NO. 99265-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This petition for review is premised on a basic error: that a jury instruction accurately stating that an administrative agency made certain findings somehow prevents a party from arguing that those findings were wrong. Here, firefighter Andrew Leitner took issue with the Board of Industrial Insurance Appeals' (Board) finding that his work did not cause his myocardial infarction, because the Board did not explicitly reference his other alleged heart problems. According to Leitner, rather than informing the jury of the Board's actual finding, the superior court should instead have replaced the phrase "myocardial infarction" with a reference to "any heart problems." But no authority supports Leitner's view that courts can tinker with Board findings in the fashion he envisions. To the contrary, statutory law requires a court to convey the Board's "exact" findings to the jury on each material issue.

Further, the court's jury instructions fully allowed Leitner to argue that all of his alleged heart problems were caused by his work. As Leitner concedes, the instructions correctly stated that the statutory presumption for occupational disease applies to all heart problems—not just the myocardial infarction—and asked the jury to determine whether Leitner's "heart problems," referenced generally, were an occupational disease. These

instructions allowed Leitner to seek allowance of his occupational disease based on all of his alleged heart problems, not just the myocardial infarction.

Because this argument and Leitner's remaining claims fail to show either a conflict in the case law or an issue of substantial public interest meriting review, the petition for review should be denied.

II. ISSUE

1. Did the Court of Appeals properly affirm the jury verdict, where the jury instructions (a) accurately conveyed the Board's findings, (b) properly articulated the burden of proof, and (c) allowed Leitner to argue that all of his alleged heart problems, not just the myocardial infarction, should warrant compensation?

2. Did the Court of Appeals properly decline to review the superior court's denial of summary judgment, because a denial premised on a material dispute of fact is not reviewable on appeal following submission to the jury?

III. STATEMENT OF THE CASE

A. Leitner Filed a Claim with the Department for Heart Problems He Developed While Working for the City

Firefighter Leitner, an employee of the City of Tacoma, worked a 24 hour shift on February 25, 2015, beginning at 7:00 a.m. CP 498-99. Three days later, he felt chest pain while sitting on his couch at home. CP 607-08. Fearing a heart attack, he called 911, and medics took him to the hospital. CP 610-11. Peter Chen, MD, saw Leitner in the emergency room and treated him for a myocardial infarction, with a complete

blockage of the coronary artery to the heart. CP 861-62. Dr. Chen inserted an emergency stent. CP 496.

For workers' compensation claims filed by firefighters, a statutory presumption applies, providing that any heart problems experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities, are occupational diseases. RCW 51.32.185(1)(a). However, an employer may rebut this presumption by a preponderance of the evidence, including by providing evidence of physical fitness and weight, hereditary factors, and exposure from other activities. *Id*. (1)(d).

In this case, in October 2015, the Department of Labor and Industries (Department) issued an order allowing Leitner's workers' compensation claim for an occupational disease, but only for "the heart problem treated on 2/28/2015." CP 284.[1]

B. The Board Directed the Department to Reject Leitner's Claim

The City appealed the October 2015 order to the Board. CP 181-84, 201. In support of its appeal, the City presented the testimony of Robert Thompson, MD, a cardiologist who examined Leitner at the

[1] The Department's order cited "RCW 51.32.182," but this is a typographical error as there is no such statute. CP 284. The Department presumably intended to cite RCW 51.32.185.

City's request. CP 726, 732. Dr. Thompson testified that Leitner had a myocardial infarction as a result of atherosclerosis, a form of coronary artery disease that causes cholesterol to cling to artery walls, narrowing them. CP 733-34, 740.

Dr. Thompson explained that atherosclerosis is caused by non-work factors including obesity, cholesterol, diabetes, high blood pressure, and family history, and that it is also highly age dependent, with the risk being highest in a person's mid-50s. CP 740. It is the leading cause of death in the United States. CP 740. Dr. Thompson did not identify exposure to smoke, fumes, or other substances as a risk factor for atherosclerosis. *See* CP 740. Dr. Thompson noted that obesity is primarily a risk factor in that it is associated with other things that are more strongly linked with atherosclerosis, such as high blood pressure, cholesterol, and diabetes, though obesity alone is also a factor, though a very mild one. CP 737-38. Dr. Thompson acknowledged that while Leitner was overweight, he did not have high cholesterol, diabetes, or high blood pressure. CP 737-38. As to Leitner's family history, he found it significant that his mother had a coronary bypass in her mid-50s. CP 733-34.

Dr. Thompson concluded that Leitner's employment as a firefighter did not contribute to his heart attack. CP 755. He noted that there is no evidence that exposure to diesel fumes causes heart attacks,

particularly when working in an open-air environment. CP 743-44, 747-48, 754.

Dr. Chen, the cardiologist who treated Leitner, testified that Leitner had a myocardial infarction as a result of the progression of his coronary artery disease. CP 857, 861-62. Dr. Chen testified that the usual causes of heart attacks include diabetes, hypertension, high cholesterol, smoking, and family history. CP 866. Dr. Chen also noted that obesity is a risk factor for heart attacks but not an important factor, and that the more important risks are diabetes, high blood pressure, smoking, and family history. CP 866. Dr. Chen understood that Leitner was not a smoker. CP 865.

Leitner presented the testimony of Aubrey Young, PA-C, a physician's assistant. CP 789. PA-C Young believed Leitner's employment as a firefighter was a proximate cause of his heart problems. CP 804-05. She noted that she had tested Leitner's cholesterol level and found it to be normal, and Leitner was otherwise in good health, so she related his heart problems to his employment. CP 806.

The Board issued a decision and order reversing the Department's order and directing the Department to reject the claim. CP 113-21. The Board noted that the only claim that the Department had allowed was premised on Leitner's condition treated on February 28, 2015, and the

evidence demonstrated that the only condition treated on that date was the myocardial infarction, which occurred within 24 hours of February 28, 2015. CP 116. (Leitner did not appeal the Board's order. *See* CP 201.) The Board concluded that the City had "soundly rebutted" the presumption that the myocardial infarction was work related, and that the weight of the evidence demonstrated that it was not. CP 115.

C. The Superior Court and the Court of Appeals Affirmed the Board's Decision

Leitner appealed to the superior court. CP 1-4. He moved for summary judgment, but the court denied the motion, concluding there were material issues of fact about whether the employer had rebutted the presumption that Leitner's heart problems were work related. CP 1030-51, 1157-58; RP 8/25/2017 at 11. At trial, Leitner moved to exclude the testimony of an industrial hygienist called as a witness by the Department, but the trial court declined to strike the testimony in its entirety, though it sustained some objections to some portions of it, such as any testimony mentioning federal or state work place safety standards. RP 7, 252-55.

The court gave a jury verdict form that the Department and Leitner both agreed with, but to which the City objected. RP 769-70, 774-76, 884-886. As given, the verdict form asked two questions:

> 1. Was the Board of Industrial Insurance Appeals correct in deciding that the employer rebutted, by a preponderance of

the evidence, the presumption that Andrew Leitner's heart problems were an occupational disease?

2. Was the Board of Industrial Insurance Appeals correct in deciding that the Plaintiff did not prove by a preponderance of the evidence that his heart problems were an occupational disease?

CP 1935.[2] Over Leitner's objection, the court gave a jury instruction that apprised the jury of the Board's findings. CP 1919-20; RP 857-58. Following closing argument, the jury answered "yes" to both questions on the verdict form. CP 1935. The court entered judgment based on the jury's verdict. CP 1953-55.

The Court of Appeals affirmed the judgment in a published decision. *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 4, 476 P.3d 618 (2020). The Court agreed with the City and the Department that the superior court's instructions allowed Leitner to argue that all of his heart problems—not just the myocardial infarction—should be accepted as an occupational disease. *Leitner*, 15 Wn. App. 2d at 14-15. The Court also rejected Leitner's argument that the superior court should have altered the Board's findings when it instructed the jury about them, noting that no statute or case law supported such an approach. *Id*. at 15-17.

[2] The verdict form directed the jury not to answer question number 2 if they answered "no" to question number 1.

IV. ARGUMENT

Central to Leitner's petition is his claim that RCW 51.52.115, which requires the Board's "exact" findings to be read to the jury, should not be followed and that the superior court erred in not modifying the findings before they were read to the jury. But he presents no conflict with precedent or issue of substantial public interest meriting review. The superior court's instructions allowed him to argue that all of his heart problems—not just the myocardial infarction—were related to his firefighting work, and that it was the City's burden to rebut the statutory presumption to that effect. Pet. 14-18. And the court properly instructed the jury regarding the Board's findings, rather than changing any reference to "myocardial infarction" to "all heart problems," because RCW 51.52.115 requires courts to inform the jury of the Board's findings of fact and the case law recognizes only minor exceptions to that rule that are not relevant here.

Likewise, Leitner's inchoate arguments about appellate review of a summary judgment denial, burden of proof, and deprivation of a liberty interest show no reason for review.

A. Review Is Not Warranted Because the Trial Court's Instructions Allowed Leitner To Argue His Theory of the Case, and the Court Properly Declined To Substantially Rewrite the Board's Findings

Leitner's contentions regarding the trial court's jury instructions do not merit review by this Court. The instructions allowed Leitner to argue his theory of the case, and Leitner has shown no conflict with the precedent of this Court or the Court of Appeals. The trial court's Instruction Nos. 8-10, 13, and the verdict form properly informed the jury that all of Leitner's alleged heart problems—not just the myocardial infarction treated on February 28, 2015—were subject to the presumption in RCW 51.32.185 that they constituted an occupational disease. CP 1920-23, 1926, 1935.

Leitner argues that by reading the Board's findings to the jury, which referenced the myocardial infarction but not his other alleged heart problems, the trial court effectively limited him to arguing only that his myocardial infarction was presumptively an occupational disease. Pet. 14-18. But Leitner admits that other jury instructions referenced "heart problems" repeatedly, allowing the jury to decide whether the Board's reference to the myocardial infarction only was error (and allowing him to argue that it was). Pet. 16-17. And the instructions as a whole unambiguously provided that the statutory presumption of

occupational disease applied to all of Leitner's heart problems, not just his myocardial infarction, allowing Leitner to make the argument that he now claims he could not make. Pet. 14-18; CP 1920-23, 1926, 1935.[3] As this Court observed in *Spivey v. City of Bellevue*, 187 Wn.2d 716, 738, 389 P.3d 504 (2017), the jury is presumed to follow the court's instructions absent evidence to the contrary, and Leitner offers no evidence that the jury disregarded the instructions here, including those telling the jury to consider all of Leitner's heart problems when deciding the case. Pet. 14-18.

Taken as a whole, the instructions allowed Leitner to argue that the jury should apply the presumption to all of his heart problems, not just the myocardial infarction. *See* CP 1921-23, 1926, 1935. The instructions also

[3] Instruction No. 8 advised the jury that the Board determined that "the employer rebutted the presumption by a preponderance of the evidence" that "Andrew Leitner's *heart problems* were an occupational disease." CP 1920 (emphasis added). Instruction No. 9 told the jury that it had to decide "[w]hether the City of Tacoma rebutted, by a preponderance of the evidence, the statutory presumption that Mr. Leitner's *heart problems* were an occupational disease." CP 1922 (emphasis added). Instruction No. 10 advised the jury that, before the Board, the burden was on the City to rebut the presumption that "claimant's *heart problem(s)* arose naturally out of his conditions of employment as a firefighter" and "his employment is a proximate cause of his heart problem(s)." CP 1923 (emphasis added).

Instruction No. 13 similarly made clear that the presumption applied to all heart problems and not just the myocardial infarction, advising the jury, "You are to presume that if a firefighter experienced *any heart problems* within seventy-two hours of exposure to smoke, fumes, or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting, then those activities were a cause of those heart problems." CP 1926 (emphasis added). These instructions also rebut Leitner's claim (at Pet. 12-14 and discussed further below) that the court misapplied the burden of proof: the instructions properly explained that the City had the burden of proof to rebut the presumption, and did so in terms consistent with *Spivey*. CP 1926; *Spivey*, 187 Wn.2d at 735, 738-39.

made clear that the City had the burden of rebutting the presumption for all of those heart problems. CP 1926 ("You are to presume that if a firefighter experienced *any heart problems* within seventy-two hours of exposure to smoke, fumes, or toxic substances, or within twenty-four hours of strenuous physical exertion due to firefighting, then those activities were a cause of those heart problems." (emphasis added)); *see also* CP 1921-23, 1935. The jury could not have plausibly believed that the myocardial infarction was the only condition before them, given the language of Instruction Nos. 8, 9, 10, and 13 and the verdict form. *See* CP 1921-23, 1926, 1935.

Leitner also fails to show that the decision below conflicts with *Clark Cty v. McManus*, 188 Wn. App. 228, 242-45 (2015), *rev'd on other grounds* 185 Wn.2d 466 (2016), and review is therefore not merited under RAP 13.4(b)(2). *McManus* permits a court to correct an "obvious scrivener's error" in a Board finding, not to make substantive changes to the Board's findings to conform to a party's view of the case. *Compare* Pet. 14-18 *with McManus*, 188 Wn. App. at 242-45. In *McManus*, a worker alleged an occupational disease involving his low back. *McManus*, 188 Wn. App. at 231. The Board concluded that the low-back claim should be allowed, but one of its findings erroneously referenced the cervical spine even though the worker never alleged a cervical spine issue.

Id. at 235, 242. *McManus* concluded that the reference to the cervical spine was an "obvious scrivener's error" and the trial court should have corrected the mistake. *Id*. at 244-45.

But here, the Board did not make a scrivener's error when it referenced the myocardial infarction. Leitner sustained a myocardial infarction and received medical treatment for it, which likely saved his life. CP 496, 861-62. And while Leitner also alleged other heart problems, all of the parties focused primarily on the myocardial infarction when presenting evidence to the Board. Indeed, the Department's order referred solely to the medical problem treated on February 28, 2015: namely, the myocardial infarction. CP 284. Unlike *McManus*, where the Board referenced a cervical spine condition accidentally, here the Board did not reference Leitner's myocardial infarction accidentally or due to a scrivener's error. *McManus* provides no support for Leitner's claim that the trial court should have rewritten the Board's findings to conform to his theory of the case.

Further, there is no statutory support for Leitner's argument that a trial court should modify the Board's findings before informing the jury if the court concludes that the findings were not comprehensive enough with regard to the issues before the Board. *Compare* RCW 51.52.115 *with* Pet. 14-18. Leitner relies on language in RCW 51.52.115 that "[i]f the court

shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified." Pet. 17. Leitner suggests that this statutory language means that if the court thinks the Board made the wrong findings, the court can rewrite them to conform to what it thinks the Board should have found. Pet. 17.

But the language in RCW 51.52.115 cited by Leitner refers to the court's authority to reverse the Board's decision on the merits if the court concludes that the Board's decision was wrong, not the manner in which the court should advise the jury of the Board's findings via jury instructions. With regard to advising a jury of the Board's findings, the statute—far from authorizing the court to rewrite the findings—instead directs the court to advise the jury "of *the exact findings of the board* on each material issue before the court." RCW 51.52.115 (emphasis added).

Leitner shows no reason to accept review because the decision below does not conflict with any case law and this case does not present an issue of substantial public interest. To the contrary, the jury instructions correctly conveyed the law and allowed Leitner a full and fair opportunity to argue his case.

B. Leitner's Remaining Arguments Also Present No Reason for Review

Leitner's remaining arguments about appellate review of a summary judgment denial, burden of proof, and deprivation of a liberty interest lack merit and present no basis for review.

First, because the parties presented disputed facts about the cause of Leitner's heart problems, the Court of Appeals properly did not review the trial court's denial of summary judgment. The *Kaplan* case Leitner claims conflicts with the decision below actually supports the decision. *Compare* Pet. 12-13 *with Kaplan v. Northwest Mutual Life Ins. Co.*, 115 Wn. App. 791, 799-800, 65 P.3d 16 (2003). Appellate courts do not review a trial court's denial of summary judgment after a case has been submitted to a jury, when the denial was based on the trial court's determination that a material fact was in dispute. *Johnson v. Rothstein*, 52 Wn. App. 303, 304-05, 759 P.2d 471 (1988).

Here, the superior court denied Leitner's summary judgment motion because the court determined that a material fact was in dispute: namely, whether the City showed by a preponderance of the evidence that Leitner's heart problems were not work related. CP 1157-58; RP 8/25/2017 at 11. Because the trial court denied summary judgment on that

basis, the Court of Appeals properly did not review the denial. *See Rothstein*, 52 Wn. App. at 304-05; *Kaplan*, 115 Wn. App. at 799-800.

The *Kaplan* case relied on by Leitner supports the Court of Appeals decision rather than conflicting with it. Pet. 12-13. *Kaplan* explains that orders denying summary judgment are not reviewable on appeal when summary judgment was denied based on the trial court's determination that "material facts are in dispute," and such orders may be reviewed on appeal only when "the parties dispute no issues of fact" and "the decision on summary judgment turned solely on a substantive issue of law." *Kaplan*, 115 Wn. App. at 799-800. Because the trial court determined that material facts were in dispute, its ruling was properly not subject to review.

Second, the Court of Appeals properly addressed every issue that Leitner raised in his appellate briefing. Leitner argues that the Court improperly declined to consider his argument that the trial court and Board misapplied the burden of proof. Pet. 11-12.[4] But Leitner's Court of

[4] Leitner also argues that the Court of Appeals should have addressed his challenge to the superior court's evidentiary rulings concerning the testimony of an industrial hygienist. Pet. 19-20. The Court declined to review this claim because Leitner "fail[ed] to provide any reasoned argument supported by legal authority on why the superior court abused its discretion." *Leitner*, 476 P.3d at 629 n.7. Though he disagrees with the Court's interpretation of his briefing, Leitner does not argue that this aspect of the decision conflicts with any case law, nor does he explain how it raises an issue of substantial public interest. *See* Pet. 19-20. And it is implausible that it would raise an issue of substantial public interest given its highly fact-specific nature. It therefore does not merit review.

Appeals brief did not clearly delineate which arguments corresponded to which of his various assignments of error. Furthermore, all of the briefing that Leitner points to relates either to his argument that the superior court should have granted him summary judgment—which the Court of Appeals properly declined to address because such decisions are generally unreviewable on appeal—or his argument that the jury instructions should have reworded the Board's findings to reference all heart problems, which the Court of Appeals addressed and properly rejected. *Leitner*, 15 Wn. App. 2d at 12; *see* Pet. 11-12 (citing CP 2, 3, 12, 13, 28, 30).

In any event, Leitner's perfunctory arguments fail to show that the Court of Appeals' analysis with regard to the burden of proof conflicts with either *Spivey* or *Gorre*. Pet. 11-12; *Leitner*, 15 Wn. App. 2d at 4; *Spivey*, 187 Wn.2d at 735, 738-39; *Gorre v. City of Tacoma*, 180 Wn. App. 729, 324 P.3d 716 (2014), *rev'd*, 184 Wn.2d 30 (2015). As Leitner notes (Pet. 11-12), under *Spivey*, to rebut the presumption of occupational disease, an employer must present evidence supporting the inference that it is more probable than not that the disease was caused by nonoccupational rather than occupational factors—though it does not have to prove the specific cause of the disease. *Spivey*, 187 Wn. 2d at 735. Under *Gorre*, an employer cannot meet this standard merely by showing that (1) there is "no known association" between firefighting and the

disease, or (2) the cause of the disease cannot be identified by a preponderance of the evidence. Pet.11-12 (citing *Gorre*, 180 Wn. App. at 758).

But Leitner does not demonstrate a conflict, because the Court of Appeals' decision is fully consistent with both cases. *Compare* Pet. 11-12 *with Leitner*, 15 Wn. App. 2d at 7. The decision below correctly articulated and applied the burden of proof as Spivey explains it should be applied. *Id.* at 7 (citing *Spivey*, 178 Wn.2d at 735, 739). It affirmed the superior court because the jury instructions properly set forth this burden of proof and conveyed that the presumption applied to all of Leitner's alleged heart problems, not just the myocardial infarction. *See id*. There is no conflict between *Spivey* and *Gorre*'s analysis and the opinion below with regard to burden of proof or any other legal issue.

Further, contrary to Leitner's arguments, the jury could reasonably rely on medical evidence in the record to conclude that the City rebutted the presumption, and nothing in *Gorre* or *Spivey* suggests otherwise. Record evidence supported the inference that Leitner's disease was more probably caused by nonoccupational factors, including age, obesity, and family history, than by his occupational exposure as a firefighter. Pet 11-12; CP 733-34, 737-40, 755, 861-62, 873, 875. In other words, in rebutting the presumption, the City did not rely on a claim that there is "no

known association" between firefighting and the disease, or that the disease had an unknown cause. *Cf. Gorre*, 184 Wn. App. at 758.

Third, Leitner baselessly argues that he was deprived of "his liberty interest in the proper placement of the burden of proof." Pet. 18-19. But Leitner waived this argument by not raising it below, and he makes no attempt to show that the narrow exception to waiver for arguments based on manifest constitutional errors should apply. Pet 18-19; *see* RAP 2.5(a); *Buecking v. Buecking*, 179 Wn.2d 438, 454-55, 316 P.3d 999 (2013). Even assuming for the sake of argument that Leitner has a protected interest in workers' compensation benefits—despite his failure to cite any authority for that proposition—his argument lacks merit because it rests on the false premise that the superior court restricted the presumption in RCW 51.32.185 to his myocardial infarction rather than applying it to all of his heart problems. But the superior court issued multiple instructions informing the jury that the presumption applied to all of Leitner's heart problems, not just the myocardial infarction, and it is implausible to assume that the jury disregarded all of those instructions.

V. CONCLUSION

Leitner establishes no conflict with case law and no issue of substantial public interest meriting this Court's review. The petition should be denied.

RESPECTFULLY SUBMITTED this 28th day of January, 2021.

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NO. 99265-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANDREW LEITNER, Appellant, v. CITY OF TACOMA and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Answer to Petition for Review and this Declaration of Service in the below described manner:

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DATED this 28th day of January, 2021, at Olympia, Washington.

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