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Appellate Court No. 52908-4-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW P. LEITNER,

Petitioner,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is firefighter Andrew Leitner.

II. CITATION TO COURT OF APPEALS' DECISION

Division II Court of Appeals opinion, *Leitner v. City of Tacoma,* 14 Wn. App. 2d 1018, filed August 18, 2020. *Appendix A*

III. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court accept review because the Appellate Court's decision conflicts with decisions of the Supreme Court and published decisions of the Appellate Court? Yes.

2. Should the Supreme Court accept review because this Petition involves an issue of substantial public interest that should be determined by the Supreme Court? Yes.

3. Should the Supreme Court accept review because the Appellate Court's decision affirms the deprivation of a liberty interest to firefighter Leitner? Yes.

IV. STATEMENT OF THE CASE.

A. Statement of background Facts

Andrew Leitner ("Leitner") was a firefighter for the City of Tacoma for thirty-one years. *CP 578:24 - 579:1.* He was exposed to diesel fumes in his job for most of his career. *CP 541:1-3; 541:5-12; 560:7-18; 563:5-11; 563:24 - 564:1; 564:12-16; 565:12-16; 565:17-22; 623: 4-7; 626:17-23;633:13-20.* Leitner went on about 800 calls a year, generally, over the course of his 31 years as a firefighter. *CP 622:20-25.* He responded to

approximately five thousand fire suppression calls as a firefighter where there was smoke, fumes and toxic substances in either a residential or a commercial fire. *CP 626:5-627:22.*

Frequently, Leitner would do patient-transfers (i.e. lifting) involving 300 to 400 pound patients. *CP 589:14-590:4*

During his December 31, 2014 shift, Leitner responded to multiple medical calls and he performed a boat check *CP 582:22-23; 583:12-20.* The boat check involved"exciting the alternator," where diesel fumes permeate the area that Leitner was in. *CP 583:18 - 584:5-8.*

Also on this shift, Leitner was aboard the fireboat and responded to a "disabled boat" call where a man had deployed his anchor into the water, using 200 or 300 feet of line. *CP 528:8-12.* Leitner began pulling the forty-to-fifty pound anchor up, hand-over-hand. *CP 530:1-2; 11.* After three to four minutes of this, Leitner experienced extreme sweatiness and nausea. The pain between his shoulders worsened and started to radiate down his left arm, which was unusual to him. *CP 530:14-20.* He paused, and then continued to pull the anchor up for another four to five minutes. As he continued to pull, the pain started to increase again in his left arm. He had an aching sensation in his chest. He still felt short of breath, and he started to feel dizzy. He secured the anchor. He was out of breath. He felt nauseous. He had some

chest pain. He did not feel very well. *CP 530:24 - 531:12; 596:14 - 597:1.*

During the remainder of that shift, Leitner felt dizzy, tired, had a sharp pain between his shoulders, still had chest pain and his left arm was throbbing. *CP 598:12-19.* At 2:00 am the morning of January 1, 2015, Leitner awoke drenched in sweat with the pain "really hard" between his shoulders and going down his left arm. *CP 533:5-7.* He felt that there was something wrong. *CP 599:10-11.* After he went home after this shift, he felt nauseous off-and-on. He felt weak and disoriented. *CP 600:9-14.* On January 2, 2015, he was still not feeling well. *CP 600:1-5.*

On February 25, 2015, Leitner started a 24 hour shift, beginning at 7:00 am. On this shift, Leitner responded to several calls. *CP 600:18- 601:8.* One call involved Leitner helping lift a very heavy man who had fallen. *CP 11-19.* Leitner felt dizzy, light-headed and the pain between his shoulders increased. *CP 601:25 - 602:1.* Leitner felt exceptionally worse than he had felt since December 31, 2014. He testified, "it was like a crescendo, an increasing, and that shift I notably told my crew again as I said when I started that, I don't feel good, my left arm woke me up again last night, which I told them that was common, every night around 2:00 my left arm would wake me up and it would hurt." *CP 605:18 - 606:4.*

Also on this shift, Leitner was dizzy at times, sometimes unsteady and

was extraordinarily tired. *CP 606:5-8.* He also was awoken with extreme left arm pain at 2:00 a.m. *id.* After getting home on January 26, 2015, he had no energy, felt off, did not feel well, felt nauseous off and on, his upper back pain was increasing and "it was different." *CP 607:4-15.*

On February 27, 2015, Leitner felt worse. He was extremely tired, nauseous, confused and dizzy. *CP 607:16-23.* He got up from the couch and felt like he was going to pass out. *CP 607:24-608:1.* Leitner woke up at approximately 6:00 am on February 28, 2015 with extreme pain. He sat up in bed and his left arm was throbbing, aching, and he felt something in his chest. *CP608: 8-13.* After getting out of bed, he walked around his house in a confused state and he again was dizzy and nauseous. *CP 608:20-24.* He broke out in a cold sweat and the pain that was between his shoulders went directly into his chest. *CP 609:1-4.* He called 911 and was taken to the hospital and into surgery. CP 611:9; *612:1-2; 613:14.*

B. The Department of L&I accepted Leitner's RCW 51.32.185 presumptive-occupational disease claim.

Leitner submitted the Supervisor's Reports of Incident or Injury and SIF-2 regarding December 31, 2014 and February 28, 2015 . *CP 236-237.* He submitted his SIF-2 Addendum detailing a history of December 31, 2014 through February 28, 2015, culminating in his trip to the hospital on February 28, 2015. *CP 251-253.* The Department of Labor and Industries

("Department") accepted Leitner's presumptive-disease heart claim. *CP 187*

C. The City appealed the Department's claim-acceptance to the Board of Industrial Insurance Appeals.

Leitner's employer, City of Tacoma ("City"), appealed the claim-acceptance order. *CP 181-184.* The Industrial Appeals Judge affirmed claim-acceptance. *CP 169-179.* The City appealed. *CP 140-164.*

D. The Board improperly limited the statutory presumption.

RCW 51.32.185 creates a presumption for eligible firefighters (such as Leitner) 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 under RCW 51.08.140. [Bold added].

The Board of Industrial Insurance Appeals ("Board") improperly limited the "any heart problems" presumption to an acute myocardial infarction of February 28, 2015 and improperly applied the 72 hour factor to only "diesel fumes" (not "smoke, fumes or toxic substances"). *CP 113-122.*

Indeed, Leitner had a myocardial infarction, which is a heart problem. But even the City's expert admitted that Leitner had coronary artery disease, which his a heart problem, and angina pectoris, which is also a heart problem. *CP 779, 782.* Angina pectoris is a heart problem. *CP 909.* The Board even stated, "Both doctors thought Mr. Leitner may have experienced angina on

various occasions between December 31, 2014, and his heart attack on February 28, 2015, due to the narrowing of his arteries combined with physical exertion." *CP 117.*

The City's expert Dr. Thompson admitted that it appears that the symptoms of angina pectoris occurred while Leitner was engaged in activities on the job. *CP 779.* Leitner had multiple "heart problems" as evidenced by the medical testimony. *e.g. CP 779, 782.*

The Board reached out and picked one heart problem (2/28/15 myocardial infarction) and put only that in its findings of fact. *CP 61.*

By limiting its findings and conclusions only to "myocardial infarction" - and ignoring the other presumptive heart problems – the Board: (1) Deprived Leitner of the full statutory presumption; and (2) Materially changed Leitner's case on appeal because in Leitner's trial, the jury was lead to believe that their decision was confined only to deciding the issues as it pertains to Leitner's "myocardial infarction" and when considering exposures, only exposures to diesel fumes.

E. The Board and Superior Court misapplied the burden of proof under RCW 51.32.185.

The Board also failed to apply the burden of proof on the City as required by RCW 51.32.185 and as construed by this Court in *Spivey v. City of Bellevue,* 187 Wn.2d 716, 389 P.3d 504 (2017) and the Appellate Court in

Gorre v. City of Tacoma, 180 Wn. App. 729, 324 P.3d 716 (2014), as amended on reconsideration in part (July 8, 2014), as amended (July 15, 2014), rev'd, 184 Wn.2d 30, 357 P.3d 625 (2015).

Dr. Thompson testified that Leitner had a buildup of cholesterol in his arteries for years and years prior to the February 28, 2015 "event". *CP 751.* When asked what caused that buildup, he testified that the cholesterol "in our blood seeps into our arteries and accumulates." *CP 751.* When asked what caused that to happen, Dr. Thompson testified not about Leitner specifically, but in general terms, "Age, smoking, high blood pressure, diabetes and sometimes you never know why one person gets it and another doesn't." *CP 751.*

Specifically as to Leitner, Dr. Thompson's testimony established that there was: **no history** of cigarette smoking, **no history** of high blood pressure, **no history** of diabetes, and **no history** of high cholesterol. *CP 767:11-21.*

Dr. Chen testified that Leitner's coronary artery (in which the stent was placed on February 28, 2015) was one hundred percent blocked and that "a complete blockage is usually an acute event." *CP 909.* Dr. Thompson admitted: "The underlying cause [of angina pectoris] was buildup of cholesterol in his arteries. **The exertion just brought out symptoms of that,**

[. . .]" [bold added]. *CP 783.* Dr. Thompson also admitted that prior to the day Leitner pulled up the anchor (12/31/14) Leitner had shown **no symptoms** or no awareness of any kind of his heart disease or heart problems. *CP 778.*

The City's evidence failed as a matter of law to meet its burden under RCW 51.32.185. The Board improperly applied the presumption, because it did not follow the rules set forth in *Spivey, id., and Gorre, id.*

F. The Dissenting member of the Board was correct.

The dissenting member of the Board noted that the Board majority misapplied the presumption:

> Because the Board majority has misapplied RCW 51.32.185 to the facts of this appeal, I respectfully dissent. *CP 62.*
>
> While on a medical aid call on February 25, 2015, Mr. Leitner began experiencing increased upper back pain, dizziness, and light-headedness immediately after assisting two other firefighters in getting a heavy man off of the floor. Along with other symptoms, those symptoms continued off and on from then until he called 911 less than three days later. As the undisputed medical testimony explained, a heart attack can be the result of strenuous physical exertion, and it can be ongoing. [. . .] He established that he suffered his attack within 24 hours of strenuous physical exertion within the meaning of RCW 51.32.185. *CP 62*
>
> Additionally, while on the job on February 25, 2015, Mr. Leitner was exposed to diesel exhaust fumes emanating from a fire engine and two fire boats. His heart attack began that very day. Consequently, he suffered his heart attack within 72 hours of his exposure to fumes within the meaning of RCW 51.32.185. *CP 63.*

> The City's evidence in rebuttal to the statutory presumption is thin to non-existent. Regarding Mr. Leitner's diesel fume exposure, the City's proffered doctor offered that it is his "impression" that open-air exposure to diesel fumes is "not [a] known . . . cause" of heart attacks. He referenced no studies in support of his opinion. Regarding Mr. Leitner's physical exertion as a presumptive cause of his heart attack, the City simply and incorrectly contends that his heart attach did not begin within 24 hours of the exertion. Additionally, the City offered no medical evidence identifying any likely alternative cause of Mr. Leitner's heart attack if the cause was not diesel fumes or strenuous exertion. *CP 63.*

G. Leitner appealed to the Superior Court.

Leitner appealed to the Superior Court. *CP 1–4.* At the jury trial, the Department aligned with Leitner in its support of the proper application of the law. *VRP 838:6-8; 955:3-17; 961:5-9.* The Superior Court found that the Board used the wrong standard in applying the presumptive disease statute and that the Board's analysis was incorrect and flawed. *See VRP 71:15-19; 369:17; 369:20-25; 459:13-14.*

H. The Superior Court misapplied the law and failed to apply the proper burden on the employer.

The Superior Court committed reversible error by limiting the statutory presumption to "myocardial infarction." The presumption applies to "any heart problems" not just "myocardial infarction". *RCW 51.32.185.*

Despite the Supreme Court's holdings in *Spivey*, *id.,* and the Appellate Court's rules in *Gorre, id.*– both of which show that in the present

case the Board misapplied the presumptive disease statute – the Superior Court failed to correct the Board's prejudicially flawed findings of fact and conclusions of law and failed to apply the proper burden on the City. Leitner was deprived of the presumption as to "any heart problems" and was deprived of the burden-shifting mechanism of RCW 51.32.185.

The jury was led to believe that when the instructions and special verdict form used the term "heart problem," the problem being referred to was the singular heart problem found by the Board and repeated in Jury Instruction No. 7, that is, the February 28, 2015 "myocardial infarction." *See Instruction No. 7 at CP 1919-1920.* This is further evidenced by the City's counsel's representation to the jury in closing argument that, "Every one of those findings of fact [. . .] it's talking about myocardial infarction, heart attack. [. . .] that's what this is about. *VRP 968:1-10.*

The Superior Court could have, and **should have**, corrected this error. The Superior Court failed to modify the Board's findings and decisions, which then compounded the Board's error at the Superior Court trial.

I. Review should be accepted under RAP 13.4(b)(1-4).

Leitner appealed to the Court of Appeals. The Court of Appeal's decision conflicts with published opinions in the Appellate Courts as well as this Court's opinion in *Spivey, id.* This Petition also involves an issue of

substantial public interest that should be determined by this Court. Guidance to the courts on this issue is needed – and the Department and City agree. Leitner was also denied a liberty interest.

V ARGUMENT

1. The Appellate Court's decision conflicts with *Spivey, id.,* and with published decisions of the Appellate Courts.

The Appellate Court in *Gorre, id.,* gave specific rules about what evidence does **not** rebut the presumption, and those rules remain good law.

Gorre Rule No. 1: Evidence that there is no known association between the disease and firefighting – fails to rebut the presumption that the disease is occupational. *See Gorre,* id., at 758.

Gorre Rule No. 2: Evidence that the cause of the disease cannot be identified by a preponderance of the evidence fails to rebut the presumption that the disease is occupational. *id.*

The *Spivey* Rule: The Supreme Court in *Spivey,* mandates that the standard for rebutting the presumption **requires** that the employer 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**. *Spivey, id., at 735.*

Here, the City's medical expert testimony fits directly within what the Appellate Court in *Gorre, id,* and the Supreme Court in *Spivey, id.,* have

made clear does **not** rebut the presumption. *See Thompson Dep at CP 737:23-24; 748:16-25; 750:16- 751:7; 753:24 -754:6; 755:16- 756:3; 757:4-12; 758:8-17; 767:11-21.*

The Board and Superior Court fail to apply the correct burden of proof when, despite testimony that does not meet the *Spivey* and *Gorre* rules, they find and/or affirm that the presumption was rebutted.

The Appellate Court claims that, "Leitner provides one statement in his brief that the superior court failed to apply the correct burden of proof on the City. Leitner does not provide any argument, citation to the record, or legal authority in support of his assertion." *Opinion, at 13.* Respectfully, that is incorrect. *See pgs 2,3,12,13,28, and 30 of Appellant's Opening Brief - App B hereto.* Based on the Appellate Court's incorrect assertion, it declined to address Leitner's assignment of error (that the Superior Court failed to apply the correct burden of proof on the City). *Opinion, at 13.* This was error.

Leitner **did** provide argument, citation to the record, and legal authority in support of his assertion. He even identified this as an assignment of error on appeal. *See p. 5 of App B.*

The Appellate Court also refused to review Leitner's assignment of error No. 4 that the Superior Court erred by denying Leitner's motion for summary judgment. The Appellate Court's basis was that the order was not

appealed before the case went to trial and verdict. *Opinion at 16.* The Appellate Court's decision conflicts with *Kaplan v. Nw. Mut. Life Ins. Co.,* 115 Wn. App. 791, 65 P.3d 16 (2003). Where the decision on summary judgment turned solely on a substantive issue of law, a denial of summary judgment can be appealed following a trial on the merits. *Kaplan,* id., at 804.

It was the trial court's misapplication of the burden of proof in RCW 51.32.185, as interpreted by *Gorre, id.,* and *Spivey, id.,* that gave rise to the court's denial of Leitner's motion for summary judgment. *CP 1030-1048.*

"Given its importance to the outcome of cases, we have long held the burden of proof to be a "substantive" aspect of a claim." *Raleigh v. Illinois Dep't of Revenue,* 530 U.S. 15, 20–21, 120 S. Ct. 1951,147 L. Ed. 2d 13 (2000). *See also Spratt v. Toft,* 180 Wn. App. 620, 636, 324 P.3d 707 (2014).

The Appellate Court's decision also conflicts with *Clark Cty. v. McManus,* 188 Wn. App. 228, 354 P.3d 868 (2015), rev'd in part, 185 Wn.2d 466, 372 P.3d 764 (2016). In *Clark Cty,* the worker contended that the trial court's refusal to revise the Board's finding so that it reflected only injury to his lumbar spine was error, and the Court of Appeals agreed. *id., at 242.* The Court of Appeals in *Clark Cty., id.,* stated: "Thus, the issue before the jury was whether the Board's determination that a causal link existed between McManus' claimed industrial injury and the conditions of his work for the

County. Because the Board's finding of fact 5 as represented to the jury referenced the wrong injury, it effectively precluded McManus from establishing this link." *id.,* at 244.

The Court of Appeals held, "Thus, the trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial." *Id.,* at 245. Here, the issue before the jury was whether the Board was correct in deciding that the City rebutted the presumption that Leitner's heart problems were an occupational disease. But because the Board's findings of fact as represented to the jury in Instruction No. 7 referenced only myocardial infarction (leaving out all of his other heart problems) it effectively precluded Leitner from a full and fair application of the presumptive disease statute, which is **not** limited to myocardial infarction.

The trial court acknowledged that the Board's rationale and its analysis was wrong, but refused to correct the Board's obvious error. The Superior Court's refusal to correct the Board's obvious error materially affected the outcome of the trial.

The Appellate Court's decision conflicts with RCW 51.52.115, *Clark Cty., id., Spivey, id., and Gorre ,id.*

2. This petition involves an issue of substantial public interest that should be determined by this Court.

Under the substantial public interest standard in RAP 13.4(b), this

Court considers three factors: (1) The public or private nature of the question presented, (2) The desirability of an authoritative determination for the future guidance of public officers, and (3) The likelihood of future recurrence of the question. *State v. Hunley,* 175 Wn.2d 901, 906, 287 P.3d 584 (2012).

The Appellate Court stated, "Contrary to Leitner's suggestion, the language he relies upon [in RCW 51.52.115] does not pertain to appeals to the superior court that are tried to a jury. When tried to a jury, it is the jury, not the superior court, that determines whether the Board's findings or decision should be reversed or modified because they are incorrect." *Opinion at 14.*

The Appellate Court conflates the jury's duty (to determine whether the Board's findings or decision was correct) with the Court's duty (to correctly interpret and apply the presumption and burden-shifting mechanism in RCW 51.32.185).

The jury is charged with deciding whether the Board's "determination of the case" was correct. *See Stratton v. Dep't of Labor & Indus.,* 1 Wash. App. 77, 80, 459 P.2d 651 (1969). There is a legal (and material) distinction between "the case" and the "Board's determination of the case."

The Board's findings constructed a case only about a February 28, 2015 myocardial infarction. The **only** heart problem in the Board's material findings of fact was myocardial infarction. *See CP 1919-1920.*

The Appellate Court rationalizes its decision by relying on Leitner's closing argument to the jury. *Opinion, at 12.* This rationale does not survive the Superior Court's jury instruction to, "accept the law as I have explained it to you" and, "disregard any remark, statement, or argument that is not supported by [. . .] the law as I have explained it to you." *CP 1911-1912.*

The Board's decision was **not** that the City rebutted the presumption that **any heart problems** experienced within the 24 hour and 72 hour time-frames were occupational, but instead was that the City rebutted the presumption that Leitner's **February 28, 2015 myocardial infarction** was occupational. The Board ignored all of Leitner's other heart problems and created "a case" only about the February 28, 2015 myocardial infarction.

The Appellate Court points out that, "the trial court's instructions and verdict form unambiguously provided that the presumption applied to all of Leitner's heart problems." *Opinion at 12.* The Appellate Court cited Jury Instructions No. 9, 10, and 13.

Indeed, Instructions No. 9, 10, 13 and the verdict form used the term "heart problems." These instructions and the verdict form were poisoned by the roots planted early-on by the Board, that is, the Board's findings and decision that put only myocardial infarction at issue. The outcome of the litigation, the jury's decision, depends on the existence or non-existence of findings of ultimate fact. *See Gaines v. Dep't of Labor & Indus.,* 1 Wash.

App. 547, 552, 463 P.2d 269 (1969). Those "findings of ultimate fact" were **not** in Jury Instructions 9, 10, 13 or the verdict form. They were in Jury Instruction 7 – the Board's material findings of fact – which the Superior Court is required to read to the jury.

Jury Instruction No. 7 specifically referenced only myocardial infarction and it did so in the context of the presumptive-disease statute's 24 hour and 72 hour time-frames. This Jury Instruction literally stated, "This was **the heart problem** for which he was treated on February 28, 2015." *CP 1919-1920.* The trial Court should have fixed this under RCW 51.52.115.

The Superior and Appellate Courts need this Court's guidance so that when this happens again, the firefighter is not left without a remedy on appeal. The jury is not the remedy for fixing legal errors. Legal errors must be fixed before the jury gets the case, so that the firefighters get the protection of the full presumption.

Full opportunity to be heard shall be had before judgment is pronounced. *RCW 51.52.115.* "If 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.**" [bold added]. id.

With presumptions in RCW 51.32.185 for "respiratory disease" and "any heart problem," there is a high likelihood that this scenario will repeat

itself because these are general terms that encompass many conditions. **Even the Department has agreed (and the City has adopted)** that:

> A number of appeals are filed with the Board and superior court that involve the firefighter presumption, and questions not uncommonly arise regarding how to apply the firefighter presumption in a superior court appeal from a Board decision. *App C (Dep't mtn to publish, p.3), App D (City mtn to publish).*
>
> The Department is unaware of a case that addresses the specific argument that the superior court should modify the Board's findings where there is a contention that the Board failed to properly apply the presumption. *App C* (p.3) & *D.*
>
> Here, the decision involves questions regarding the application of the firefighter presumption to superior court appeals from Board decisions, and addresses issues that have not been addressed in a published opinion before. *App C (p.4) & D.*
>
> (4) Help from a higher court was needed to clarify how a superior court should resolve the legal questions raised by this appeal. *App C (p.5) & D.*

Under the Appellate Court's rationale, in an appeal from a Board order, firefighters have no remedy to modify or reverse the Board's findings to ensure that the firefighter's right to the **complete** presumption in RCW 51.32.185 of "any heart problems" is protected for the jury trial.

3. RAP 13.4(b)(3): Leitner was deprived of a liberty interest.

Because the jury decides if the Board's determination of the case was correct, and because "the case" was the result of the Board and Superior Court failing to apply the presumption of "any heart problems," Leitner was

deprived of the presumption, deprived of the burden-shifting mechanism of the presumptive-disease statute, and deprived of his liberty interest in the proper placement of the burden of proof.

A liberty interest may arise from an expectation or interest created by state laws. *See In re Bush,* 164 Wash.2d 697, 702, 193 P.3d 103 (2008). The Fourteenth Amendment protects individuals from deprivation of liberty without due process of law, and from the arbitrary exercise of the powers of government. *In re Lain*, 179 Wash. 2d 1, 14, 315 P.3d 455 (2013).

The Superior Court knew that the Board erred, yet it did not perform its duty under RCW 51.52.115 and modify or reverse the Board's findings. *See VRP 252:24 - 254:6 VRP 77:22-23. VRP 70:5-9.*

3. The Appellate Court improperly refused to decide a properly identified and briefed assignment of error.

The Appellate Court refused to review the merits of Leitner's issue on appeal that the Superior Court committed reversible error by denying Leitner's motion to exclude the testimony of Dr. Riordan. *Opinion at 18.* This witness's testimony was irrelevant. The Appellate Court's rationale for refusing to decide this issue was based on its **incorrect** conclusion that, "Leitner does not provide any argument in support of his claim."

Assignment of Error No. 5 in Leitner's Opening Brief stated: "The Superior Court committed reversible error by failing to exclude the testimony

of industrial hygienist Frank Riordan." *App B*. Facts pertaining to this issue were documented at pages 3-4, 14-16. *App B*. Legal argument on this issue was presented at pages 27-28 *(App B)* and pages 17-18 of Leitner's Reply Brief *(App E)*. The Appellate Court was incorrect and as a result, it failed to address this properly identified assignment of error.

4. Attorney fees.

Leitner requests that this Court award him his attorney fees, costs and witness fees incurred in the appeal to the Board, Appellate and Supreme Court under RCW 51.32.185(9) and *Spivey v. City of Bellevue, id.* When a determination involving the presumption is appealed to the Board or 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 by the opposing party.

VI. CONCLUSION

The Supreme Court should accept review and reverse the Court of Appeals' decision because the appellate Court's decision misapplies case law and conflicts with case law on issues of great importance and that involve a liberty interest. Leitner requests that the opposing party be ordered to pay his fees, costs and witness fees, for the appeal to the Board and all courts.

DATED: November 30, 2020

RON MEYERS & ASSOCIATES PLLC

By: ______________________________

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Appendix A

Filed
Washington State
Court of Appeals
Division Two

August 18, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANDREW P. LEITNER, Appellant, v. CITY OF TACOMA and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	No. 52908-4-II UNPUBLISHED OPINION

CRUSER, J. — Andrew P. Leitner appeals from a jury verdict affirming the Board of Industrial Insurance Appeals' (Board) denial of his occupational disease claim under former RCW 51.32.185 (2007). Leitner asks us to reverse, arguing that (1) the Board and the superior court improperly limited the scope of the statutory presumption under former RCW 51.32.185, (2) the superior court failed to apply the correct burden of proof on the City of Tacoma (City) under former RCW 51.32.185, (3) the superior court erred when it refused to modify or reverse the Board's findings and decision, (4) the superior court erred when it denied his motion for summary judgment, (5) the superior court erred when it denied his motion to exclude certain witness testimony, and (6) he is entitled to fees and costs for services rendered before the Board and on appeal.

We hold that the superior court did not limit the scope of the statutory presumption or abuse its discretion by not modifying or reversing the Board's findings and decision. We deny Leitner's request for fees and costs and decline to consider Leitner's remaining claims.

Accordingly, we affirm.

FACTS

I. Background and Medical History

Leitner worked as a firefighter for the City for over 30 years. While working as a firefighter, Leitner also served as a marine officer, an incident commander, a fire lieutenant, and a member of the hazardous material team. As a part of his job, Leitner regularly physically exerted himself. Leitner was also regularly exposed to smoke, fumes, and other toxic substances. In particular, Leitner was often exposed to diesel fumes from the diesel-powered fire engines and fireboat.

As a marine officer, Leitner performed duties on a fireboat. On December 31, 2014, Leitner responded to a disabled boat when working on the fireboat. While pulling up the boat's anchor, Leitner experienced upper back pain between his shoulders that radiated into his chest and down his left arm. Leitner also experienced weakness, dizziness, shortness of breath, and nausea. After the December 31 incident, Leitner reported regularly feeling pain between his shoulders and into his left arm, weakness, dizziness, fatigue, and nausea.

On February 25, 2015, Leitner began a 24-hour shift. His shift was busy, and he was exposed to diesel fumes while working, which was normal for Leitner. During his shift, Leitner assisted two other firefighters in lifting a heavy man from the floor while on a suppression call. After lifting the man, Leitner experienced extreme left arm pain and felt dizzy, lightheaded, and fatigued.

Leitner's symptoms significantly worsened. On the morning of February 28, Leitner called 911 and was transported to the hospital. Leitner experienced a myocardial infarction, commonly

referred to as a heart attack. Leitner had a 100 percent blockage in his left descending artery. Dr. Peter Chen conducted an emergency stent placement.

II. Procedural History

Leitner filed an application for benefits to the Department of Labor and Industries (L&I) for his heart problems experienced on December 31, 2014, which culminated to his myocardial infarction on February 28, 2015. On June 26, 2015, L&I rejected his claim, reasoning that Leitner's condition was the result of a pre-existing condition and not an industrial injury as defined by Industrial Insurance Laws.

Leitner appealed, arguing that L&I failed to comply with former RCW 51.32.185. Former RCW 51.32.185(1) provides a rebuttable presumption for firefighters who experience heart problems within 72 hours of exposure to smoke, fumes, or toxic substances, or within 24 hours of strenuous physical exertion on the job. On October 13, 2015, L&I issued an order that reversed its June 26, 2015 order rejecting Leitner's claim. However, L&I accepted Leitner's claim for only "the heart problem treated on" February 28, 2015 pursuant to former RCW 51.32.185.[1] Clerk's Papers (CP) at 284.

A. Industrial Appeals Judge Hearing and Ruling

The City appealed L&I's October 13, 2015 order to the Board. The Board's Industrial Appeals Judge (IAJ) held a hearing. Leitner presented the testimony of Aubrey Young, a physician's assistant, who was Leitner's primary provider. Young testified that she had examined

[1] L&I's order states RCW 51.32.182, which does not exist. This is clearly a scrivener's error and should have been RCW 51.32.185.

not based on realistic conditions. The court denied his request but struck portions of Riordan's deposition testimony where he compared the results of his measurements to federal legal standards.

The case proceeded to trial, and the jury was read the record offered before the Board. The court instructed the jury that the issues to be decided where (1) whether the Board was correct when it concluded that the City had rebutted the statutory presumption that Leitner's "heart problems were an occupational disease[,]" and (2) whether the Board was correct when it concluded Leitner did not establish that his "heart problems were an occupational disease." *Id.* at 1935.

The court also instructed the jury on the presumption set forth in former RCW 51.32.185 and the City's burden of proof before the Board. As to the presumption, the court instructed the jury that "[y]ou 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." *Id.* at 1926. The court instructed the jury that before the Board, the City had the burden to rebut the presumption that Leitner's "heart problem(s) arose naturally out of his conditions of employment[,]" and "his employment is a proximate cause of his heart problem(s)." *Id.* at 1923.

The court also instructed the jury on the Board's findings and decision.[2] Following the reading of the findings and decision, the court instructed the jury by stating that "[b]y informing you of these findings [and decision] the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings [and decision]." *Id.* at 1920-21.

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[2] RCW 51.52.115 states that "[w]here the court submits a case to the jury, the court shall by instruction advise the jury on the exact findings of the board on each material issue before the court."

During his closing argument, Leitner discussed the court's instructions to the jury. Leitner argued that the presumption applied to any heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances. Leitner argued that his heart problems began on December 31, 2014, and that all his heart problems experienced after December 31, 2014 applied to the presumption under former RCW 51.32.185.

The jury found that the Board correctly decided that the City rebutted the presumption that Leitner's heart problems were an occupational disease. The jury also found that the Board correctly decided that Leitner did not prove that his heart problems were an occupational disease. The court entered a formal judgment reciting the jury's findings and an order affirming the Board's rejection of Leitner's claim.

Leitner appeals the court's judgment and order.

DISCUSSION

I. Standard of Review

The Industrial Insurance Act (IIA), Title 51 RCW, governs judicial review of workers' compensation cases. In an appeal to the superior court, the court acts in an appellate capacity and reviews the findings and decision of the Board de novo, relying exclusively on the evidence presented to the Board. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "'Only issues of law or fact that were included in the notice of appeal to the Board or in the proceedings before the Board may be raised in the superior court.'" *City of Bellevue v. Raum*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012) (quoting *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 446, 213 P.3d 44 (2009)).

The Board's decision and order are presumed correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Spivey v. City of Bellevue*, 187 Wn.2d 716, 729, 389 P.3d 504 (2017). The party challenging the decision in an appeal must establish a prima facie case for the relief sought on appeal, and they must do so by a preponderance of the evidence. RCW 51.52.050(2)(a); *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 206, 210, 378 P.3d 139 (2016).

RCW 51.52.115 provides the right to trial by jury to resolve factual disputes. *Raum*, 171 Wn. App. at 139. "'[T]he trier of the fact, be it court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive.'" *Id.* at 139 (alteration in original) (quoting *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 550, 463 P.2d 269 (1969)).

On an appeal of an industrial insurance claim from the superior court, the appellate court reviews the superior court's decision, not the Board's order. RCW 51.52.140; *Rowley*, 185 Wn.2d at 200. The appellate court reviews the record to determine "'whether substantial evidence supports the findings made after the superior court's de novo review and whether the court's conclusions of law flow from the findings.'" *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015) (alteration in original) (quoting *Ruse*, 138 Wn.2d at 5). We view the record in the light most favorable to the party who prevailed in superior court. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009).

II. FORMER RCW 51.32.185: FIREFIGHTER PRESUMPTION

Under the IIA, a claimant is entitled to certain benefits if the claimant suffers from an "occupational disease." *Gorre*, 184 Wn.2d at 33. An occupational disease is disease that "arises naturally and proximately out of employment." RCW 51.08.140. The worker generally has the burden of proving that a disease suffered is an occupational disease. *Spivey*, 187 Wn.2d at 726.

Former RCW 51.32.185(1) provides an exception to firefighters to the IIA's general rule that the claimant carries the burden of proof. *Gorre*, 184 Wn.2d at 47. As relevant here, the statute provides a rebuttable evidentiary presumption that any heart problem experienced within 72 hours of exposure to smoke, fumes, or toxic substances, or within 24 hours of strenuous physical exertion during employment, is an occupational disease. Former RCW 51.32.185(1)(b). Thus, if the heart condition qualifies under this definition, the law eliminates the need for the firefighter to prove causation, or that the heart condition arose naturally and proximately out of the firefighter's employment.

However, the presumption set forth in former RCW 51.32.185(1) is a rebuttable presumption. If the firefighter shows that the heart condition qualifies under the statute, the burden shifts to the employer to show, by a preponderance of the evidence, or more likely than not standard, that the condition is not occupational. Former RCW 51.32.185(1)(d); *Spivey*, 187 Wn.2d at 735. If the employer meets its burden, the presumption is rebutted. *Raum*, 171 Wn. App. at 141. The firefighter may still receive workers' compensation benefits, but the firefighter retains the burden of proof. *Spivey*, 187 Wn.2d at 727.

It takes more than production of contrary evidence for the employer to rebut the presumption. *Id.* at 732. The presumption set forth in former RCW 51.32.185(1) shifts the burden

of production and persuasion to the employer. When a firefighter shows that he or she suffers from a qualifying disease, the employer has the burden to both (1) "*produce* contrary evidence and" (2) "*persuade* the finder of fact" that the disease, more probably than not, arose from nonoccupational factors. *Spivey*, 187 Wn.2d at 735. The question of whether the employer rebutted the presumption is a question of fact that requires weighing all the evidence. *Id.* at 729.

A. APPLICATION OF THE PRESUMPTION

Leitner claims that the superior court improperly limited the heart conditions suffered by Leitner to which the firefighter presumption could apply.[3] Leitner argues that the court improperly applied the presumption by limiting its application to his February 28, 2015 myocardial infarction. We hold that Leitner's claim lacks merit because, as L&I and the City both correctly contend, the superior court did not, in fact, limit the jury's application of the firefighter presumption to only Leitner's myocardial infarction.[4]

Our review of the record demonstrates that the superior court did not limit the jury's consideration to only Leitner's February 28, 2015 myocardial infarction. Leitner argued that all

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[3] Leitner also argues that the Board committed "reversible error" by improperly limiting the heart conditions suffered by Leitner to which the firefighter presumption could apply. Br. of Appellant at 5. But as L&I and the City both point out, the Board's order is not the subject of review in this appeal. This court reviews the superior court's decision, not the Board's decision and order. RCW 51.52.140; *Rowley*, 185 Wn.2d at 200. Thus, Leitner's assignment of error, to the extent it asks us to reverse the Board, fails.

[4] The City includes a lengthy argument in its brief to the effect that the superior court erred in allowing Leitner to place all of his heart problems before the jury because the proper scope of review of the Board's order was limited to the myocardial infarction. The City presents this argument as though it is an assignment of error by the City. But the City did not file a cross appeal in this case. Therefore, the City cannot lodge an assignment of error.

Leitner prior to December 31, 2014 and saw no signs of cardiovascular distress. She opined that any heart problems must be work related.

The City presented Cardiologist Dr. Robert Thompson to testify to his independent medical examination performed on Leitner. Thompson noted that Leitner had no history of high blood pressure, high cholesterol, or cigarette smoking. Leitner "has a family history of coronary artery disease in that his mother had a coronary bypass in her mid-50s," which increased Leitner's chances of a myocardial infarction. *Id.* at 269. Thompson diagnosed Leitner with coronary artery disease. He opined that the first manifestations of the disease occurred on December 31, 2014, when Leitner experienced angina pectoris, or chest pain, during exertion due to inability to increase blood flow through narrow arteries. Eventually, his coronary artery disease caused a total blockage on February 28, 2015.

Thompson explained that Leitner's coronary artery disease was a pre-existing condition in which cholesterol had been building in his arteries for many months or years. Thompson stated that exposure to open air diesel fumes from the fire engines or fireboat could not cause a myocardial infarction. He testified that Leitner's work did not cause, aggravate, or light up his heart condition. He also testified that Leitner's myocardial infarction did not occur within 24 hours of performing strenuous activity as a firefighter.

L&I presented testimony of Chen, the cardiologist who treated Leitner on February 28, 2015, when he experienced a myocardial infarction. Chen also diagnosed Leitner with coronary artery disease. He testified that factors for heart disease include diabetes, high cholesterol, smoking, obesity, and family history of heart disease. Chen testified that "obesity is a risk for heart disease, but it is not [an] important risk." *Id.* at 1620. He testified that the "important cardiac risks

include diabetes, hypertension, high cholesterol, smoking, and family history." *Id.* at 1620. Chen stated that Leitner was obese, but he discovered no signs of hypertension or diabetes, and Leitner did not smoke. Chen stated that Leitner's myocardial infarction was acute and was caused by plaque breaking loose within his artery.

Chen offered no opinion as to how diesel fumes may have affected Leitner's condition. Chen also did not know if Leitner's chest pain experienced before his myocardial infarction on February 28 was an ongoing myocardial infarction that exceeded 24 to 48 hours.

The City presented testimony from Frank Riordan, an industrial hygienist. Riordan performed emissions tests on Leitner's fireboat on two different days. He did not test emissions in the fire station. Riordan tested for levels of diesel fumes and by-products of burning diesel fuel, such as nitrogen dioxide, nitric oxide, sulfur dioxide, carbon monoxide, and carbon dioxide. Riordan concluded that all measurable gasses were "very low" and that no special precautions were necessary to limit firefighters' exposure to diesel fumes while working on the fireboat. *Id.* at 1451.

On October 26, 2016, the IAJ issued a proposed decision and order. The IAJ concluded that Leitner's condition was an occupational disease within the meaning of RCW 51.08.140 and affirmed L&I's acceptance of Leitner's claim for his heart problem experienced on February 28, 2015.

B. The Board's Ruling on Appeal

The City petitioned the IAJ's decision to the Board. The Board reviewed the IAJ's record and disagreed with its ruling. The Board found that Leitner met the statutory presumption set forth in former RCW 51.32.185, but that the City's expert medical opinions rebutted the presumption.

The Board found that Thompson and Chen made clear that Leitner's myocardial infarction experienced on February 28 was a result of coronary artery disease, or the buildup of plaque in his arteries, which developed over a long period of time.

The Board reversed L&I's October 13, 2015 order accepting Leitner's claim and entered the following conclusions of law: (1) "[t]he rebuttable presumption of occupational disease provided by RCW 51.32.185 applies to" Leitner's myocardial infarction, (2) "Leitner's myocardial infarction is not an occupational disease within the meaning of RCW 51.08.140[,]" and (3) L&I's order granting Leitner's claim for his heart problem treated on February 28, 2015 is incorrect. *Id.* at 61-62. The Board remanded Leitner's claim to L&I to issue an order rejecting his claim.

C. APPEAL TO SUPERIOR COURT

Leitner appealed the Board's decision to superior court, where he moved for summary judgment reversal. Leitner argued that the Board (1) failed to properly apply the former RCW 51.32.185 presumption of firefighter occupational heart disease, thereby depriving him of the benefit of the presumption; (2) erred when determining that the City rebutted the presumption that his heart problem was occupational; and (3) failed to apply the former RCW 51.32.185 presumption to his chest pain that occurred on December 31, 2014. Leitner also requested attorney fees and costs. The superior court denied Leitner's motion for summary judgment, concluding that there was a genuine issue of material fact as to whether the City rebutted the statutory presumption of former RCW 51.32.185.

Leitner moved to strike the testimony of Riordan due to "lack of foundation, prejudice, confusion, incomplete and unrealistic test conditions, and lack of scientific validity." *Id.* at 1211. Leitner argued that his testimony should be excluded because his findings were incomplete and

his heart problems apply to the presumption, and the trial court's instructions and verdict form unambiguously provided that the presumption applied to all of Leitner's heart problems.

For example, the court instructed the jury that before the Board, the City had the burden to rebut the presumption that Leitner's "*heart problem(s)* arose naturally out of his conditions of employment" and "his employment [was] a proximate cause of his *heart problem(s)*." CP at 1923 (emphasis added). The court made clear that the presumption applied to all Leitner's heart problems and not just the myocardial infarction, advising the jury, "[y]ou 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*." *Id.* 1926 (emphasis added). The court also instructed the jury that it must decide whether the City "rebutted, by a preponderance of the evidence, the statutory presumption that Mr. Leitner's *heart problems* were an occupational disease." *Id.* at 1922 (emphasis added).

Furthermore, the instructions facilitated Leitner's argument to the jury that it should apply the presumption to all his heart problems. For example, during his closing argument, Leitner argued to the jury that the presumption applied to any heart problems experienced within 72 hours of exposure to smoke, fumes, or toxic substances. On multiple occasions, Leitner argued that the angina pectoris that he experienced regularly beginning on December 31, 2014 until he experienced his myocardial infarction on February 28, 2015 should be considered when applying the presumption.

Because the court did not limit the jury's consideration to only Leitner's February 28, 2015 myocardial infarction, Leitner's claim fails.[5]

B. <u>SUPERIOR COURT'S FAILURE TO REVERSE OR MODIFY THE FINDINGS AND DECISION OF THE BOARD</u>

Leitner claims that the superior court erred because the court should have reversed or modified the Board's findings and decision based on his assertions that the Board erroneously limited the application of the firefighter presumption to only his myocardial infarction, and that the Board employed the wrong burden of proof.

We conclude that the superior court did not abuse its discretion when it declined to reverse or modify the Board's findings and decision. Moreover, Leitner misunderstands the procedure set forth in RCW 51.52.115.

With regard to his argument that the superior court should have modified the findings and decision of the Board, Leitner misreads the statute. In support of his argument, Leitner relies on the following portion of RCW 51.52.115:

> If 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.*

[5] Leitner includes an assignment of error that "[t]he Board and the Superior Court committed reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue*." Br. of Appellant at 5. Leitner provides one statement in his brief that the superior court failed to apply the correct burden of proof on the City. Leitner does not provide any argument, citation to the record, or legal authority in support of his assertion. RAP 10.3(a)(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Furthermore, "[p]assing treatment of an issue or lack of reasoned argument" does not merit our consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Therefore, we decline to address this assignment of error.

(Emphasis added.)

RCW 51.52.115 provides the superior court with the authority to modify or reverse the Board's decision on the merits if the superior court determines that the Board's findings or decision were incorrect. Contrary to Leitner's suggestion, the language he relies upon does not pertain to appeals to the superior court that are tried to a jury. When tried to a jury, it is the jury, not the superior court, that determines whether the Board's findings or decision should be reversed or modified because they are incorrect.

Leitner's argument that the court should have modified the Board's findings and decision is also contrary to the procedural requirements of a jury trial set forth in RCW 51.52.115. The statute expressly states that in jury cases, "the court shall by instruction advise the jury of the *exact findings* of the board on each material issue before the court." RCW 51.52.115 (emphasis added). Although not entirely clear, it appears that Leitner envisions a hybrid procedure where the court substantially modifies the Board's findings and decision before informing the jury of the findings and decision. However, RCW 51.52.115 does not provide for such procedure. RCW 51.52.115 is clear that the trial court is required to advise the jury of the Board's exact findings and decision.

With regard to Leitner's claim that the superior court should have reversed the findings and decision of the Board, Leitner appears to argue that the superior court should have reversed the Board's findings and decision as a matter of law, and that RCW 51.52.115 provided the superior court with the authority to do so. But as the City correctly observes, "RCW 51.52.115 does not bestow upon the trial court judge the authority to unilaterally dispose of appeals on the merits in a jury trial." Br. of Resp't City at 27. Leitner, for his part, cites no authority to support his contention that the superior court had the authority to reverse the Board in an appeal which

was tried to a jury. RCW 51.52.115 ("In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law.").

"'[T]he trier of the fact, be it court or jury, is at liberty to disregard board findings and decision if,'" it finds by a preponderance of evidence that the Board's decision is erroneous. *Raum*, 171 Wn. App. at 139 (alteration in original) (quoting *Gaines*, 1 Wn. App. at 550). To protect the jury's de novo review of the Board's findings and decision, the superior court is required to advise the jury of findings on material issues before the court. *Gaines*, 1 Wn. App. at 551. Without being informed of the Board's findings and decision, the jury could not know whether the Board's decision was supported by substantial evidence. *See Spivey*, 187 Wn.2d at 737-38.

Here, Leitner's case proceeded to jury trial to determine whether the Board "correctly construed the law and found the facts." RCW 51.52.115. At trial, Leitner was free to argue that the Board's findings and decision were incorrect or not supported by substantial evidence. Leitner was also free to argue that the Board's findings and decision were incorrect because the Board failed to address other heart issues that he believed also applied to the presumption under former RCW 51.32.185(1). Furthermore, the superior court's instructions to the jury facilitated review of Leitner's arguments by stating that the jury must decide whether (1) the City had rebutted, by a preponderance of the evidence, the statutory presumption that Leitner's "heart *problems* were an occupational disease[,]" and (2) whether Leitner established, by a preponderance of the evidence, that his "*heart problems* were an occupational disease." CP at 1922 (emphasis added).

Ultimately, the question of whether Leitner's other heart problems qualified for application of the statutory presumption was a factual question for the jury. The question of whether the Board

incorrectly applied the presumption by failing to address Leitner's other heart problems was also a question for the jury. Therefore, we conclude that Leitner's argument that the superior court erred by failing to reverse or modify the Board's findings and decision lacks merit.[6]

C. SUMMARY JUDGMENT

Leitner argues that the superior court committed reversible error by denying his motion for summary judgment because as a matter of law, the City did not rebut the presumption under former RCW 51.32.185(1). Because Leitner did not appeal the superior court's denial of summary judgment, we decline to consider his argument.

We review summary judgment rulings de novo. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). However, we will only review a trial court decision as a matter of right as provided in RAP 2.2. Furthermore, we do not review a trial court's denial of a summary judgment after a jury trial under RAP 2.2. *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 257 n. 1, 258 P.3d 87 (2011); *Johnson v. Rothstein*, 52 Wn. App. 303, 306, 759 P.2d 471 (1988).

In *Johnson*, we held that "an order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits." 52 Wn. App. at 306. The purpose of summary judgment is to avoid useless trials, and once a trial on the

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[6] In his reply brief, Leitner cites to *Clark County v. McManus*, 188 Wn. App. 228, 244-45, 354 P.3d 868 (2015), *rev'd in part on other grounds*, 185 Wn.2d 466, 372 P.3d 764 (2016), for the proposition that the court may revise a Board finding before informing the jury of the Board's finding. In that case, the court found that the Board's finding contained a scrivener's error that prejudiced the claimant because the finding referenced the wrong injury. *Id.* at 244. Because the error materially affected the outcome of the trial, the case was reversed and remanded for a new trial. *Id.* at 245. Leitner does not explain how this case has any application to his matter, as Leitner does not claim that the Board's findings and decision contain a scrivener's error that prejudiced him at trial.

merits is held, review of summary judgment does nothing to further its purpose. *Id.* at 307. An exception to this general rule occurs where the decision on summary judgment turned solely on a substantive issue of law. *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 804, 65 P.3d 16 (2003).

Here, Leitner failed to appeal the superior court's denial of his motion for summary judgment before he submitted his case to a jury trial and verdict. Leitner also failed to cite any legal authority which would allow us to review the superior court's summary judgment order. Leitner contends only that the court erred in denying his motion, and that his motion presented a question of law of whether the City rebutted the presumption. However, the superior court correctly treated the question of whether the City had rebutted the presumption that Leitner's heart problems were occupational as a genuine issue of material fact. Moreover, Leitner undermines his argument that the City could not rebut the presumption as a matter of law by engaging in a lengthy discussion of the facts that support his position that the City did not rebut the presumption.

We decline to review Leitner's claim because the superior court denied his motion for summary judgment on the grounds that there was a genuine issue of material fact and the case went to trial thereafter.

III. Attorney Fees

Leitner requests fees and costs on appeal and for services rendered before the Board under former RCW 51.32.185(9). We decline Leitner's request for fees and costs.

RCW 51.32.185(9)(a) and (b) provide that when a determination involving the presumption under RCW 51.32.185(1) is appealed to the Board or any court, "and the final decision allows the

claim for benefits," the Board or the court "shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter."

Here, we affirm the jury's verdict and the superior court's order affirming the Board's order reversing L&I's approval of benefits. Accordingly, we decline Leitner's request for fees and costs under RCW 51.32.185(9) because the final decision does not allow for the claim of benefits.[7]

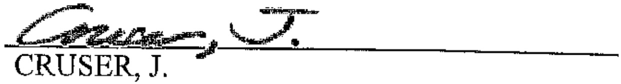
[7] Leitner also argues that the superior court committed reversible error by denying Leitner's motion to exclude the testimony of Riordan. We decline to review the merits of Leitner's claim because Leitner does not provide any argument in support of his claim. Leitner provides some discussion on this matter in his statement of the facts, however RAP 10.3(a)(5) is clear that an appellant's statement of the facts is reserved for "facts and procedure relevant to the issues presented for review, without argument." Leitner also briefly touches on this issue in his reply brief but fails to provide any reasoned argument supported by legal authority on why the superior court abused its discretion. We decline to consider whether the court committed reversible error by denying Leitner's motion to exclude the testimony due to his passing treatment and lack of reasoned argument on this issue. *Holland*, 90 Wn. App. at 538.

CONCLUSION

We hold that the superior court did not limit the scope of the statutory presumption or abuse its discretion by not modifying or reversing the Board's findings and decision, and we deny Leitner's request for fees and costs. Last, we decline to address Leitner's remaining claims.

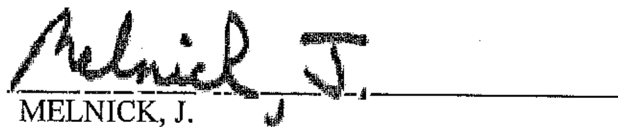
Accordingly, we affirm the jury's verdict and the superior court's order affirming the Board's order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

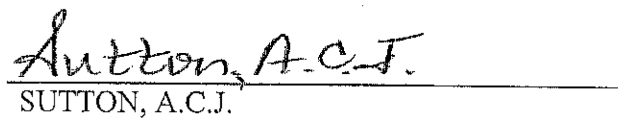


CRUSER, J.

We concur:



MELNICK, J.



SUTTON, A.C.J.

Appendix B

No. 52908-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

For over thirty years, Andrew Leitner ("Lt. Leitner") was a fire fighter for the City of Tacoma. This is a worker's compensation case governed by the Industrial Insurance Act, Title 51 RCW. Under RCW 51.32.185(1)(a)(ii), any "heart problems" experienced by Lt. Leitner 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 presumed to be occupational diseases under RCW 51.08.140.

This presumption is not limited to myocardial infarction (heart attack) or myocardial infarction as a singular event. Rather, it pertains to "any heart problems". The presumption is not confined to exposure to only "diesel fumes". Rather, it applies to the more broad categories of "smoke, fumes or toxic substances" exposure. *See RCW 51.32.185(1)(a)(ii).*

RCW 51.32.185, reflects a strong social policy, for which the Courts must accord it the strength intended by the legislature. *See Spivey v. City of Bellevue,* 187 Wash. 2d 716, 731, 389 P.3d 504 (2017). This presumption does not vanish on the production of contrary evidence; rather, it shifts both the burden of production and persuasion to the employer. *id.*

As a matter of law, the employer fails to meet its burden to rebut the presumption if: (1) the cause of the disease cannot be identified by a

preponderance of the evidence; **or** (2) if there is no known association between the disease and firefighting, **or** (3) if the employer fails to provide evidence from which a reasonable trier of fact could conclude that the disease was, more probably than not, **caused by non-occupational** factors. *See Gorre v. City of Tacoma,* 180 Wash. App. 729, 758, 324 P.3d 716 (2014), as amended on reconsideration in part (July 8, 2014), as amended (July 15, 2014), rev'd, 184 Wash. 2d 30, 357 P.3d 625 (2015), reversed on other grounds. and See *Spivey v. City of Bellevue, supra* at 735.

In making its findings of fact and conclusions of law, the Board improperly limited the application of the presumption in this case to a singular "acute" "myocardial infarction" (instead of "any heart problem") and improperly applied the 72 hour exposure prong to only "diesel fumes" (instead of "smoke, fumes or toxic substances"). *CP 113-122.* The Board also incorrectly applied the burden placed on the employer by RCW 51.32.185 as interpreted by the Appellate Court in *Gorre v. City of Tacoma, supra* and the Supreme Court in *Spivey v. City of Bellevue , supra.*

On appeal to the Superior Court, the Superior Court judge acknowledged that the Board's rationale is flawed and that the Board applied the wrong standard. *VRP 459, 369.* The Court even stated: "I think the Board's analysis was incorrect". *VRP 369.* Despite the Court acknowledging

that the Board applied the wrong standard and that the Board's analysis was flawed – and despite the Supreme Court's holdings in *Spivey v. City of Bellevue*, and the Appellate Court's holdings in *Gorre v. City of Tacoma* – the Court failed to correct the Board's prejudicially flawed findings of fact and conclusions of law and failed to apply the proper burden on the employer. The Court had a duty under RCW 51.52.115 to reverse or modify the Court's findings of facts and conclusions of law – but failed to do so.

At trial, Lt. Leitner was deprived of the presumption as to "any heart problem" and was deprived of the protection of the burden-shifting mechanism of RCW 51.32.185.

Lt. Leitner was also prejudiced by the Court's failure to exclude the City's industrial hygienist expert – when his testimony was irrelevant because (a) it is undisputed that Lt. Leitner was exposed to diesel fumes on the fireboat on December 31, 2014 and so the "level" of fumes is immaterial under the presumptive disease statute and (b) who failed to perform any test of exposure to smoke, fumes or toxic substances to which Leitner was exposed while working at the fire station or from the fire engine on December 31, 2014 and February 25, 2015 and throughout his 30 year career; and (c) his testing performed as to the fire boat so far departed from the real world conditions that it was unreliable.

Riordan tested only the exposures on the fire boat – ignoring the various stations and apparatus to which Lt. Leitner was exposed throughout his career and during his heart problems experienced from December 31, 2014 through February 28, 2015.

He testified that the light wind was blowing off the water both days of his testing. *CP 698.* He admitted that in that situation, it was **impossible** to say whether the diesel exhaust from the boat would be pushed parallel to the upper surface of the boat so that it would not be coming across the boat or over the tope of the working deck. *CP 698.*

He admitted that he never took the fireboat out in the bay - rather, "we stayed in the harbor." *CP 699.* He admitted that they stayed "at a low speed." *CP 699.* He admitted that during the two hours each day that he was at the dock and the ten, twenty, thirty minutes that he was out each day at low speed, they **did not** rev up the boat. *CP 699.*

He admitted that the conditions when he was on the fire boat weren't necessarily the typical routine for the fireboat's operation. *CP 712.* He testified: "They were just idling and staying on board."

II. ASSIGNMENTS OF ERROR

1. The Board and Superior Court committed reversible error by treating this case as if the only condition applicable to the presumption in RCW 51.32.185(1)(a)(ii) was a February 28, 2015 "myocardial infarction" and as if that the only exposure

applicable to the presumption's 72 hour time-frame was "diesel fumes".

2. The Board and Superior Court committed reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue.*

3. The Superior Court committed reversible error by failing to reverse or modify the Board's findings and decisions to comply with the law as set forth in RCW 51.32.185 and *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue.*

4. The Superior Court committed reversible error by failing to grant Lt. Leitner's motion for summary judgment.

5. The Superior Court committed reversible error by failing to exclude the testimony of industrial hygienist Frank Riordan.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board and Superior Court commit reversible error by treated this case as if the only condition applicable to the presumption in RCW 51.32.185(1)(a)(ii) was a February 28, 2015 "myocardial infarction"? and that the only exposure applicable to the presumption's 72 hour time-frame was "diesel fumes"? Yes.

2. Did the Board and Superior Court commit reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue.* Yes.

3. Did the Superior Court commit reversible error when it failed to reverse or modify the Board's findings and decisions to comply with the law as set forth in RCW 51.32.185 and *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue*?

4. Did the Superior Court commit reversible error when it failed to grant Lt. Leitner's motion for summary judgment? Yes.

5. Did the Superior Court commit reversible error when it failed to exclude the testimony of industrial hygienist Frank Riordan? Yes.

IV. STATEMENT OF FACTS

For thirty-one years, Lt. Leitner was a fire fighter for the City of Tacoma. *CP 578:24 - 579:1.* He made Lieutenant in 1988. *CP 580:14-19.* For most of Lt. Leitner's career, when the rig was backing into the fire station, Lt. Leitner stood behind the engine – and as a result, he would breathe fumes. *CP 541:1-3.* In approximately 2011, the City phased in a hose system to divert the exhaust from the rigs in the station, but until the connector is connected ,the fumes are still blowing into Lt. Leitner's face – because it was his job to connect the connector. *CP 626: 17-23; 541:5-12.*

This hose system is called the Nederman system - and without exception, it was Lt. Leitner's responsibility to attach that system when he would be returning back to the station on an engine after a call. *CP 560:7-18; CP 563:5-11.* He breathes diesel exhaust while he's walking back to connect the Nederman system. *CP 563:24 - 564:1.* Even with the diesel exhaust being connected to the Nederman system, there are still diesel exhaust fumes in the apparatus bay. *CP 564:12-16.*

Lt. Leitner smelled diesel exhaust in his living quarters at Station 14

as recently as the last shift he worked there, which was February 25, 2015. *CP 565:12-16* There was always a diesel smell at Station 14 in the living quarters. *CP 565:17-22.*

Lt. Leitner went on about 800 calls a year, generally, over the course of his 31 years as a firefighter for the City of Tacoma. *CP 622:20-25.* On every one of those calls, he was exposed to diesel fumes in the apparatus or on the scene or in returning to the fire station. *CP 623: 4-7.*

All vehicles, except for staff vehicles, that Lt. Leitner worked around during his employment as a firefighter and a fire lieutenant were diesel vehicles – and he was never assigned to a "staff vehicle." *CP 633:13-20.*

During his career, Lt. Leitner responded to approximately five thousand fire suppression calls as a firefighter were there was smoke, fumes and toxic substances in either a residential or a commercial fire. *CP 626:5-627:22.*

During his December 31, 2014 24 hour shift, Lt. Leitner responded to multiple medical calls. *CP 582:22-23.* Fire engine 14 is a diesel rig. *CP 586:6-7.* Frequently, Lt. Leitner would do patient-transfers (i.e. lifting) involving 300 to 400 pound patients. *CP 589:14-590:4*

Also on his December 31, 2014 24-hour shift, Lt. Leitner performed a boat check, where they take the fire engine down to the fire boat and

perform the check. *CP 583:12-20.* Part of this boat check involves "exiting the alternator" – where the boat is started, the engines are revved up and down multiple time suntil the RPMs and the altnerator shows over 14 amps before going back down to an idle. *CP 583:18 - 584:5.* In doing this, there is a lot of diesel fumes from the back of the boat that permeates the area that Lt. Leitner was in. *CP 584:6-8.* He was in proximity to the diesel exhaust. *CP 585:7-586:1.*

Also on this new year's eve, 2014 shift, Lt. Leitner was aboard the fireboat and responded to a "disabled boat" call where a man had deployed his anchor into the water - 200 maybe 300 feet of hoseline. The boat had no battery power, no lighting, and was in the shipping lane. The boat's radio was not working. *CP 527:17- 528:17.*

The fireboat got up to 30 knots (around 30 mph). *CP 632:24-633:5.* While on the disabled boat, Lt. Leitner began pulling the anchor up, hand-over-hand. *CP 530:1-2.* The anchor was forty to fifty pounds. *CP 530:11.* After pulling the anchor up for three to four minutes, Lt. Leitner started to experience extreme sweatiness and nausea. The pain between his shoulders worsened, and started to radiate down his left arm, which was unusual to him. *CP 530:14-20.* He paused, and then continued to pull the anchor up for another four to five minutes. As he continued to pull the anchor up, the pain

started to increase again in his left arm, the pain between his shoulders started to feel like there was a knife poking between his shoulder blades, and the pain in his chest was an aching sensation, he still felt short of breath and he started to feel dizzy. He secured the anchor. He was out of breath. He felt nauseous. He had some chest pain. He did not feel very well. *CP 530:24 - 531:12; 596:14 - 597:1.*

During the remainder of that December 31, 2014 to January 1, 2015 shift, Lt. Leitner felt dizzy, tired, had a sharp pain between his shoulders, still had chest pain (but decreased) and his left arm was throbbing. *CP 598:12-19.*

At 2:00 am the morning of January 1, 2015, Lt. Leitner awoke drenched in sweat with the pain "really hard" between his shoulders **and going down his left arm.** CP 533:5-7. He felt that there was something wrong. *CP 599:10-11.* After he went home after his shift on January 1, 2015, he felt nauseous off and on. He felt weak and disoriented. *CP 600:9-14.* On January 2, 2015, he was still not feeling well. *CP 600:1-5.*

On February 25, 2015, Lt. Leitner started his shift at 7:00 am, and that shift ended on February 26, 2015 at 7:00 am. On this shift, Lt. Leitner responded to several calls. *CP 600:18- 601:8.* One call involved Mr. Leitner helping lift a very heavy man who had fallen. *CP 11-19.* Lt. Leitner felt

dizzy, light-headed and the pain between his shoulders increased. *CP 601:25 - 602:1.* On this shift, Lt. Leitner felt exceptionally worse than he had felt since December 31, 2014 - he testified "it was like a cresendo, an increasing, and that shift I notably told my crew again as I said when I started that, I don't feel good ,my left arm work me up again last night, which I told them that was common, every night around 2:00 my left arm would wake me up and it would hurt." *CP 605:18 - 606:4.*

Also on this shift (2/25/15 through 2/26/15 at 7:00 am), Lt. Leitner was dizzy at times, sometimes unsteady and was extraordinarily tired. *CP 606:5-8.* He also was awoken with extreme left arm pain at 2:00 am. *id.* After getting home on January 26, 2015, he took had no energy, felt off, did not feel well, felt nauseous off and on and the upper back pain was increasing and "it was different." *CP 607:4-15.*

The next day, February 27, 2015, Lt. Leitner felt worse. He was extremely tired, nauseous, confused and dizzy. *CP 607:16-23.* He got up from the couch and felt like he was going to pass out. *CP 607:24-608:1.* Lt. Leitner woke up at approximately 6:00 am on February 28, 2015 with extreme pain. He sat up in bed and his left arm was throbbing, aching, and he felt something in his chest. *CP608: 8-13.* After getting out of bed, walked around his house in a confuses state and he, again, was dizzy and nauseous.

CP 608:20-24. He broke out in a cold sweat and that pain that was between his shoulders went directly into his chest. *CP 609:1-4.*

He testified: "I think this has gone on too long, [. . .]". *CP 611:1.* He called 911. CP 611:9. He was taken to the hospital. *CP 612:1-2.* He was taken into surgery. *CP 613:14.*

Lt. Leitner submitted the Supervisor's Reports of Incident or Injury and SIF-2 regarding **December 31, 2014** and February 28, 2015 . *CP 236-237.* He submitted his SIF-2 Addendum detailing a history of December 31, 2014 through February 2, 2015, culminating in his trip to the hospital on February 28, 2015. *CP 251-253.*

The Department of Labor and Industries ("Department") accepted Lieutenant Leitner's RCW 51.32.185(1)(a)(ii) presumptive occupational disease heart claim. *CP 187.* The employer appealed. *CP 181-184.* The IAJ affirmed claim acceptance under RCW 51.32.185, the presumptive occupational disease statute. *CP 169-179.* The employer sought review by the Board of Industrial Insurance Appeals ("Board"). *CP 140-164.*

In making its findings of fact and conclusions of law, the Board improperly limited the application of the presumption in this case to a singular "acute" "myocardial infarction" (instead of "any heart problem") and improperly applied the 72 hour exposure prong to only "diesel fumes"

(instead of "smoke, fumes or toxic substances"). *CP 113-122.* This was despite evidence of other heart problems experienced within 24 hours of strenuous physical activity and within 72 hours of exposures to smoke, fumes or toxic substances.

As such, in Lt. Leitner's trial on appeal from the Board's Decision & Order, the jury was misled to believe that the jury's decision was confined only to deciding the issues as it pertains to Leitner's "myocardial infarction" (opposed to "any heart problem") and when considering exposures, only exposures to diesel fumes (opposed to "smoke, fumes or toxic substances" more generally).

A second error at the Board occurred because the Board failed to apply the burden of proof placed upon the employer by RCW 51.32.185 as construed by the Court of Appeals in *Gorre v. City of Tacoma, supra* and *Spivey v. City of Bellevue, supra.* The City, as matter of law, fails to rebut the presumption by a preponderance of the evidence if there is no known association between the disease and firefighting, or if the employer fails to provide evidence from which a reasonable trier of fact could conclude that the disease was, more probably than not, caused by non-occupational factors.

The City's medical expert's testimony fits directly within what Washington State's Appellate and Supreme Court has made clear does **not**

rebut the presumption. *See Thompson Dep at CP 748:16-25; 750:16- 751:7; 753:24 -754:6; 755:16- 756:3; 757:4-12; 758:8-17.*

Lt. Leitner appealed to the Pierce County Superior Court. *CP 1–4.* Lieutenant Leitner moved for summary judgment in the Superior Court, stating in part:

- There is no preponderance of rebuttable evidence regarding causation because the SIE, as well as the Board, bases the "rebuttal" on the mechanism of the heart attack, not the cause, (CABR 5,15,18,21,35,36,38) and pure speculation. *CP 1039.*

- The SIE cannot rebut the presumption that Petitioner's heart problem is occupational. This highlights the significance of correct placement of the burden of proof and how failure to give Petitioner the benefit of the presumption deprives him of due process." *CP 1039.*

- Just applying speculation and conjecture to trumpet a conclusory opinion that firefighting isn't a cause of Petitioner's heart problem does not meet the evidentiary standard set forth in RCW 51.32.185 or required by *Spivey, id. CP 1042.*

- In other words, the SIE had, and continues to have, the burden of showing that **all causes** of Petitioner's heart problem originated outside of employment as a firefighter. *CP 1043.*

The Superior Court denied this motion. *CP 1157-1158.* This was error, given the case law in *Gorre v. City of Tacoma* and *Spivey v. City of Bellevue* – which solidified the strength of the presumption and the burden that RCW 51.32.185 places squarely on the employer.

The Court also should have excluded the testimony of the City's other "expert", industrial hygienist Frank Riordan, CIH. *CP 660:13-14.*

Riordan performed an exposure assessment pertaining to the fireboat on which Lt. Leitner was on when he pulled up the anchor on December 31, 2014. *Riordan Dep at CP 663:12-15; 664:3-11; 666:7-12.*

Riordan did not do any measurement in this case on any of the engines or EMS apparatus at Stations 14, 12, 3 or 5. *CP 708:23 - 709:2.* Riordan did not do any testing at the fire house. *CP 712:21-23.* He also failed to go out on any fire calls that Station 14 may have been called out on after he was hired for this litigation. *CP 712:24 - 713:2; 712:4-12.* He admitted that the conditions when he was on the fire boat were not necessarily the typical routine for the boat's operation. *CP 712:16-19.* He testified: "They were just idling and staying on board." *CP 712:20.* He admitted that they did not actually "go out on the bay." *CP 699:4.* He testified that "We stayed in the harbor." *CP 699:4-5.* He admitted that they "Did not go full speed" and that they "stayed at a low speed." *CP 699:5-7.* He admitted that during the two hours each day that he was at the dock and the ten, twenty, thirty minutes that he was out each day at low speed, they did not "rev up the boat." *CP 699:16-24.*

During his testing, there was light wind blowing off of the water. CP

698:9-11. He then admitted that in that situation, it is **impossible to say** (without doing smoke tubes and seeing where the wind is going) whether the diesel exhaust would be pushed parallel to the upper surface of the boat so that it wouldn't be coming across the boat or over the top of the working deck. *CP 698:12-20.*

Lt. Leitner moved in limine to exclude this witness. *CP 1211-1212.* In his Motion in Limine, Lt. Leitner informed the Court that: "The data collected by the City of Tacoma's expert is incomplete, technically flawed, and will confuse – not assist – the jury." and "The opinion of the City of Tacoma expert was preordained by the lack of realistic conditions and by failure to test all sources of smoke, fumes and toxic substance exposures from diesel exhaust sources experienced by Lt. Leitner during his 24 hour shifts on December 31, 2014 and on February 28, 2015." and "Incomplete data collected under less than "real world" conditions has no value." *CP 1212. See Leitner's counsel's argument on this issue beginning at VRP 7:17; See also Lt. Leitner's argument at CP 19:4-20:1.*

After Pat DeMarco (the Department's attorney) cross examined Riordan, Ms. DeMarco moved to strike Riordan's deposition and his testimony:

> Based upon all those bits of what I've heard in this testimony, I'm going to move to strike the deposition and the testimony as not being relevant. CP 713:5-8.

On appeal in the Superior Court, the Department joined-in with Lt. Leitner's counsel and argued to exclude Riordan:

> The basis for the motion, Your Honor, is Mr. Riordan went out to the fireboat Destiny on two days. He tested for two hours only. There was no showing in the record that the weather or conditions over those two hours in two days approximated what Mr. Leitner was -- or Lieutenant Leitner was exposed to, and certainly didn't qualify -- there wasn't the qualifying foundation to render this opinion relevant to these facts.
>
> [. . .]
>
> THE COURT: 58. Thank you. Your objection was relevance?
> MS. DeMARCO: Yes, because there was a lack of foundation to show that anything that he tested was relevant to what Lieutenant Leitner had experienced.

VRP 8:13-21; VRP 9:2-4. The Court did not exclude Riordan. This was prejudicial error.

On appeal to the Superior Court, the Superior Court judge acknowledged that the Board's rationale is flawed and that the Board applied the wrong standard. *VRP 459, 369.* The Superior Court even stated: "I think the Board's analysis was incorrect". *CP 369.* Despite the Supreme Court's holdings in *Spivey v. City of Bellevue*, and the Appellate Court's holdings in *Gorre v. City of Tacoma* – all of which show that in the present case the Board misapplied the presumptive disease statute – the Superior Court failed to correct the Board's prejudicially flawed findings of fact and conclusions

of law and failed to apply the proper burden on the employer.

Lieutenant Leitner was deprived of the presumption as to "any heart problem" and was deprived of the protection of the burden-shifting mechanism of RCW 51.32.185.

V. ARGUMENT

"The IIA is remedial in nature, and thus we must construe it "liberally ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."" *Spivey v. City of Bellevue,* supra at 726; quoting *Dennis v. Dep't of Labor & Indus.*

The trial judge found that the Board used the wrong standard in applying the presumptive disease statute and that the Board's analysis was incorrect and flawed.

- "[. . .] but simply to find that the City rebutted the presumption because they've disproved that the most recent exposure was the cause and, therefore, the presumption doesn't apply, I think, is the wrong analysis, [. . .]" *VRP 71:15-19.*
- "I think the Board's analysis was incorrect." *VRP 369:17.*
- "I think they got to the way they got **the wrong way because of the way they addressed the presumption,** finding it had been rebutted, effectively, because the exposure within 72 hours, they felt, had been demonstrated to not be the cause of the heart problem in February. **That's not the standard.**" [Emph added]. *VRP 369:20-25.*

- I think the Board's rationale is flawed in light of *Larson* and *Spivey*. *VRP 459:13-14*

Imagine an apple tree, filled with ripe apples ready to be picked and used. The farm's manager decides which apples get picked. Imagine this manager picks only two of the apples from the tree, and leaves the remaining ripe apples in the tree, unpicked and thus unused. These remaining apples, if left on the tree, will rot. But the farm *owner*, aware that several ripe apples were left on the tree, can correct the manager's mistake and have **<u>all</u>** of the ripe apples picked for use.

This case is like that apple tree. The Board picked two apples (a singular myocardial infarction and diesel fumes) – and left all the other apples on the tree (all other heart problems, and exposures to smoke, fumes, and toxic substances over his career). The Court failed to fix the Board's error, and therefore Lieutenant Leitner was deprived of the full statutory presumption. He had to try his case with two apples, while all the remaining apples were left on the tree by the Board and then the Court to rot.

By limiting its findings and conclusions only to "myocardial infarction" even though the record evidences numerous "heart problems" and even though the presumption applies to "any heart problems", the Board created error that rippled all the way to the trial, the jury instructions and even the verdict form.

For example, the Board concluded: "The rebuttable presumption of occupational disease provided by RCW 51.32.185 applies to Mr. Leitner's **myocardial infarction.**" *CP 61.*

As another example, the Board found: "Mr. Leitner's **myocardial infarction** was not caused by any strenuous physical exertion at work, nor was it caused by his exposure to diesel fumes within the 72 hours just prior to his heart attack." *CP 61.*

As a third example, the Board found: "Mr. Leitner's **myocardial infarction** was not suffered within 24 hours of strenuous activity as a firefighter, [. . .]". *CP 62.*

The Board's findings of fact and conclusions of law failed to recognize all of Lieutenant Leitner's heart problems and instead treated this case as if the only condition applicable to the presumption was a February 28, 2015 "myocardial infarction".

The issue should not have been limited to whether or not Lt. Leitner had the singular event of a "myocardial infarction" within 24 hours of strenuous physical exertion or within 72 hours of exposure to "diesel fumes". But the Board misapplied RCW 51.32.185(1)(a)(ii) and failed to give Lietner the complete presumption and failed to properly frame the issues.

This error was felt all the way through Leitner's jury trial. Pursuant

to RCW 51.52.115, the court shall by instruction advise the jury of the exact findings of the Board on each material issue before the court. *See RCW 51.52.115.* Because the Board's decision is what is on appeal, the jury is tasked with deciding whether the Board was correct or incorrect. But in this case, the Board's decision pertained only to myocardial infarction – and so Leitner was deprived of all the other apples on the tree – and the jury never got the chance to apply the presumptive disease statute as correctly interpreted by Division II COA in *Gorre, supra* and by the Supreme Court in *Spivey, surpa.*

And the ripple effect of this error carried all the way through closing arguments. City of Tacoma attorney stated in his closing argument: "You have a jury instruction in there that enumerates all the different Board's findings of fact. **Every one of those findings of fact** you can see as a click through what – **it's talking about myocardial infarction, heart attack.** As I was trying to tell you folks at the beginning, and hopefully I got it across, **that's what this is about.** Finding of Fact No. 2, "Mr. Leitner suffered a condition diagnosed as a **heart attack.** While off duty and at home."" [emph added]. *VRP 968:1-10*

The Board misapplied the presumptive disease statute and the Judge acknowledged that error. The Judge stated: "[. . .] the analysis done by two

of the three members of the Board focuses on the connection, or lack thereof, between the most recent exposure and the heart problem. The statute [RCW 51.32.185] doesn't do that, and I don't think that's supported by *Spivey or Larson.*" *VRP 70:5-9.* The judge also stated:

> The City has the burden of overcoming that presumption by a preponderance of the evidence, and what they have to prove, because it's presumed to be an occupational disease, they have to rebut that presumption. And so I think there is some minimal relevance in opinions, or possibly even lay testimony, that the most recent exposure wasn't the cause of the heart problems, but it's -- and it's only minimally relevant because it is to say -- it's one tiny aspect of the work environment and it's a little bit like saying if Mr. Leitner has served ten thousand shifts, we have the burden of proving that nothing that happened on those ten thousand shifts contributed to the heart problems. We can eliminate this shift as causing the heart problems which tends to minimally move towards or in the direction of rebutting their presumption. The problem is, it places things out of context and it suggests to the jury that if the city proves that the most recent exposure didn't cause the heart problems, that alone rebuts the presumption, and it doesn't. I think it's minimally relevant in the same way that it would be relevant to go back to a shift ten years ago and say you weren't exposed to smoke or fumes or any noxious substances then. That is, if this presumption of occupational disease is almost like a wall that the City has to rebut, talking about what happened on the most recent shift is like taking one brick out of a thousand-brick wall, and the City bears the burden of overcoming that presumption. And so cause relating to the most recent exposure is relevant to that extent, but it does not, in and of itself, rebut the presumption." *VRP 252:24 - 254:6*

Speaking about the Board, the Court even stated: "I do think the rationale and the analysis was wrong, [. . .]" *VRP 77:22-23.* The Superior Court could

have, and **should have**, corrected this error.

The Court **shall** reverse or modify the decision of the Board if the Court finds that the Board exceeded its power or incorrectly construed the law and facts. "If 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.**" [Emph added] *RCW 51.52.115 in pertinent part.*

When discussing RCW 51.52.115's provision that the findings and decisions of the Board shall be prima facie correct, Liutenant Leitner's counsel raised the correct point to the judge that: "[i]t is presumed correct when there are no obvious errors. There are obvious errors in the Board's decision because it is not using the test and the protocols that were adopted by the Supreme Court in interpreting RCW 51.32.185. So the "presumed correct" -- there's no doubt that they were incorrect. [. . .] That's why I would ask you to make some corrections in the record."

Lt. Leitner's attorney also stated:

> There's only one more complicating factor in these types of cases that I can think of, Your Honor. That's because this is de novo, you actually have the right to change the decision of the Board of Industrial Insurance Appeals if you think there's clear and obvious error. One of the reasons that we're here is because this decision came out about two weeks before the Spivey and Larson decisions where the supreme court said, hey, here's how this law is to be applied. And, clearly, if you

> look at where the burdens were placed, the error came not because of any misfeasance but because everybody kind of argued always that the burden was on the claimant, and it wasn't until you got to the supreme court where they said no, it's not like that at all. *VRP 46: 1-15.*

But the Court failed to correct the Board's findings and decisions, which then compounded the Board's error at the Superior Court trial. The City of Tacoma took clear advantage, stating in closing argument: "You have an instruction in your packet that says the Board of Industrial Insurance Appeals is presumed correct. It's what they do. The Board of Industrial Insurance Appeals. That's what they do." *VRP 966:23 - 967:1*

The Board also misapplied the burden of proof in RCW 51.32.185 as interpreted by Division II in *Gorre, supra* and the Supreme Court in *Spivey, supra.* At trial, the City called two expert witnesses: Robert Thompson, MD and Frank Riordan, CIH.

Dr. Thompson testified that weight is a *mild* risk factor in the prevalence of heart disease, but when asked what he meant by "mild risk factor" he testified that "[. . .] mainly it acts through high blood pressure, high cholesterol, diabetes. It's a risk factor for those conditions which are, in turn, risk factors for blood vessel disease." *CP 737:13-20.* He then promptly admitted: "I was going to add that none of those conditions existed [pertaining to Lt. Leitner]." *CP 737:23-24.*

Dr. Thompson admitted that there was **no** history of diabetes, high blood pressure, high cholesterol or of cigarette smoking for Lt. Leitner. *CP 767:11-21.* Dr. Thompson also admitted that he does **not know:**

(1) that all of the apparatus for the City of Tacoma, including the fire engine that Lt. Leitner rides to work in and stands beside when he's going down to the fireboat Destiny are all diesel-fueled;

(2) how many thousands of exposures to smoke and fumes and toxic substances Lt. Leitner had during his career as a three-decade City of Tacoma firefighter;

(3) how many times during a shift that Lt. Leitner is exposed to diesel exhaust. *CP 772:3-12; 775:3-12; 771:24-25, respectively.*

Dr. Thompson – by his own admission – did not pay much attention:

> Q NOW, I want you to assume that the reason Mr. Leitner was able to get the Department to issue an allowance order under the presumption statute, was the alleged experience within 72 hours of exposure to smoke, fumes or toxic substances a heart problem. Did an exposure to fumes, smoke or toxic substances approximately cause Mr. Leitner's heart attack on February 28th -- sorry, myocardial infarction on February 28, 2015?
>
> MR. MEYERS: Same objections.
>
> A Did he inhale the smoke within 72 hours? **I don't know. I don't remember. I didn't pay much attention.**

CP749:21-749:8.

The Supreme Court in *Spivey v. City of Bellevue, supra,* was clear that rebutting the presumption of occupational disease requires that the employer 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**. *See Spivey, supra* at 716.

In *Gorre v. City of Tacoma, supra,* Division II held that the employer fails to rebut the presumption when the employer cannot identify the cause of the occupational disease or if the employer's basis is that there is no known association between the disease and firefighting. *Gorre v. City of Tacoma,* supra at 758, reversed on other grounds. Yet that is precisely what the City's defense was based on – medical expert opinions that as a matter of law fail:

> Q This is a hypothetical. Assuming those facts with what we've talked about thus far, do you have an opinion on a more-probable-than-not basis as to whether or not that alleged exposure on February 25, 2015 was a proximate cause of his myocardial infarction on February 28, 2015?
>
> A No.
>
> A If smelling diesel fumes caused -- triggered immediate heart attacks, we would have heart attacks allover the place. **It's just not one of the things that causes heart attacks.**
>
> Q What is it?
>
> A Smelling diesel fumes **not known to cause heart attacks.**

CP 750:16- 751:7.

> Well, why are you of that opinion that you don't believe that Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated or lit up by Mr. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?
>
> A There is **no proof** whatsoever that casual exposure to small amount of diesel fumes will trigger a myocardial infarction.

CP 753:24 - 754:6. See also CP 748:16-25.

> Q Without waiving objection; after everything that you've reviewed, do you have an opinion on a more-probable-than-not basis as to whether or not Mr. Leitner's employment with the City of Tacoma proximately caused, aggravated or lit up Mr .. Leitner's heart problem?
>
> MR. MEYERS: Objection; foundation; heresay; speculation.
>
> A I **found no evidence that it did.**
>
> Q Why do you say that?
>
> A **I found no evidence of anything** that would exacerbate or trigger atherosclerosis of his coronary arteries or a myocardial infarction.

CP 755:16 - 756:3. The City's expert was given another bite at the apple, and again he articulated an opinion that – as a matter of law – fails to rebut the presumption:

> Q Without waiving objection, after everything that you've reviewed, did Mr. Leitner's employment for the City of Tacoma proximately cause Mr. Leitner to suffer a heart-related occupational disease?

> A No.
>
> Q Why do you say that?
>
> A **There's nothing that I found in reviewing the records that would trigger a heart attack or cause atherosclerosis of his coronary arteries.**

CP 757:4-12. The City gave its expert a third try, but to no avail:

> Q Without waiving objection, was the claimant's heart problem that was treated on 2-28-15 result of an occupational disease arising naturally and proximately from the distinctive conditions of his employment as a City of Tacoma firefighter?
>
> MR. MEYERS: Objection; foundation; speculation.
>
> A No.
>
> Q For the same reasons articulated?
>
> A Yes.

CP 758:8-17.

The City's other "expert", industrial hygienist Riordan, did not know whether or not all of the vehicles in the City's Fire Department apparatus bays are diesel engine fire apparatus. *CP 709:5-8.* He also admitted that during one day of his testing, when the fire boat's engine was started, there was smoke coming out of the water for about **fifteen minutes**. *CP 666:23 - 667:3.* He also admitted that he detected diesel particulate matter in his samples and that he saw diesel particulates and that there is "no way to know" what might not have come out of the water in this type of situation.

CP 667:20-22; 668:9-14.

Riordian's testimony (see facts section supra) was entirely irrelevant to rebut the presumption, because it is indisputable that Lt. Leitner was exposed to diesel fumes aboard the fire boat on December 31, 2014 and was exposed to smoke, fumes or toxic substances that day and on February 25, 2015.

Because the presumption establishes the causal connection to Lt. Leitner's heart problems experienced with 72 hours of exposure to **smoke, fumes and toxic substances**, and because rebutting the presumption requires that the City prove causation by **non-occupational** factors, the "level" of occupational exposure is completely irrelevant toward rebutting the presumption.

Riordan's testimony is also irrelevant because his testing was conducted under conditions that departed from the actual conditions that they rendered his testing unreliable and irrelevant. ER 401, 702 and 703.

The Superior Court judge found that the Board's rationale was flawed, that the Board's analysis was incorrect, that the Board "[g]ot to the way they got **the wrong way because of the way they addressed the presumption,** [. . .]" and that the Board applied the wrong standard. *VRP 459:13-14; 369:20-25; 4:5-15.* The Superior Court had an obligation to

reverse or modify the Board's findings of fact and conclusions of law. *See RCW 51.52.115.* The Court failed to do so.

Ultimately, the jury was asked to decide whether the Board was correct in deciding that the City rebutted, by a preponderance of the evidence, the presumption that Andrew Leitner's heart problems were an occupational disease. *See Verdict Form at CP 1935.* But the jury was led to believe that the only heart problem about which the jury was deciding was a February 28, 2015 myocardial infarction. This is because the jury was instructed as to findings of fact and issues in this case that were based on the Board incorrectly construing the presumption in RCW 51.32.185(1)(a)(ii), failing to correctly apply the burden placed on the employer in RCW 51.32.185(1), *Spivey v. City of Bellevue, supra and Gorre v. City of Tacoma, supra,* and leaving several apples on the tree, out of the juries reach, to rot. *See Jury Instruction 7 at CP 1919-1920; See Jury Instruction 8 at CP 1921.*

The Superior Court should have granted Lt. Leitner's motion for summary judgment, because the City could not – as a matter of law – rebut the presumption as required by RCW 51.32.185, *Gorre, supra* and the Supreme Court in *Spivey, supra.* The City cannot prove that Lt. Leitner's heart problems were caused by non-occupational factors. The testimony has been taken. The City does not make and cannot change what the law

presumes. And disagreeing with the causal connection between Lt. Leitner's heart problems and smoke, fumes, toxic substances, or strenuous physical activity, does not rebut the presumption. Citing to a "lack of evidence" – whether in the medical field or otherwise, does not rebut the presumption.

> If the employer cannot meet this burden [to rebut the presumption], 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, supra at 729. The burden to rebut the presumption is heavy. It is a burden of production *and* persuasion. *See Spivey v. City of Bellevue, supra.* Failing to apply the correct burden of proof on the City at the Board hearing and at trial renders the burden-shifting mechanism within RCW 51.32.185 meaningless. Constricting the presumption in RCW 51.32.185(1)(a)(ii) to a single myocardial infarction – when the statute says "any heart problems" re-writes the statute and deprives Lt. Leitner of the full presumption.

Lt. Leitner's motion for summary judgment should have been granted. The City could not rebut the presumption as a matter of law, based on their own expert's testimony and the high threshhold for rebutting the presumption as set forth in *Gorre v. City of Tacoma, supra* and *Spivey v. City of Bellevue, supra.*

The MSJ was denied and the case went to trial. At trial, the judge – who found that the Board's analysis was incorrect – had a duty under RCW 51.52.115 to modify or reverse the Board's findings and conclusions. To not correct the Board's errors resulted in the jury being improperly limited in the scope of what it was to decide, misleading instructions, an improper narrowing of the presumption, an incorrect burden of proof and an unfair trial an unfair trial.

Attorney Fees:

Lt. Leitner requests attorney fees and costs under RCW 51.32.185(9) for fees and costs of the appeal and under RCW 51.52.120 for fees and costs for services performed at the Department. RCW 51.32.185(9)(a) and (b) provides:

> (9)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals 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.
> (b) 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.

Spivey v. City of Bellevue, id. RCW 51.52.120(1) states:

> (1) Except for claim resolution structured settlement agreements, it shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director or the director's designee for services performed by an attorney for such worker or beneficiary, if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the department is communicated to the party making the application.

VI. CONCLUSION

This Court can and should decide as a matter of law that the City failed to rebut the presumption of occupational disease. In the alternative, this Court should remand this case to be tried under the proper application of RCW 51.32.185 and without the testimony of Riordan.

DATED: May 3, 2019.

RON MEYERS & ASSOCIATES PLLC

By: ______________________

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Appendix C

FILED
Court of Appeals
Division II
State of Washington
9/4/2020 3:35 PM

NO. 52908-4-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

ANDREW P. LEITNER, Appellant, v. CITY OF TACOMA and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	CITY OF TACOMA'S MOTION TO PUBLISH, JOINING THE DEPARTMENT'S MOTION

I. IDENTIFY OF MOVING PARTY

The Respondent, City of Tacoma, seeks the relief specified in Part II below.

II. RELIEF SOUGHT

The City of Tacoma seeks an Order publishing the Court's unpublished decision that was filed August 18, 2020.

III. FACTS RELEVANT TO MOTION

On August 18, 2020, this Court issued its unpublished opinion in this case. *Leitner v. City of Tacoma*, No. 52908-4-II (Wash. Ct. App. August 18, 2020) (slip op.).

IV. GROUNDS FOR RELIEF

A party may move the Court to publish an unpublished opinion. RAP 12.3(e). RAP 12.3(d) provides four considerations when determining whether to grant motions to publish. *See* Dept. Motion to Publish at 2.

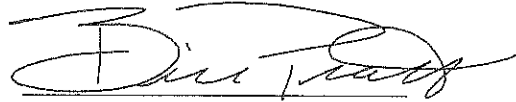
V. ARGUMENT

The City of Tacoma respectfully joins, and adopts by reference, the arguments presented by the Department's Motion to Publish.

VI. CONCLUSION

The City of Tacoma also believes that this Court's decision meets the criteria for publication provided for in RAP 12.3(d)(2), and respectfully joins the Department's request that the Court publish its August 18, 2020 decision in this case.

RESPECTFULLY SUBMITTED this 4th day of September, 2020.



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NO. 52908-4-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

ANDREW P. LEITNER, Appellant, v. CITY OF TACOMA and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	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 City of Tacoma's Motion to Publish, Joining the Department's Motion and this Certificate of Service in the below-described manner:

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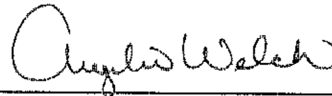

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Appendix D

FILED
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Division II
State of Washington
8/31/2020 2:23 PM

NO. 52908-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANDREW P. LEITNER, Appellant, v. CITY OF TACOMA and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	MOTION TO PUBLISH UNPUBLISHED OPINION

I. IDENTITY OF MOVING PARTY

The Department of Labor and Industries (Department) moves for relief designated in Part II. The Department is the state agency charged by the Washington State Legislature with the administration of the industrial insurance laws at issue here.

II. RELIEF SOUGHT

Under RAP 12.3(e), the Department seeks an order publishing the Court's decision filed August 18, 2020. A copy of the slip opinion is attached.

III. FACTS RELATIVE TO MOTION

On August 18, 2020, this Court issued its decision in this case. *Leitner v. City of Tacoma*, No. 52908-4-II (Wash. Ct. App. August 18, 2020) (slip op.). The Court did not publish the opinion. *Id.*

IV. GROUNDS FOR RELIEF

RAP 12.3(e) allows a party to move to publish an unpublished opinion. RAP 12.3(d) provides the criteria the appellate court uses to determine whether to publish an opinion. The Court considers:

> (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d). The Court developed these criteria in *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

The Department believes that this Court's decision meets the criteria for publication, and in particular meets the second criteria.

V. ARGUMENT

A. This Opinion Clarifies Established Principles of Law and Is of General Public Interest

This Court's decision clarifies how the Board of Industrial Insurance Appeals (Board) and the courts should apply the firefighter presumption (RCW 51.32.185) when deciding cases. Specifically, the decision explains that RCW 51.32.185 creates a presumption that any heart problems that

arose within 72 hours of exposure to smoke or other substances (or within 24 hours of unusual exertion) are presumed to be occupational diseases that were proximately caused by firefighting work. The decision also clarifies that, under RCW 51.52.115, the superior court should advise the jury of the precise findings of the Board, even when the worker contends that the Board's findings were incorrect or that the Board failed to properly apply the firefighter presumption.

The facts in this case are not unique. A number of appeals are filed with the Board and superior court that involve the firefighter presumption, and questions not uncommonly arise regarding how to apply the firefighter presumption in a superior court appeal from a Board decision. And the Department is unaware of a case that addresses the specific argument that the superior court should modify the Board's findings where there is a contention that the Board failed to properly apply the presumption. Publication of this Court's decision would clarify that the court should advise the jury of the Board's findings in that situation, as doing so is necessary for the jury to be able to determine whether the Board's findings meet the preponderance of the evidence standard, while also allowing the worker to argue that the Board made incorrect findings or failed to properly apply the presumption.

B. No Negative Consequences Exist Precluding Publication

In *Fitzpatrick*, 5 Wn. App. at 669, the court listed criteria under which an opinion should not be published. The Department believes the decision in this case does not fall within these negative criteria.

Fitzpatrick's first criterion for not publishing is where an affirmance is based upon the conclusion that the evidence is sufficient to sustain a finding of fact. *Fitzpatrick*, 5 Wn. App. at 669. This case did not involve a substantial evidence challenge so this criterion does not apply.

Fitzpatrick's second criterion for not publishing is whether an affirmance or reversal is readily determined by following legal principles well established by previous decisions. *Fitzpatrick*, 5 Wn. App. at 669. Here, the decision involves questions regarding the application of the firefighter presumption to superior court appeals from Board decisions, and addresses issues that have not been addressed in a published opinion before.

Fitzpatrick's third criterion for not publishing is when the Court's decision is based upon a question of practice or procedure. *Fitzpatrick*, 5 Wn. App. at 669. While this case involves issues that have a procedural component, the issues are specific to the provisions of the Industrial Insurance Act—specifically, the interaction between RCW 51.32.185 and RCW 51.52.115—rather than garden variety questions regarding a court's practices and procedures. And in any event, publication of the case would be

beneficial to the public and the courts, as it would help clarify how a superior court should resolve the legal questions raised by this appeal.

VI. CONCLUSION

The Department believes that the decision meets the criteria for publication in RAP 12.3(d)(2). Accordingly, the Department respectfully requests that the Court publish its decision in this case.

RESPECTFULLY SUBMITTED this 31st day of August, 2020.

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Appendix E

No. 52908-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANDREW P. LEITNER,

Appellant,

v.

CITY OF TACOMA and DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

"The IIA is remedial in nature, and thus we must construe it "liberally ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."" *Spivey v. City of Bellevue,* 187 Wash. 2d 716, 726, 389 P.3d 504, 509–10 (2017), quoting *Dennis v. Dep't of Labor & Indus.,* 109 Wash.2d 467, 470, 745 P.2d 1295 (1987).

II. ARGUMENT

The Department of Labor and Industries, which supported Lt. Leitner at trial, has now turned an about-face and taken the opposite position. The Department should be judicially estopped from making its arguments in opposition of Lt. Leitner's claim. At trial, the Department's attorney stated:

- "I will remind Mr. Meyers that the Department has been aligned with Lieutenant Leitner from the very beginning because the Department's order that the self-insured employer appealed was to allow the claim under the presumption." [bold added]. VRP 34:8-12.

- "What's happened in this case is the City of Tacoma has asked, and the Board agreed, that you should ignore all of the straw that had accumulated on this camel's back until two hours of Lieutenant Leitner's last shift that he worked before his myocardial infarction on February 28th. So, essentially, they're asking you to ignore 30 years worth of shifts where he was inhaling diesel particles and diesel exhaust, he was inhaling smoke, fumes, and toxic substances as he did his work as a first responder for the City of Tacoma. I submit to you that the evidence that you heard in this trial includes all of the straw that was on this camel's back, not the last two hours or two hours in the last shift that he worked." [bold added]. VRP 955:3-17.

- "The law says the City had to have produced sufficient evidence at the Board to overcome the presumption of causation by a preponderance of the evidence. **I would suggest to you that they did not meet that standard.**" [bold added]. VRP 959:22-23.

- "So when you look at your verdict form, as Mr. Meyers pointed out, the first -- the first question is, was the Board of Industrial Insurance Appeals correct when it decided that the City had rebutted the presumption -- the occupational presumption by a preponderance of the evidence? **The answer should be, No**, the Board did not get it right." [bold added]. VRP 959:23-960:4.

- "**The City did not put forth sufficient evidence to rebut the presumption** that Andrew Leitner's heart problems -- any of his heart problems -- weren't proximately caused by his work as a firefighter." [bold added]. VRP 961:5-9.

- **Dr. Thompson specifically stated that pulling up the anchor on 12/31/14 lit up his angina pectoris.** So there's evidence in the record to support this. There's been plenty of testimony that the -- the building up of cholesterol, the coronary artery disease, if you will, happened over a period of time. Mr. Leitner didn't know about it, but Dr. Thompson specifically said it was a temporary lighting up of this condition." [bold added]. VRP 805:14-22

- "The only thing that I would weigh in on this one is **Gore is good law**, and it remains good law, [. . .]" [bold added]. VRP 838:6-8;

- "It certainly conflicts with what we're giving for the lighting-up instruction which comes directly out of **Dr. Thompson's testimony because, there, we've said that the condition could be latent or quiescent and pre-existing and the work activity lights it up.**" [bold added]. VRP 868:14-19;

- "I'm thinking of the testimony in this case and how the doctors defined the angina pectoris, and how it's a partial blockage that starves the heart of blood. So the way I've conceptualized this is **it's one, long continuum with the lesser symptoms preceding the ultimate which was the myocardial infarction.** So I don't see them

> necessarily as distinct conditions. I see them along the pathway to a heart attack, speaking from some personal experience with that." [bold added]. VRP 877:25-878:9

Judicial estoppel bars the Department's attorney from now arguing that the Board and Superior Court did not limit the issue to only myocardial infarction. *See Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d 13 (2007).

The City of Tacoma ("City") states:

- First, the Board's and superior court's proper scope of review as limited to that of the October 13, 2015 Department order's allowance **for myocardial infarction**. [bold added]. *RB p. 11.*
- Here, the October 13, 2015 Department allowance order "actually decided" that this claim should be allowed for Leitner's **myocardial infarction** for which he received treatment on "2/28/15." [bold added]. *RB p. 14.*
- "The October 13, 2015 Department order expressly and exclusively allowed this claim for Mr. Leitner's February 28, 2015 **heart attack.** [bold added]. *RB 15.*

This claim (that the Department's order exclusively allowed the claim for a 2/28/15 myocardial infarction, i.e. heart attack) forms the basis for the City's larger argument- which is that Lt. Leitner's other heart problems such as his angina pectoris symptoms and his coronary artery disease were "beyond the Board's and superior court's statutory authority". *See RB p.15.*

The problem with the City's argument are the facts. The City's claim that the Department's order was limited to "myocardial infarction" fails when

confronted with the provable fact – that it was not. *See CP 1145.* Reality is that the Department's order states in pertinent part: "This claim is allowed for the **heart problem** treated on 2/28/15 pursuant to the provisions of RCW 51.32.182." [bold added]. *CP 1145.* **Nowhere** on the Department's October 13, 2015 order are the terms "myocardial infarction" or "heart attack". *CP 1145.*

Leitner submitted his SIF-2 Addendum detailing a history of December 321, 2014 through February 28, 2015, culminating in his trip to the hospital on February 28, 2015.[1] *CP 251-253.*

The City also claims that Lt. Leitner was "given free reign by the superior court to argue that all heart problems supported by the record were also presumptive "heart problems" warranting claim allowance and reversal of the Board Decision." *RB p. 19.* The Department makes a similar argument.

Even if that were true, it was rendered futile because the jury was led to believe that the only heart problem about which the jury was deciding was a February 28, 2015 myocardial infarction. The Board's findings of fact are limited to "myocardial infarction." *CP 61.* The jury must be advised by jury instruction of the "**exact findings** of the Board". [bold added]. *See RCW*

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1 The opening brief at p. 11 mistakenly states "through February 2, 2015." It should read "through February 28, 2015.

51.52.115. The jury was instructed by the court as to the Board's material findings - which pertained only to one heart problem - a "myocardial infarction".

The City's attorney took the following position in his closing argument:

> You have a jury instruction in there that enumerates all the different Board's findings of fact. **Every one of those findings of fact** you can see as a click through what – **it's talking about myocardial infarction, heart attack.** As I was trying to tell you folks at the beginning, and hopefully I got it across, **that's what this is about.** *VRP 968:1-10.*

Judicial estoppel bars the City's attorney from now arguing that the Board and Superior Court did not limit the issue to only myocardial infarction.

Quoting *Bartley–Williams v. Kendall,* 134 Wash.App. 95, 98, 138 P.3d 1103 (2006), the Supreme Court stated: "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc., id.,* at 538.

The City claims that the Board's application of the burdens of production and persuasion are not at issue here. *RB p. 19.* That is inaccurate. The following is Issue No. 2 in Lt. Leitner's Opening Brief:

> Did the Board and Superior Court commit reversible error by failing to place the proper burden of proof on the City of Tacoma, per RCW 51.32.185 and as construed by the Appellate Court in *Gorre v. City of Tacoma* and the Supreme Court in *Spivey v. City of Bellevue.* Yes.

Prior to the Supreme Court's opinion in *Spivey v. City of Bellevue, id.*, the government would claim that whether an employer rebutted the presumption in RCW 51.32.185 should be left to the judge to decide as a matter of law **in every instance**. *See e.g. Spivey, id.*, at 728. The issue went up to the Supreme Court, and the Supreme Court disagreed with the government. *see id.* The Supreme Court determined that it was a question of fact and **may be** submitted to the jury. *See Spivey, id., at 727-728.* But that is not to say that it *has* to go to the jury.

The Supreme Court in *Spivey, id.*, stated: "Because neither party has briefed the issue, we decline to address whether it would ever be permissible for a judge to decide the issue as a matter of law." *id.*, at 729.

CR 56 states that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The City repeatedly relies on a position that has already been determined by case law as failing to rebut the statutory presumption of occupational disease. On direct examination, the City's expert was asked the basis for his ultimate opinion, and his basis, was legally incompetent to rebut the

presumption under *Spivey v. City of Bellevue, id., and Gorre v. City of Tacoma*, 180 Wash. App. 729, 736, 324 P.3d 716, 720 (2014), as amended on reconsideration, reversed on other grounds. The court erred when it denied Lt. Leitner's motion for summary judgment.

Dr. Thompson testified that Lt. Leitner had a buildup of cholesterol in his arteries for years and years prior to the February 28, 2015 "event". *CP 751.*

When asked what caused that buildup, he testified that the cholesterol "in our blood seeps into our arteries and accumulates." *CP 751.* But when asked what caused that to happen, Dr. Thompson testified not about Lt. Leitner specifically, but in a general sense: "Age, smoking, high blood pressure, diabetes and **sometimes you never know** why one person gets it and another doesn't." *CP 751.*

On cross examination Dr. Thompson testified specifically about Lt. Leitner, in that that there was:

- **No history** of cigarette smoking for Lt. Leitner,
- **No history** of high blood pressure for Lt. Leitner,
- **No history** of diabetes for Lt. Leitner; and
- **No history** of or high cholesterol for Lt. Leitner.

CP 767. Dr. Thompson admitted that prior to December 31, 2014 (the day Leitner pulled up the anchor) Lt. Leitner had shown **no symptoms** or no awareness of any kind of his heart disease or heart problems. *CP 778.*

"In light of the foregoing authority, we hold that aggravation of a pre-existing, asymptomatic disease may be compensable as an occupational disease within the meaning of RCW 51.08.140, provided that the employment conditions producing the aggravation are peculiar to, or inherent in, the particular occupation." *Snyder v. Dep't of Labor & Indus.*, 40 Wash. App. 566, 575, 699 P.2d 256 (1985).

"In a long line of cases in this jurisdiction, it has been established that if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury and not to the pre-existing physical condition, and it is immaterial whether the infirmity might possibly have resulted in eventual disability or death, even without the injury." *Harbor Plywood Corp. v. Dep't of Labor & Indus. of State of Wash.*, 48 Wash. 2d 553, 556–57, 295 P.2d 310 (1956).

On direct examination, Dr. Thompson was asked what his opinion was on a more probable than not basis, after everything he has reviewed, as to whether or not "Mr. Leitner's 2-28-15 heart attack proximately caused,

aggravated or lit up on Mr. Leitner's alleged exposure to smoke, fumes or toxic substances within 72 hours of the 2-28-15 heart attack." *CP 753.* Dr. Thompson gave the conclusory opinion "no". CP 753.

"Conclusory opinions lacking adequate factual support are insufficient to defeat a motion for summary judgment." *Tiger Oil Corp. v. Yakima Cty.,* 158 Wash. App. 553, 575, 242 P.3d 936 (2010).

And then Dr. Thompson's ultimate opinion was revealed when the City's attorney asked Dr. Thompson **why** he is of the opinion that he does not believe that"Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated or lit up by Lt. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?" *CP 753-754.*

This was where the rubber met the road. This was the City's expert's chance to provide the basis for his opinion that Lt. Leitner's 2-28-15 heart attack was not proximately caused, aggravated or lit up by his exposure to smoke, fumes or toxic substances within 72 hours of the 2-28-15 heart attack.

If the expert's basis for his opinion was to disagree with the causal-connection established by the presumption, then that basis fails to rebut the presumption as a matter of law. *See Spivey, id.,* at 735. And that is precisely what the City's expert did:

> Q Well, why are you of that opinion that you don't believe that Mr. Leitner's 2-28-15 heart attack was proximately caused, aggravated

or lit up by Mr. Leitner's alleged exposures to smoke, fumes, or toxic substances within 72 hours of his heart attack?

A There is no proof whatsoever that casual exposure to small amount of diesel fumes will trigger a myocardial infarction.

CP 753-754. The government cannot rely on a lack of a known association between the disease and firefighting to rebut the presumption. *See Gorre v. City of Tacoma,* id., at 758, reversed **on other grounds.**

Dr. Chen testified that Lt. Leitner's coronary artery (in which the stent was placed on February 28, 2015) was one hundred percent blocked and that "a complete blockage is usually an acute event." CP 909.

The Department argues that "Where the evidence is overwhelming that firefighter did not cause a particular worker's disease, it would make no sense to say that the party nonetheless failed to rebut the presumption, [. . .]" RB. p.22. It may not "make sense" to the Department, but it makes sense to Division II of the Appellate Court and to the Supreme Court:

"[the standard for rebutting the presumption] requires that the employer 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.**" *Spivey v. City of Bellevue, id., at* 735.

[. . .] 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,* id., at 758.

This Court has the right and should review and overturn the trial court's denial of Lt. Leitner's motion for summary judgment, when it was the trial court's misapplication of the burden of proof in RCW 51.32.185, as interpreted by *Gorre v. City of Tacoma, id.,* and *Spivey v. City of Bellevue, id.,* that gave rise to the court's order. Leitner is not "raising this issue for the first time" in reply, but rather is responding to the Department's claim that this Court cannot review the trial court's MSJ order.

The Superior Court also committed reversible error by limiting the application of the statutory presumption to "myocardial infarction." The presumption applies to "heart problems" not just "myocardial infarction". *See RCW 51.32.185.* Also, Lt. Leitner is not required to identify the specific toxic agent responsible for his disease or disability. *See Intalco Aluminum v. Dep't of Labor & Indus.,* 66 Wash. App. 644, 656, 833 P.2d 390 (1992).

Indeed, Lt. Leitner had a myocardial infarction, which is a heart problem. But even the City's expert admitted that Lt. Leitner had coronary artery disease, **which his a heart problem**, and angina pectoris, **which is also a heart problem**. CP 779, 782. Dr. Chen also testified that angina pectoris is a **heart problem**. CP 909.

Dr. Chen was also asked: "So, Doctor, let's talk about Mr. Leitner. I think your prior testimony was that the 100 percent blockage of that left descending coronary artery was **based on plaque breaking loose**?" [bold added] CP 918. Dr. Chen answered: "Yeah, I strongly believe so." id.

Dr. Thompson even admitted that it appears that the symptoms of angina pectoris occurred while Lt. Leitner was engaged in activities on the job:

> Q And you talked about angina pectoris, and you talked about that specifically in relationship to the anchor incident on 12-31-2014. You would me, would you not, that angina pectoris is a heart problem, correct?
>
> A Yes.
>
> Q And you would agree with me that it appears that the symptoms of angina pectoris occurred while Mr. Leitner was engaged in physical activities on the job, correct?
>
> A Yes.

CP 779. Dr. Thompson testified that "The underling cause [of the angina pectoris] was buildup of cholesterol in his arteries." *CP 781-782*. And he had already admitted that (1) "sometimes you never know why one person gets it and another doesn't." and (2) Lt. Leitner had no history of diabetes, high cholesterol, high blood pressure or cigarette smoking.

It was Lt. Leitner's strenuous physical activity at work that brought out the symptoms. Dr. Thompson admitted: "The underlying cause [of angina pectoris] was buildup of cholesterol in his arteries. **The exertion just**

brought out symptoms of that, [. . .]" [bold added]. CP 783. Dr. Thompson also admitted that if a ruptured plaque had healed over, it could be damaged by strenuous physical activity, and he admitted that prior to December 31, 2014 (the day Leitner pulled-up the anchor) Mr. Leitner had shown no symptoms or awareness of "any kind of his heart disease or heart problems." CP 769, 778.

The Board limited the issue to a February 28, 2015 myocardial infarction - even though Lt. Leitner had multiple "heart problems" as evidenced by the medical testimony. CP 61. Even though the *Department's* order said "heart problems", the Board picked one heart problem from a tree-full of heart problems and put that, and only that, in its findings of fact.

The City and Department make much about Instructions 8, 10, 13 and the Special Verdict Form using the term "heart problems" or "heart problem(s)". But as far as the jury was led to believe, when the instructions and special verdict form used these terms, the problem being referred to was the singular heart problem found by the Board and repeated in instruction No. 7 – the February 28, 2015 "myocardial infarction." *See Instruction No. 7 at CP 1919-1920.*

This is further evident by the City's counsel's representation to the jury in closing argument. *See VRP 968:1-10.*

The Superior Court failed to correctly apply the burden of proof as set forth in RCW 51.32.185 and interpreted by *Gorre v. City of Tacoma, id.,* and *Spivey v. City of Bellevue, id.* The Superior Court, knowing that the Board's analysis was incorrect, failed to correct the error as required by statute and therefore erred itself.

> If 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.

[bold added]. *RCW 51.52.115, in pertinent part.*

- "I think the Board's rationale is flawed in light of *Larson* and *Spivey,* [. . .]" *Judge Blinn. VRP 459:13-14.*

- "I think the Board's analysis was incorrect. [. . .] I think they got to the way they got the wrong way because of the way they addressed the presumption, finding it had been rebutted, effectively, because the exposure within 72 hours, they felt, had been demonstrated to not be the cause of the heart problem in February. That's not the standard." *Judge Blinn VRP 369:17-25.*

- "[. . .] but simply to find that the City rebutted the presumption because they've disproved that the most recent exposure was the cause and, therefore, the presumption doesn't apply, I think, is the wrong analysis, [. . .]" *Judge Blinn, VRP 71:15-19.*

- "[. . .] and I do think the rationale and the analysis was wrong, [. . .]" Judge Blinn, VRP 77:22-23

- "I can't remember if it was Dr. Thompson or Mr. Riordan. One of them essentially testified that there is no evidence that the myocardial infarction was caused by the most recent exposure and, therefore, concluded that it wasn't causally connected, but that flips the burden, doesn't it, if there's no evidence and it's presumed, then there's

> nothing to rebut. There's no evidence to rebut. And to the extent that he concludes that it's not causally connected to the exposure within 72 hours because there's no evidence to suggest that it is, doesn't that flip the presumption on its head?" *Judge Blinn, VRP 79:20- 80:6.*

In *Clark Cty. v. McManus,* 188 Wash. App. 228, 354 P.3d 868, 877 (2015), rev'd in part, 185 Wash. 2d 466, 372 P.3d 764 (2016), the worker contended that the trial court's refusal to revise the Board's finding so that it reflected only injury to his lumbar spine was error, and the Court of Appeals agreed. *id., at 242.*

The Court of Appeals in *Clark Cty. v. McManus, id.,* stated: "Thus, the issue before the jury was whether the Board's determination that a causal link existed between McManus' claimed industrial injury and the conditions of his work for the County. Because the Board's finding of fact 5 as represented to the jury referenced the wrong injury, it effectively precluded McManus from establishing this link." *Id.,* at 244.

The Court of Appeals held: "Thus, the trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial." *Id.,* at 245.

Here, the issue before the jury was whether the Board was correct in deciding that the City rebutted the presumption that Lt. Leitner's heart problems were an occupational disease. But because the Board's findings of fact as represented to the jury in Instruction No. 7 referenced only myocardial

infarction (leaving out all of his other heart problems) it effectively precluded Lt. Leitner from a full and fair application of the presumptive disease statute RCW 51.32.185 which is **not** limited to myocardial infarction.

The trial court acknowledged that the Board's rationale and its analysis **was wrong.** The trial court's refusal to correct the Board's obvious error materially affected the outcome of the trial. No Respondent, employing reason and objectivity, would say otherwise.

Lt. Leitner had a **right to the full statutory presumption** in RCW 51.32.185 as to "heart problems": on two separate shifts, and to the proper application of the burden-shifting mechanism of that statute. The Superior Court rendered the protection of the statutory presumption meaningless when it failed to uphold the legislative expectation that (1) the presumption applies to all heart problems, not just myocardial infarction and (2) the presumption survives an opposition that merely disagrees with the causal connection established by the presumption.

A liberty interest may arise from an expectation or interest created by state laws. *See In re Bush,* 164 Wash.2d 697, 702, 193 P.3d 103 (2008). The Fourteenth Amendment protects individuals from deprivation of liberty without due process of law, and from the arbitrary exercise of the powers of government. *In re Lain,* 179 Wash. 2d 1, 14, 315 P.3d 455, 461 (2013).

The argument that Lt. Leitner "argued his theory of the case" misses the fundamental error in this case. Lt. Leitner did not fold-up shop and go home. He played the erroneous, biased facts and law he was dealt. The Board limited the presumptive disease statute to an event of myocardial infarction, failed to properly apply the presumptive-disease statute's burden of proof, and the trial court did nothing to fix that error. Lt. Leitner could have "argued his theory of the case" until he was blue in the face, but the jury must follow the jury instructions. And it was quite clear that the "heart problems" referenced in the jury instructions related to the ONE heart attack incident that the Board found and on which the jury was instructed – a February 28, 2015 myocardial infarction.

The City improperly comports the "all objections" provision in WAC 263-12-117(5)(a) with a motion to exclude Riordan. Regardless, the City admits that the Department's attorney moved to strike the deposition and the testimony of Riordan at the end of Leitner's and the Department's cross-examinatiosn of Riordan. RB p.34.

Because, Riordan's testimony is irrelevant because the "level" of occupational exposure is completely irrelevant toward rebutting the presumption, where, as here, the presumption establishes the causal connection to Lt. Leitner's heart problems experienced with 72 hours of

exposure to **smoke, fumes and toxic substances**, or strenuous physical activity, and because rebutting the presumption requires that the City prove causation by **non-occupational** factors.

Riordan's testimony is also **irrelevant** because his testing was cconducted under conditions that departed from the actual conditions that they rendered his testing unreliable and irrelevant. ER 401, 702 and 703.

It was an abuse of discretion to allow the City to present Riordan's testimony. Having conducted testing under conditions that greatly departed from the actual conditions, and because the "level" of occupational exposure is completely irrelevant toward rebutting the presumption where, as here, the presumption establishes causation and the City is required by law to rebut the presumption by proving causation from a non-occupational factor, Riordan's testimony was not helpful to the jury.

Admissibility of an expert's testimony depends on three factors, one of which is that it be helpful to the trier of fact *See State v. Willis,* 151 Wash. 2d 255, 262, 87 P.3d 1164 (2004).

During his career, Lt. Leitner responded to approximately five thousand fire suppression calls with smoke, fumes and toxic substances in either a residential or a commercial fire. *CP 626:5-627:22.* The City wants to ignore the repeated exposures by Lt. Leitner to smoke, fumes and toxic substances

while working.

On December 31, 2014, Lt. Leitner was engaged in strenuous physical activity pulling up a heavy anchor and the left arm pain, feeling like there was a knife poking between his shoulder blades, chest pain, shortness of breath and dizziness.

One call on February 25, 2015 involved Mr. Leitner helping lift a very heavy man who had fallen. *CP 11-19.* Lt. Leitner felt dizzy, light-headed and the pain between his shoulders increased. *CP 601:25 - 602:1.* On this shift, Lt. Leitner felt exceptionally worse than he had felt since December 31, 2014.

On February 28, 2015 Lt. Leitner woke up at approximately 6:00 am on with extreme pain. He sat up in bed and his left arm was throbbing, aching, and he felt something in his chest. *CP608: 8-13.*

This is not a case about a single myocardial infarction on February 28, 2015, but multiple heart problems supported by the medical testimony and the testimony of Lt. Leitner, beginning on December 31, 2014.

II. CONCLUSION

This Court can and should decide as a matter of law that the City failed to rebut the presumption of occupational disease. In the alternative, this Court should remand this case to be tried under the proper application of

RCW 51.32.185 and without the testimony of Riordan.

DATED: August 7, 2019.

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Filing Motion for Discretionary Review of Court of Appeals

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