a meaningful opportunity to be heard and defend.**

King County Local Rules 7(b)(5)(B)(3) provides:

(iii) Statement of Issues. A concise statement of the issue or issues of law upon which the Court is requested to rule.

Superior Court rule 7(b)(1) provides:

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, **shall state with particularity the grounds therefor, and shall set forth the relief or order sought.** The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. [Emphasis added].

The City and Department’s motions had a “Statement of Relief Requested” and “Statement of The Issues,” respectively, which did not ask for a ruling on whether the City rebutted the presumption. *Appendix B to Petitioner’s Motion for Discretionary Review, Decl. of Friedman Exhibit 1 and 2, respectively.*

“Waiver of a constitutional right must be “knowing, intelligent, and voluntary.” *State v. Stone*, 165 Wash. App. 796, 815, 268 P.3d 226 (2012)

quoting *State v. Stegall*, 124 Wash.2d 719, 724, 881 P.2d 979 (1994). In order to establish waiver, the State must prove “ ‘an intentional relinquishment or abandonment of a known right or privilege.’ ” *Id.*, quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Johnson*, 304 U.S. at 464, 58 S.Ct. 1019).

At the Superior Court hearing on the City’s motion, the City’s counsel stated to the Superior Court judge, at page 4, lines 7-10 of the verbatim report of proceedings:

-- if I could. Morning, Your Honor. Chad Barnes on behalf of the City of Bellevue. This, uh - - the City’s Motion for a *Determination of the Legal Standard on Appeal*. [Emphasis added].

A review of the hearing transcript reveals how lacking the oral argument was of argument discussing the specific medical testimony of the City’s experts to show an inability to rebut the presumption. *See Verbatim Report of Proceedings*.

Asking for a determination of the legal standard on appeal is not the same as asking for a determination as to whether the presumption was rebutted by a preponderance of evidence. Nonetheless, the Court ruled at the Superior Court hearing, in part: “Here, the - - I’m satisfied that, uh, the City of Bellevue met that production, uh, and - - uh, and rebutted the

presumption.” VRP 41:7-9. After the Court ruled, Del Spivey’s counsel stated to the judge:

MR. FRIEDMAN: I -- I have a clarifying question, Your Honor.  
THE COURT: Go ahead.

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

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

THE COURT: All right.

MR. FRIEDMAN: - - <sup>“AVC”</sup> I thought I heard you saying something else. I just want to make sure the order is simply that it’s a question of law - -

THE COURT: All right.

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

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

[Emphasis added]. VRP 43:1-44:12. Accordingly, Lt. Spivey's counsel brought a motion for reconsideration, stating in part:

Appellant Delmis Spivey respectfully moves the Court to reconsider its March 27, 2015 order that the City of Bellevue "met its burden to rebut the presumption of occupational disease within the meaning of RCW 51.32.185" and requests that the Court vacate, nullify and void that order. That issue, whether the presumption was rebutted, was not before the Court on the City of Bellevue's Motion for Determination of Legal Standard on review and to Strike Portions of Dr. Coleman's Testimony, nor was that issue before the Court on the Department of Labor and Industries' Motion to Strike Portions of Spivey's Brief. Firefighter Spivey was denied a fair and just opportunity to defend that issue and to be heard on that issue. CP 215.

**C. Conjecture and speculation does not rebut the presumption.**

The City and Department contend that it was established that sun exposure caused Lt. Spivey's melanoma. The City relies in part on Dr. Hackett's testimony, but the burden to rebut is a *preponderance of evidence*.

A preponderance of the evidence requires consideration of all of the evidence, not just evidence that seems to favor one side. *See Bresemann v. Hiteshue*, 151 Wash. 187, 189-190, 275 P.543 (1929). Dr. Coleman's testimony, Lt. Spivey's independent expert, is found at CABR 000914-000963.

Moreover, conclusory opinions by the City's experts, based on speculation and conjecture should not be sufficient to rebut the presumption.

The City's *epidemiologist*, Dr. Noel Weiss, when asked if it was a fair comment that he cannot rule out organic chemicals as a cause of malignant melanoma at this time, testified in part, "I haven't investigated the sum of the literature to be able to comment on that. . . ." *CABR 000470* (correcting Cite in Petitioner's Brief). He does not know whether firefighters are exposed to pesticides, peroxides, plastics, solvents, lead or mercury. *CABR 000474*. (correcting Cite in Petitioner's Brief). He has not reviewed any of the materials related to chemicals that are released during open burning. *CABR 000479* (correcting Cite in Petitioner's Brief). Most notably, when given a hypothetical by the City's attorney on re-direct examination and then asked "Do you have an opinion on the cause of his malignant melanoma?", the last sentence of Dr. Weiss' answer is as follows: "And I haven't - - so the answer to your question is **I don't know what was responsible for his illness.**" *CABR 000484-000485* (correcting Cite in Petitioner's Brief). [Emphasis added]. Dr. Weiss was asked, "Do we understand all causes of malignant melanoma as we sit here today?" He answered: "No." [Emphasis added]. *CABR 000465* (correcting Cite in Petitioner's Brief). He was asked:

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

*Appendix B to Petitioner's Motion for Discretionary Review, Friedman Dec.,*

*Ex 5.* He answered as follows:

A: I think it's safe to say that at the present time **that would be impossible.** [Emphasis added].

*Appendix B to Petitioner's Motion for Discretionary Review, Friedman Dec.,*

*Ex 5.*

Another City expert witness, Dr. Chien, was asked if he agrees that there are a number of chemicals that firefighters are exposed to that cause cancer generally, and he answered: "I don't, I don't know enough about firefighting to be definitive in an answer, but I would say that I think it would be reasonable to think that firefighters are exposed to certain materials that may put them at higher risk." *CABR 000548* (correcting Cite in Petitioner's Brief). Dr. Chien was also asked:

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

*Appendix B to Petitioner's Motion for Discretionary Review, Friedman Dec.,*

*Ex 6.* His answer was, in part:

A: That is actually **not known.** . . . [Emphasis added].

*Appendix B to Petitioner's Motion for Discretionary Review, Friedman Dec.,*

*Ex 6.* He also admitted that he does not know all of the

factors that are working on causing that particular cell to mutate into malignant melanoma:

Q: In addition to not knowing when that transition happens, is it fair to say that **you don't know all of the factors that are working on causing that particular cell to mutate into malignant melanoma?**

A: Yes, [Emphasis added].

*Appendix B to Petitioner's Motion for Discretionary Review, Friedman Dec., Ex 5.* The Department and City both cite to testimony of Dr. Leonhardt. Notably, Dr. Leonhardt was asked by the City's counsel if she has an opinion whether Mr. Spivey's potentially being exposed to smoke as a firefighter was the cause of his melanoma and she answered: "I do not." *CP 57.*

She was asked by the City counsel: "Are you aware of any scientific evidence that would suggest the inhalation of smoke can lead to the development of cutaneous melanoma, Doctor?" She answered: "I am not." *CP 57.*

Further in her testimony, she testified that she is "not aware of any evidence that supports or refutes that." referring to whether or not smoke or toxic substances or soot or presence of ash on somebody's skin may or may not lead to the development of cutaneous melanoma. *CP 58.*

Most notably, she was asked by the City's counsel, "Doctor, on a more-probable-than-not basis, did Del Spivey's occupation as a firefighter have any role in his development of melanoma?" And she answered: "I don't feel I know enough about Mr. Spivey's job or occupation to answer that question." *CP 59*.

The Appellate Court in *Gorre v. City of Tacoma* was clear: "If the employer cannot meet this burden, for example, **if the cause of the disease cannot be identified by a preponderance of the evidence or even if there is no known association between the disease and firefighting**, the firefighter employee maintains the benefit of the occupational disease presumption." *Gorre v. City of Tacoma*, 180 Wash. App. 729, 758, 324 P.3d 716 (2014), amended in part (July 8, 2014), amended (July 15, 2014), overturned on other grounds in *Gorre v. City of Tacoma*, 184 Wash. 2d 30, 357 P.3d 625 (2015). [Emphasis added].

The Appellate Court in *Crane v. Department of Labor & Industries*, *supra*, noted that although Dr. Stumpp could not determine any cause of the disease, he nevertheless concluded Crane's pulmonary emboli were more probably than not unrelated to firefighting. *Crane*, at 4. *Unpublished opinion*, cited as non-binding authority *per* GR 14.19(a).

However, the Court stated: “Dr. Stumpp's general statements that he does not know of a study establishing a relationship between firefighting and pulmonary emboli do not establish that there is a study affirmatively ruling out a relationship between firefighting and pulmonary emboli.” *Id at 5. Unpublished opinion, cited as non-binding authority per GR 14.19(a).*

The Appellate Court also stated: “The essence of Dr. Stumpp's testimony is that there is no basis for the statutory presumption in this case because no one can point to a study that confirms such a relationship. But **such skepticism does not constitute a preponderance of the evidence** that no relationship exists between firefighting and Crane's respiratory disease. [emphasis added]. *Id. Unpublished opinion, cited as non-binding authority per GR 14.19(a).*

The Department contends that RCW 51.32.185 does not suggest that firefighters have a liberty interest in application of the presumption. The Department cites to *In re Pers. Restraint of Cashaw*, 123 Wn2d 138, 144, 866 P.2d 9 (1994) for the proposition that procedural rules do not create liberty interest. The legislature did not create needless formality in RCW 51.32.185, but rather an interest to which a firefighter eligible under the statute has a legitimate claim of entitlement – and that interest is (1) a

presumption that his cancer is occupational and (2) that the burden of proof is shifted to the City/Employer.

Burden of proof is a **substantive** aspect of a claim, *See Spratt v. Toft*, 180 Wash. App. 620, 636, 324 P.3d 707 (2014). Accordingly, RCW 51.32.185 creates a liberty interest that if a firefighter is eligible for the presumption, he is entitled to the presumption and to the burden-shifting mechanism of RCW 51.32.185. If that burden-shifting protection is not provided to an eligible firefighter as it should be, his liberty interest is impeded.

#### **D. Attorney's Fees and costs**

The City takes a position that puts the employer's interest before the interests of the worker. That position runs contrary to the strong public policy behind the Industrial Insurance Act.

Additionally, RCW 51.32.185(7)(b) specifically couches its fee provision in the context of what the "final decision allows". RCW 51.32.185(7)(b) starts by stating in part: "When a determination involving the presumption established in this section is appealed to any court . . .".

This case involves the presumption of RCW 51.32.185, and this case has been appealed to the Board, to the Superior Court and to the Supreme Court. Accordingly, the above-two factors of RCW 51.32.185(7)(b) are

satisfied. Because the above-two factors are satisfied, all reasonable costs of the appeal, including attorney's fees and witness fees, are to be paid to the firefighter or his or her beneficiary if the final decision allows the claim.

When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

*RCW 51.32.185(7)(b)*. *RCW 51.32.185(7)(a)* applies even if the Board's decision is appealed to any Court, because section (7)(a) applies to final Board decisions. *RCW 51.32.185(7)(b)* contemplates that a Board decision may be appealed to a Court.

When the Board's decision is appealed, then what matters for purposes of determining recovery of reasonable fees and costs incurred at the Board-level, is whether the final decision of the appeal allows the firefighter's claim. *RCW 51.32.185(7)(b)* ensures that the firefighter's benefits will not be diminished due to costs and attorney's fees incurred at any level if the firefighter ultimately prevails on appeal to the Court. This interpretation upholds this Court's recognition of the purpose of allowing attorney's fees in industrial accident cases.

'The purpose behind the award of attorney fees in workers' compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department:

The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense or the diminution of his award if ultimately granted for the purpose of paying his counsel.

*Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Department of Labor & Indus.*, 26 Wash.2d 51, 173 P.2d 164, 167 (1946)); *Rehberger*, 154 Wash. at 662, 283 P. 185."

*Brand v. Dep't of Labor & Indus. of State of Wash.*, 139 Wash. 2d 659, 667, 989 P.2d 1111 (1999), as amended on denial of reconsideration (Apr. 10, 2000), as amended (Apr. 17, 2000).

If the Board in a presumptive-disease case does not allow the claim, the firefighter should not have his benefits diminished due to attorney's fees and costs incurred before the Board, if on appeal to a Court, the final decision determines that the Board was wrong. If the Board correctly decided that case and the employer appeal fails, the firefighter is also entitled to all attorney fees and costs. See, *Larson v. City of Bellevue*, at 884.

#### CONCLUSION

Lt. Spivey was not given notice and a meaningful opportunity to be heard and defend on the issue of whether the City rebutted the presumption. Lt. Spivey was deprived of his right to a jury trial on that issue. Lt. Spivey was deprived of his right to the proper application and burden shifting

protection of RCW 51.32.185. Lt. Spivey's impending trial was rendered meaningless as it pertains to the issue of whether the City rebutted the presumption of occupational disease. Lt. Spivey's freedom to prosecute his case with the benefit of the burden-shifting protection of RCW 51.32.185 has been taken away. Lt. Spivey respectfully requests that this Court allow Lt. Spivey's claim as a matter of law, or in the alternative rule that the burden is on the City to rebut the presumption, that the burden is a burden of persuasion, and that Lt. Spivey is entitled to have a jury decide whether the City rebutted the presumption of occupational disease.

Lt. Spivey requests an award of reasonable attorney's fees and costs incurred at all levels of appeal, including before the Board, the Superior Court and the Supreme Court.

DATED: September 8, 2016

RON MEYERS & ASSOCIATES PLLC

By: 

Ron Meyers, WSBA No. 13169

Matthew G. Johnson, WSBA No. 27976

Tim Friedman, WSBA No. 37983

Attorneys for Petitioner Spivey

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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DELMIS SPIVEY

Petitioner,

v.

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

Respondents.

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DECLARATION OF SERVICE  
PETITIONER'S REPLY BRIEF

---

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I certify under penalty of perjury under the laws of the State of Washington that on the date set forth below, I served the documents listed below on the following parties in each manner set forth:

Documents:           1.     Petitioner's Reply Brief  
                          2.     This Declaration of Service

Original To:   Washington State Supreme Court

Via E-filing - [Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov)

Copies To:   Chad Barnes  
                  City of Bellevue  
                  Office of the City Attorney  
                  450 110<sup>th</sup> Ave. NE  
                  Bellevue, WA 98004

Via US Mail

Via Email: [cbarnes@bellevuewa.gov](mailto:cbarnes@bellevuewa.gov)

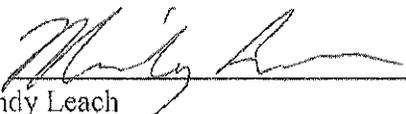
Anastasia Sandstrom  
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Via Email: [anas@atg.wa.gov](mailto:anas@atg.wa.gov)

DATED: September 8, 2016, in Olympia, Washington.

**RON MEYERS & ASSOCIATES PLLC**

By:   
Mindy Leach  
Paralegal

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**Subject:** Delmis Spivey v. City of Bellevue et al; Supreme Court Case No. 91680-2

Dear Clerk:

Attached please find Delmis Spivey's Petitioner's Reply Brief and a Declaration of Service. Please file the attached documents in the Delmis Spivey v. City of Bellevue; Supreme Court Case No. 91680-2. Thank you.

Mindy Leach



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