NO. 100446-0

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN T. BRADLEY,

Respondent,

v.

CITY OF OLYMPIA,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER
DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Court of Appeals resolved this routine statutory construction case by following the plain language of the statute and this Court's decision in *Spivey v. City of Bellevue*, 187 Wn.2d 716, 389 P.3d 504 (2017). *See Bradley v. City of Olympia*, No. 54981-6-II, slip op. at 1-2 (Wash. Ct. App. Nov. 9, 2021). The Legislature has directed that certain occupational diseases be presumed occupational diseases. RCW 51.32.185. This presumption may be rebutted through evidence the disease was most likely caused by nonoccupational factors. *Id.*

Stephen Bradley had the benefit of the presumption when he contracted bladder cancer. RCW 51.32.185. In an attempt to rebut the presumption, his employer, the City of Olympia, presented medical evidence that firefighting activities in general do not cause bladder cancer. This was tantamount to saying that the Legislature was incorrect to say that bladder cancer should be presumed to be an occupational disease. And it conflicts with *Spivey*'s directive that, under the statute, the firefighter's

employer must "provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." 187 Wn.2d at 735. The City's other claimed bases for review—a conflict with *City of Bellevue v. Raum*, 171 Wn. App. 124, 286 P.3d 695 (2012), a constitutional claim, and an issue of substantial public interest[1]—similarly lack merit and show no basis for review.

II. ISSUE

May an employer rebut the firefighter presumption on a showing that, in general, firefighting does not cause bladder cancer, without presenting any evidence that the cancer was most probably caused by nonemployment factors?

[1] Other than reciting that there was an issue of substantial public interest (Pet. 8), the City does not explain why review should be granted under RAP 13.4(b)(4).

III. STATEMENT OF THE CASE

A. Statutory Background

RCW 51.32.180 states that any "worker who suffers disability from an occupational disease in the course of employment" is entitled to certain workers' compensation benefits. Under RCW 51.08.140, an "occupational disease" is a disease that "arises naturally and proximately out of employment." In addition, RCW 51.32.185(1)(a)(iii) establishes a presumption for firefighters that cancer is an occupational disease. RCW 51.32.185(3)(b) expressly applies that presumption to bladder cancer.

The presumption is rebuttable by "evidence [that] 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." RCW 51.32.185(1)(d). In *Spivey v. City of Bellevue*, the Court stated that, to rebut the RCW 51.32.185(1) presumption, the firefighter's employer must "provide evidence from which a

reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." 187 Wn.2d at 735.

B. The City of Olympia Did Not Produce Evidence About Nonemployment Factors that Caused Bradley's Cancer

Firefighter Stephen Bradley worked as a City of Olympia firefighter from 1997 until 2014. Slip op. at 2. He filed a claim with the Department of Labor and Industries, claiming that his bladder cancer resulted from firefighting activities. *Id.* at 3.

L&I denied Bradley's workers' compensation claim, and Bradley appealed to the Board of Industrial Insurance Appeals. *Id.*

An industrial appeals judge (IAJ) held an evidentiary hearing in April 2018. *Id.* Because bladder cancer is presumed to be an occupational disease, it was the City's burden to prove that his bladder cancer was not caused by firefighting. RCW 51.32.185. To rebut the presumption, the City presented three expert medical witnesses: Dr. Bill Vanasupa, Bradley's treating

physician and a Board certified urologist; Dr. Noel Weiss, an epidemiologist and professor of epidemiology at the University of Washington; and Dr. Erik Torgerson, medical director of urology at the Swedish Urology Group and a Board certified urologist. Slip op. at 4.

Bradley began seeing Dr. Vanasupa for bladder cancer treatment in September 2016. *Id.* Dr. Vanasupa generally stated that, "based on the articles he reviewed, he believed that there was an increase in bladder cancer mortality among firefighters, but that the increase was not statistically significant." *Id.* Dr. Vanasupa testified that Bradley's bladder cancer was possibly caused by firefighting, but placed the probability of a causal connection at less than 50 percent. *Id.* Dr. Vanasupa admitted, however, "that he did not know what carcinogens firefighters in general or Bradley specifically were exposed to during fire suppression activities." *Id.*

Dr. Vanasupa testified that bladder cancer could be more likely in a person with a history of smoking or certain genetic

predispositions. *Id.* But he acknowledged that Bradley had neither a history as a smoker nor a history of bladder cancer in his family. *Id.*

Dr. Weiss stated that, "based on his review of studies involving firefighters and bladder cancer, his opinion was that it was unreasonable to make the inference that exposure to firefighting activities caused bladder cancer." *Id.* at 5. He testified that, of the 30 studies on the hypothesis, there were inconsistent conclusions, along with "a weak association between firefighting activities and bladder cancer." While it was his opinion "that firefighting does not have the capacity to cause bladder cancer . . . he could not rule out that possibility." *Id.*

Bradley's medical records showed no family history of bladder cancer and that Bradley was a nonsmoker, which Dr. Weiss acknowledged. *Id.* Dr. Weiss admitted to not knowing "how many times Bradley was exposed to various carcinogens while on the job." *Id.*

Dr. Torgerson believed that bladder cancer was not associated with firefighting as an occupation. *Id.* He admitted to having "no knowledge about the extent to which Bradley was exposed to carcinogens as a firefighter or what Bradley's duties were as a firefighter." *Id.* Like Drs. Vanasupa and Weiss, Dr. Torgerson testified that Bradley "had no family history of kidney or bladder cancer, or any genitourinary cancer" and was a nonsmoker. *Id.*

The IAJ's proposed decision and order affirmed L&I's order. *Id.* The IAJ determined that, while the statutory presumption in RCW 51.32.185(1) applied, the evidence presented by the City's medical experts "had rebutted the presumption by a preponderance of the evidence." *Id.* But the IAJ also "noted that none of the medical experts could state with certainty as to what caused Bradley's bladder cancer." *Id.* Specifically, the IAJ found that evidence of Bradley's history of secondhand smoke exposure "was insufficient to rebut the presumption." *Id.* Even so, "the IAJ concluded that the

preponderance of the evidence did not establish that Bradley's distinctive employment conditions caused his cancer rather than conditions of everyday life or employments in general." *Id.*

The Board denied Bradley's petition for review and adopted the IAJ's decision and order. *Id.* at 6.

C. The Superior Court Reversed the Board and the Court of Appeals Affirmed

Bradley appealed to superior court and filed a motion for summary judgment on the grounds the City failed to meet its burden to prove that Bradley's bladder cancer was caused by nonoccupational factors on a more probable than not basis. *Id.* At that point, L&I conceded that the workers' compensation claim for Bradley's bladder cancer should be allowed. *Id.*

The superior court granted summary judgment in favor of Bradley. *Id.* The City of Olympia appealed to the Court of Appeals, which affirmed. The court held that the statutory presumption could not "be rebutted solely with medical evidence that firefighting activities *in general* [i.e., with studies] do not cause bladder cancer." Slip op. at 8. This is

because it would usurp the Legislature's decision to create the presumption: "By adopting the presumption that a firefighter's bladder cancer is an occupational disease, the legislature already has determined that there is at least some causal connection between firefighting activities and bladder cancer." *Id.* at 9. This is because "RCW 51.32.185(1)(a) is designed to foreclose the argument that firefighting activities cannot cause bladder cancer." *Id.* The court further reasoned that, because an employer cannot satisfy its burden to rebut the presumption by arguing "that firefighting in general does not cause bladder cancer . . . the employer must focus on evidence showing what caused the *individual claimant's* cancer." Id. at 12-13.

IV. REASONS TO DENY REVIEW

The Court of Appeals followed this Court's decision in *Spivey* and declined to second-guess the Legislature's adoption of the presumption. The City shows no reason for review under RAP 13.4.

A. The Court of Appeals' Decision Is Consistent with *Spivey*

This Court need not take review because the Court of Appeals' decision is consistent with *Spivey*. *Contra* Pet. 24-25. In *Spivey*, the Court stated that, to rebut the presumption in RCW 51.32.185(1), a firefighter's employer is required to "provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." 187 Wn.2d at 735. The Court of Appeals followed this edict. Slip op. at 1-2 (quoting *Spivey*, 187 Wn.2d at 735).

The City points out that the *Spivey* Court noted "that 'this standard [related to the presumption statute] does not impose on the employer a burden of proving the specific cause of the firefighter's melanoma.'" Pet. 24-25 (quoting 187 Wn.2d at 735). It characterizes the Court of Appeals' decision as holding that "as a matter of law, the City had not established a *specific* alternate nonoccupational cause of Bradley's bladder cancer."

Pet. 25 (emphasis added). The Court of Appeals did not require such a showing.

In fact, the Court of Appeals cited *Spivey* for the proposition that RCW 51.32.185(1) does not require the employer to prove the specific cause of the firefighter's disease. Slip op. at 7. Instead it noted that the employer had to produce evidence showing "that the firefighter's disease was, more probably than not, caused by nonoccupational factors." Slip op. at 7 (emphasis omitted) (quoting *Spivey*, 187 Wn.2d at 735).

The Court of Appeals used the word "specific" to point out the nonoccupational risk factors in RCW 51.32.185(1)(d) were all "nonoccupational risk factors specific to an individual claimant." Slip op. at 11 (emphasis omitted). This is a correct observation. And as the court observed, "[n]othing in RCW 51.32.185(1)(d) suggests that an employer can rebut the presumption by showing that there actually is no connection between firefighting and bladder cancer." Slip op. at 11.

The City argues that "[t]he Court of Appeals' decision will legally prevent employers from rebutting the presumption," arguing that the presumption is now irrebuttable. Pet. 9. This is not true. If an employer presents evidence that shows the condition was most likely caused by nonoccupational factors, then the presumption was rebutted under the Court of Appeals' opinion, just as *Spivey* and the plain language of RCW 51.32.185 require.

The heart of the City's argument is that there are two types of causation: general and specific. And citing to out-of-jurisdiction cases,[2] it argues that under a theory of general causation, it can produce general evidence, through statistical analysis, that firefighting doesn't cause cancer. But this contradicts RCW 51.32.185(1)(a), which provides that "there shall exist a prima facie presumption that . . . cancer . . . [is an]

[2] Pet. 10-11 (citing *Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997); *Casey v. Ohio Med. Prods.*, 877 F. Supp. 1380 (N.D. Cal. 1995); *City of Littleton v. Indus. Claims Appeals Off.*, 2016 CO 25, 370 P.3d 157, 160 (2016)).

occupational disease[],” and *Spivey*, which requires “evidence from which a reasonable trier of fact could conclude that the firefighter’s disease was, more probably than not, caused by nonoccupational factors.” 187 Wn.2d at 735. The Legislature that decided that bladder cancer was presumed to be an occupational disease. General evidence that contradicts this is no more than an attack on the Legislature’s policy decisions. In *Spivey,* the Court approved the proposition that the purpose of the firefighting statute “was to implement a social policy of providing compensation to firefighters in circumstances where medical evidence fails to establish the definitive cause of the plaintiff’s heart disease.” 187 Wn.2d at 733. The City’s attempts to act contrary to *Spivey* and the Legislature do not warrant review.[3]

[3] The City argues that since *Spivey* said “preponderance of the evidence” is a question of fact, there is a conflict. Pet. 25-26. But the Court did not abrogate CR 56 summary judgment.

B. The Court of Appeals' Decision Does Not Conflict with *Raum*

The Court of Appeals' decision does not conflict with *Raum*, contrary to the City's arguments. The City relies on language from *Raum* that "the statute 'does nothing more than shift the burden of proof for duty related heart disease for'" firefighters. Pet. 24 (quoting *Raum*, 171 Wn. App. at 143-44) (emphasis omitted). But this statement does not contradict anything in the decision here. And the Court in *Raum* was not presented with the argument about what type of evidence was sufficient to rebut the firefighting presumption, so naturally the quoted statement did not mention that issue. The City argues the Court of Appeals shifted the burden of persuasion and limited the evidence an employer could rely on, contrary to *Raum*. Pet. 24. But *Raum* didn't address those issues. And in any event *Spivey* firmly places the burden of persuasion on the employer, so the Court of Appeals here properly recognized that that burden was the employer's. *Spivey*, 187 Wn.2d at 721.

C. The City Does Not Adequately Present a Constitutional Issue

With no citation to authority other than the bare reference to due process provisions, the City argues review should be granted for constitutional reasons. Pet. 29. To adequately present a constitutional argument, a party must cite to authority and present argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994). But the City did not raise this argument at superior court and has no analysis to show a manifest error. RAP 2.5(a). There is no manifest error if there is no argument, authority, and a developed record. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *Havens*, 124 Wn.2d at 169. The City would have to produce authority that a disagreement about the factual foundation of a statute (which it terms arbitrary) is subject to a due process challenge. Because it has not done so, this Court should not consider the issue.

V. CONCLUSION

This Court should deny review.

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RESPECTFULLY SUBMITTED this 6th day of January, 2022.

ROBERT W. FERGUSON
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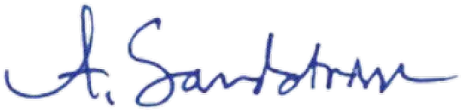

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SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN T. BRADLEY, Respondent, v. CITY OF OLYMPIA, Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Answer of the Department of Labor & Industries and this Certificate of Service in the below described manner:

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