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THE SUPREME COURT OF THE STATE OF WASHINGTON

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DELMIS SPIVEY

Petitioner,

v.

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

Respondents.

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PETITIONER'S BRIEF

---

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## I. INTRODUCTION

Lieutenant Delmis Spivey (“Lt. Spivey”) is another City of Bellevue firefighter diagnosed with malignant melanoma – a disease presumed by RCW 51.32.185 to arise naturally and proximately out of his employment as a firefighter. Lt. Spivey appealed the Board’s Decision and Order to the King County Superior Court. Lt. Spivey demanded a jury – as it was his right to have a jury decide whether the City rebutted the presumption that his malignant melanoma was occupational. However, before trial the Superior Court deprived Lt. Spivey of his right to a jury on that issue when it deemed it a question of law. Both RCW 51.32.185 and Washington case law clearly establish that determining whether the City rebutted the presumption is a question of fact. Moreover, without Lt. Spivey being given notice and a meaningful opportunity to be heard and defend on the issue of whether the City rebutted the presumption that his malignant melanoma was occupational, the Court ordered that the City rebutted the presumption. Lt. Spivey was not given due process on that issue, and because of the Court’s order, he was deprived of his right to a jury trial on that issue. Moreover, the Superior Court made this decision without being fully informed of the record, and without properly applying the burden shifting protection of RCW 51.32.185 to Lt. Spivey.

The Superior Court’s pre-trial order rendered Lt. Spivey’s trial

meaningless as it pertains to the issue of whether the City rebutted the presumption of occupational disease and took an issue for ultimate decision by the jury away from the jury. Lt. Spivey's freedom to prosecute his case with the benefit of the burden-shifting protection of RCW 51.32.185 has been taken away. Lt. Spivey respectfully requests that this Court allow Lt. Spivey's claim as a matter of law.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it deemed the question of whether the City rebutted the statutory presumption of occupational disease within RCW 51.32.185 a question of law.

**Issue:** Is whether the City has rebutted the presumption of occupational disease in RCW 51.32.185(1) by a preponderance of evidence a question of law or fact?

**Issue:** Did the Superior Court deprive Lt. Spivey of his right to a trial by jury?

2. The Superior Court erred when it ordered that the City rebutted the statutory presumption that Lt. Spivey's malignant melanoma is an occupational disease.

**Issue:** The City's burden of proof to rebut the presumption is not simply to *produce* contrary evidence. The City's burden is a burden of persuasion that requires the City -- by a preponderance of admissible evidence -- to (a) prove a non-firefighting cause and (b) disprove firefighting as a cause.

**Issue:** Did the City rebut the presumption that Lt. Spivey's disease was occupational when it could not prove a non-occupational cause for melanoma?

**Issue:** Did the City rebut the presumption that Lt. Spivey's disease

was occupational when it cannot disprove firefighting as a cause?

3. The Superior Court erred when it failed to apply the burden of proof required by RCW 51.32.185.

**Issue:** Did the Superior Court deprive Spivey due process by failing to apply the burden of proof required by RCW 51.32.185.

4. The Superior Court erred when it went beyond the issues in the City and Department's motion and beyond the relief proposed in the City and Department's orders and ordered that the City rebutted the presumption.

**Issue:** Did the Superior Court deprive Lt. Spivey of due process by failing to provide Lt. Spivey with notice and a meaningful opportunity to be heard and defend?

5. The Superior Court erred when it ordered that the City rebutted the presumption.

**Issue:** Did the Superior Court deprive Lt. Spivey of due process by failing to apply the burden of proof required by RCW 51.32.185?

**Issue:** Did the Superior Court wrongfully deprive Lt. Spivey of having a jury decide whether the presumption was rebutted by a preponderance of the evidence?

6. Attorney's Fees and Costs - Is Lt. Spivey entitled to attorney's fees and costs at all levels of appeal, including the Board, Superior Court and Supreme Court.

### **III. STATEMENT OF THE CASE**

Lt. Spivey was a career firefighter for the City of Bellevue ("City") beginning in 1995. CP 3-4, 8. After 20 years of exposure to smoke, fumes and toxic substances, Lt. Spivey developed malignant melanoma, a presumed occupational disease. Lt. Spivey was diagnosed with malignant melanoma

in December, 2011. CP 8. The Department of Labor and Industries (“Department”) denied his claim, and Lt. Spivey appealed to the Board of Industrial Insurance Appeals (“Board”). The Board found that Lt. Spivey met the factors necessary to apply the statutory presumption of RCW 51.32.185. CP 8. However, the Board incorrectly decided that the City rebutted the presumption that Lt. Spivey’s malignant melanoma was an occupational disease. CP 9. Lt. Spivey appealed the Decision and Order of the Board to the King County Superior Court. CP 1-2. Lt. Spivey demanded a jury. CP 15.

On February 27, 2015, the City filed a motion entitled “Respondent City of Bellevue’s Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman’s Testimony.” CP 17-33.

Section I of the City’s Motion was entitled “RELIEF REQUESTED” and it did **not** ask the Court to rule on whether the City rebutted the presumption that Lt. Spivey’s malignant melanoma was occupational. CP 18. See also Motion for Discretionary Review (“MDR”), Appendix B, Friedman Dec, Ex 1.

Under heading “V LEGAL ANALYSIS” in the City’s motion, the City included two subsections – subsections A and B. CP 23, 28. See also MDR, Appendix B, Friedman Dec, Ex 1. In Subsection A, the City argues that its burden to rebut the presumption in RCW 51.32.185 is only a burden

of production and that whether it met the burden of production to rebut the presumption of occupational disease within RCW 51.32.185 is a question of law that should be decided by the judge. CP 28. Under heading “VI. CONCLUSION” of its motion, the City did **not** request a ruling from the Court on its motion that the Court decide whether or not the City rebutted the presumption. CP 33. Rather, the City requested that following introduction of evidence the Court determine as a question of law whether the City met its burden of production to rebut the evidentiary presumption in RCW 51.32.185. CP 33.

In Subsection B, the City argues that the Court should strike certain portions of Lt. Spivey’s expert’s testimony. CP 28-32.

Moreover, the City’s proposed order on its motion did **not** propose that the Court order that the City had rebutted the presumption. CP 475-477, 456-458, 174-176, 306-308, 281-283. See also MDR, Appendix B, Friedman Dec, Ex 3.

On March 18, 2015, The Department filed a reply to the City of Bellevue’s motion. CP 157. Under heading “Statement of the issues” in the Department’s reply brief, the Department framed the issues as follows: “Is whether the City met its burden of production in rebutting RCW 51.32.185 evidentiary presumption a question of law to be decided by the judge?” and

“Should Spivey’s references to the proposed decision and order be stricken because an industrial appeals judge’s decision has no standing until adopted by the full Board?” CP 157. See also MDR, Appendix B, Friedman Dec, Ex 2. The “Statement of the issues” in the Department’s Reply brief did **not** ask the Court to rule on whether the City had rebutted the presumption of occupational disease.

Moreover, the Department’s proposed order did **not** propose that the Court order that the City had rebutted the presumption. CP 172-173. See also MDR, Appendix B, Friedman Dec, Ex 3.

On March 27, 2015, the King County Superior Court heard oral argument on the City’s motion. CP 475-477,456-458,174-176, 306-308, 281-283. The Superior Court also heard oral argument on the Department’s request – found within its Reply brief – to enter an order in limine that no party may refer to the proposed decision and order. CP 172-173; 168.

On March 27, 2015, the Superior Court entered an order that granted the City’s motion – thereby deeming the question of whether or not the City rebutted by a preponderance of evidence the presumption that Lt. Spivey’s malignant melanoma was occupational as a question of law. CP 475-477,456-458,174-176, 306-308, 281-283.

Moreover, in addition to that ruling, the Court went beyond the issues in the City's motion brief and beyond the issues in the Department's Reply brief and beyond the relief proposed in the City and Department's Orders and ordered that the City rebutted the statutory presumption -- having not been fully informed of the record, having not provided Lt. Spivey notice and a meaningful opportunity to be heard and defend and having failed to apply the burden of proof required by RCW 51.32.185. CP 475-477,456-458,174-176, 306-308, 281-283. Lt. Spivey filed a motion for reconsideration of the Superior Court's March 27, 2015 order. CP 215-221. The Superior Court denied Lt. Spivey's motion for reconsideration. CP 240.

The Superior Court deemed the question of whether the City rebutted the presumption a question of law -- even though answering that question is precisely the role of the jury -- thereby depriving Lt. Spivey of his liberty interest in the application of the burden shifting protection of the statutory presumption and of his Constitutional right to a jury on that factual issue. The Superior Court also ordered that the City rebutted the statutory presumption, despite the fact that (a) there was no motion putting that issue before the Superior Court, (b) the City and Department did **not** propose an order that the presumption had been rebutted, and (c) Lt. Spivey was not given notice and a meaningful opportunity to be heard and defend that issue.

The facts are that the City cannot determine the cause of malignant melanoma and therefore cannot rebut that firefighting is a cause – as presumed by RCW 51.32.185.

a. **Pertinent testimony from the City’s expert epidemiologist, Noel Weiss, MD:**

The City’s own epidemiologist, Dr. Noel Weiss was asked on direct examination at the Board hearing:

Q: Do epidemiologic studies actually prove causation for a disease?

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added]. He answered:

A: The word proof doesn’t fit with science, any science. We don’t prove things. We observe and we draw inferences. We’ve infer cause and effect, like we’ve inferred cigarette smoking causes lung cancer. **Nobody proves that.**

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added].

City expert Dr. Weiss further established an inability to rebut that the cause of Lt. Spivey’s malignant melanoma is the exposures from firefighting.

He was asked on cross examination at the Board hearing:

Q: In any given sample of 100 cases of malignant melanoma, in how many of those cases can you determine the cause of the malignant melanoma?

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added]. He answered:

A: It’s not - - I don’t think it’s appropriate to talk about the cause. Every, **every illness would have multiple causes** so that, for example, if you had – I’m picking a number out o the

air now – 80 of those 100 people who have fair skin, you’d say yes 80 of those people had a cause of the disease; but **that doesn’t preclude the possibility that other causes could have been present in those individuals.**

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added]. He was then asked:

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

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added]. He answered as follows:

A: I think it’s safe to say that at the present time **that would be impossible.**

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added].

Dr. Weiss also testified in pertinent part, “. . . we certainly do not understand all the risk factors. There are many that we don’t not understand. . . .” and “. . . For most of us **most cases of cancer are unknown.**” and “. . . I do believe, I do believe I answered that correctly, that we never - - **at the present time we’re unable to identify all the causes of a given cancer of any type in any person.**” MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added].

**b. Pertinent testimony from the City's medical expert Andy Chien, MD:**

Another City expert, Dr. Andy Chien, was asked on cross examination at the Board hearing in this case:

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

MDR, Appendix B, Friedman Dec., Ex 6. His answer was, in part:

A: That is actually **not known**. . . .

MDR, Appendix B, Friedman Dec., Ex 6. [Emphasis added]. He also admitted that he does not know all of the factors that are working on causing that particular cell to mutate into malignant melanoma:

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

A: Yes.

MDR, Appendix B, Friedman Dec., Ex 5. [Emphasis added].

Unable to prove the cause of Lt. Spivey's malignant melanoma, the City attempts to rebut the presumption with a conclusory leap to UV rays – based on speculation and conjecture since they do not know and cannot prove a non-occupational cause of his malignant melanoma. Compounding its speculation and conjecture, the City cannot distinguish between occupational

and non-occupational UV rays – nor can the City rebut the contribution to Lt. Spivey’s melanoma from *occupational* UV rays. See testimony of City experts Dr. Chien and Hackett at MDR, Appendix B, Friedman Dec., Ex 7. [Emphasis added].

The City cannot rebut the statutory presumption that Lt. Spivey’s occupation is a cause of his malignant melanoma.

#### IV. ARGUMENT

The Washington Supreme Court has clearly stated:

RCW 51.04.010 embodies these principles, and declares, among other things, that “sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy.” To this end, **the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed** 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.**

*Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 470, 745 P.2d 1295, (1987).

1. **The Superior Court erred when it deemed the question of whether the City rebutted the statutory presumption of occupational disease within RCW 51.32.185 a question of law.**
  - a. **Determining whether the City rebutted the presumption that Lt. Spivey’s cancer is occupational is a question of fact – not a legal question.**

The operation of the presumption of RCW 51.32.185 requires the City to rebut what is presumed. What is presumed in RCW 51.32.185 is the fact that the firefighter's disease arises naturally out of his or her job and the fact that the disease arises proximately out of his or her job - i.e. the disease was "occupational" as defined by RCW 51.08.140. Whether the City has proven by a preponderance of evidence that Lt. Spivey's malignant melanoma did not arise naturally and proximately out of his employment are questions of fact, to be decided by the jury. The Superior Court erred when it deemed these as questions of law.

RCW 51.32.185 states that the presumption may be rebutted by a preponderance of the evidence. Triers of fact consider and weigh evidence and make decisions on the persuasiveness of that evidence to determine issues such as causation and whether a disease did or did not arise out of conditions of employment. "Proximate cause is generally a question of fact." *White v. Twp. of Winthrop*, 128 Wash. App. 588,595,116 P.3d 1034 (2005). Whether a disease "arises naturally from conditions of employment" is factual.

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

RCW 51.32.185 requires a quality of proof to rebut the presumption and a weighing of all the evidence to determine if the evidence produced achieves the necessary level of persuasiveness. This presents a question of fact requiring an evaluation of the credibility of witnesses and the persuasiveness of evidence. *Larson v. City of Bellevue*, 188 Wash. App. 857, 872, 355 P.3d 331 (2015), review granted (Feb. 9, 2016) overruled by *Clark Cty. v. McManus*, No. 91963-1, 2016 WL 1696759 (Wash. Apr. 28, 2016) on other grounds.

In a case involving the presumption against suicide, the Supreme Court stated,

The **jury** are the final arbiters as to the weight of the evidence necessary to overcome the presumption.

*Burrier v. Mut. Life Ins. Co. of New York*, 63 Wash. 2d 266, 281, 387 P.2d 58 (1963). [Emphasis added]. In a case involving the presumption of death, the Court held:

The presumption of death arising from seven years' unexplained absence is always rebuttable. **Jurors** are the "final arbiters as to the weight of the evidence necessary to overcome the presumption."

*Nelson v. Schubert*, 98 Wash.App. 754, 763, 994 P.2d 225 (2000). [emphasis added]. The Supreme Court in *Luna v. Seattle Times Co.*, stated:

The sum and substance of all that has been written on the force and effect of presumptions is that, in the first instance,

it is for the court to say whether or not the evidence is sufficient, as a matter of law, to overcome a presumption. If not, the question may be left to the jury, under proper instruction.

*Luna v. Seattle Times Co.*, 186 Wn.2d 618, 628, 59 P.2d 753 (1936).

It should be noted that in the *Larson v. City of Bellevue* malignant melanoma case currently pending before the Supreme Court, the City proposed a Revised Special Verdict form in the King County Superior Court jury trial that asked the jury whether the Board was correct in finding that the City rebutted the presumption. See CP 1749 in the *Larson v City of Bellevue* matter.

The Superior Court committed a fundamental due process error when it took an issue for ultimate determination by the jury away from the jury.

- b. Lt. Spivey has a right to a jury trial on the issue of whether the City rebutted the presumption within RCW 51.32.185 that his malignant melanoma is occupational. This right was taken away by the Superior Court's order.**

By treating the factual question of whether the City rebutted the presumption as a legal question, the Court deprived Lt. Spivey of a jury on that issue and the Court has invalidated the provisions of our State's Constitution and RCW 51.52.115, which secure Lt. Spivey's right to a trial by jury. The Court's ruling has violated the Industrial Insurance Act's strong public policy in favor of the injured worker.

The Superior Court's error in denying Lt. Spivey a right to a jury on this issue has substantially altered Lt. Spivey's trial and is a substantial due process departure from the accepted and usual course of judicial proceedings.

The jury trial is the rootstock of our liberties, a fundamental right for which the peers of England stood firm at Runnymede against King John, without which the original states refused to ratify the constitution until the bill of rights was added, and which article I section 21 requires must remain "inviolable."

*Bird v. Best Plumbing Grp., LLC*, 175 Wash. 2d 756, 785, 287 P.3d 551 (2012).

2. **The Superior Court erred when it ordered that the City rebutted the statutory presumption that Lt. Spivey's malignant melanoma is an occupational disease.**
  - a. **The City's burden of proof to rebut the presumption is not simply to *produce* contrary evidence. The City's burden is a burden of persuasion that requires the City to (a) prove a non-firefighting cause and (b) disprove firefighting as a cause.**

The Appellate Court in *Larson v. City of Bellevue* correctly held that, "The text of RCW 51.32.185(1) supports the conclusion that this statute shifts both the burden of persuasion and production." *Larson v. City of Bellevue*, 188 Wash. App. 857, 871, 355 P.3d 331 (2015), review granted (Feb. 9, 2016) overruled by *Clark Cty. v. McManus* on other grounds.

In the present case, there is a specific burden-shifting statute that requires rebuttal by a preponderance of evidence. RCW 51.32.185 is clear

-- the presumption must be rebutted "by a preponderance of evidence." WPI 155.03 defines preponderance of evidence, and states that the jury "must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true."

RCW 51.32.185 uses the term "prima facie" with respect to the presumption. This Court has explained "prima facie" within the context of the Industrial Insurance Act.

In this context, 'prima facie' means that there is a presumption on appeal that the findings and decision of the board, based upon the facts presented to it, are correct until the **trier of fact finds from a fair preponderance of the evidence** that such findings and decision of the board are incorrect. **It must be a preponderance of the credible evidence.**

*Allison v. Dep't of Labor & Indus.*, 66 Wash.2d 263, 268, 401 P.2d 982 (1965). [Emphasis added]. When the *Allison* case was decided, RCW 51.32.185 did not exist. However, when creating the statutory presumption of RCW 51.32.185, the legislature used the same term ("prima facie"). ". . . the legislature is presumed to know the existing state of the case law in those areas in which it is legislating." *Woodson v. State*, 95 Wash.2d 257, 262, 623 P.2d 683 (1980).

This Court, in *Gorre v. City of Tacoma*, another firefighter case involving RCW 51.32.185, stated:

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

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

[Emphasis added]. The Appellate Court in *Gorre v. City of Tacoma* similarly stated:

If the employer cannot meet this burden, for example, **if the cause of the disease cannot be identified by a preponderance of the evidence or even if there is no known association between the disease and firefighting**, the firefighter employee maintains the benefit of the occupational disease presumption.

*Gorre v. City of Tacoma*, 180 Wash. App. 729, 758, 324 P.3d 716 (2014), amended in part (July 8, 2014), amended (July 15, 2014), overturned on other grounds in *Gorre v. City of Tacoma*, 184 Wash. 2d 30, 357 P.3d 625 (2015).

The burden is not simply to produce contrary evidence. Rather, the City’s burden is to *rebut* the presumption by a preponderance of evidence.

To that end, the City cannot rebut the presumption unless it can establish a non-occupational cause and also eliminate firefighting as a cause.

- b. **The City cannot rebut the presumption that Lt. Spivey's disease was occupational when it cannot prove a non-occupational cause.**

RCW 51.32.185 presumes that Lt. Spivey's malignant melanoma is "occupational," which means by statutory definition that his cancer (a) "arose naturally" and (b) "arose proximately" out of employment. *RCW 51.08.140*. A disease "arises naturally" out of employment if the firefighter's particular work conditions more probably caused the disease **than conditions in everyday life or all employments in general**. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 482, 745 P.2d 1295 (1987). [Emphasis added]. It follows that for the City to rebut this fact, it must prove that conditions in everyday life or conditions of non-firefighting employment were the cause – i.e. the City must prove facts.

A disease is "proximately caused" by employment when there is "no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the extra-hazardous employment." *Simpson Logging Co. v. Dept. of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448, (1949). It follows that for the City to rebut this fact, it must prove by a preponderance of the evidence the existence of an **intervening independent and sufficient cause** (i.e. facts) for the disease, and contraction would have occurred regardless of firefighting.

The City must do more than merely disagree that firefighting is a cause. The City must **prove** their conclusion, **and do so by a preponderance of admissible evidence**. Asserting that causation does not exist due to a lack of data or awareness is merely an impermissible rejection of the law, opposed to rebutting the presumption by a preponderance of admissible evidence.

The requirement to establish a specific non-firefighting cause is consistent with the language of RCW 51.32.185. While not an exhaustive list, RCW 51.32.185(1) provides several distinct examples that, if supported by competent admissible evidence, may rebut the presumption *if it is by a preponderance of all evidence*. It is not the actual rebuttable factors themselves that are noteworthy, but rather the commonality shared among each factor. Each rebuttable factor enumerated by the legislature is **an identifiable non-firefighting cause**. Notably absent from the *types* of rebuttable factors are factors that derive from a lack of etiology or lack of data or awareness of the etiology. Our fundamental objective when interpreting a statute is “to discern and implement the intent of the legislature.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The surest indication of the legislature's intent is the plain meaning of the statute, which we glean “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in

question.” *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-306, 268 P.3d 892 (2011).

**c. The City cannot rebut the presumption that Lt. Spivey’s disease is occupational when it cannot disprove firefighting as a cause.**

If the City cannot disprove firefighting as a cause, they have not rebutted the statutory presumption that firefighting is a cause. Even if the City established by competent admissible evidence a non-occupational cause, that alone does not eliminate the presumed fact that firefighting is also a cause. There may be one or more proximate cause of a condition. *WPI 155.06 - Proximate Cause - Allowed Claim. See also Hurwitz v. Dep’t of Labor & Indus.*, 38 Wash. 2d 332, 229 P.2d 505 (1951); and *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 197 P.3d 127 (2008).

**d. The City is unable to rebut the presumption.**

See pages 8, 9, and 10, *supra*, for examples of the City’s own expert’s testimony that illustrate the City’s inability to rebut the presumption that a cause of Lt. Spivey’s malignant melanoma is the exposures from firefighting.

Moreover, City expert Noel Weiss testified: “Well, it’s my opinion, as I’ve indicated, that an occupational exposure sustained during firefighting - - you know we don’t know, we don’t know if that does or does not

increase the risk of melanoma right. Now it's only a possibility." CABR 501. [Emphasis added].

When asked if it was a fair comment that he cannot rule out organic chemicals as a cause of malignant melanoma at this time, he testified in part, "I haven't investigated the sum of the literature to be able to comment on that. . . ." CABR 484. He does not know whether firefighters are exposed to pesticides, peroxides, plastics, solvents, lead or mercury. CABR 488. He has not reviewed any of the materials related to chemicals that are released during open burning. CABR 493. Most notably, when given a hypothetical by the City's attorney on re-direct examination and then asked "Do you have an opinion on the cause of his malignant melanoma?", the last sentence of Dr. Weiss' answer is as follows: "And I haven't - - so the answer to your question is **I don't know what was responsible for his illness.**" CABR 488-489. [Emphasis added].

City expert Dr. Chien testified that he does not know whether firefighters are in contact with arsenic in the course of fire suppression or overhaul activities. CABR 544. When asked what Dr. Chien knows about firefighters' occupational exposure to ultraviolet, Dr. Chien answered, "I don't think I know enough about firefighting to be able to answer that." CABR 549. Dr. Chien was asked if he agrees that there are a number of

chemicals that firefighters are exposed to that cause cancer generally, and he answered: “I don’t, I don’t know enough about firefighting to be definitive in an answer, but I would say that I think it would be reasonable to think that firefighters are exposed to certain materials that may put them at higher risk.”

CABR 562. When asked if he is aware generally or specifically with the carcinogens that firefighters are exposed to in fire suppression or overhaul activities, Dr. Chien answered: “I don’t think I have any type of comprehensive knowledge on that.” CABR 564.

The presumption establishes the causal link between the employment of firefighting and malignant melanoma. Simply rejecting the statute is not rebutting it by a preponderance of evidence – nor is the presumption rebutted when the City cannot establish a non-firefighting cause and that firefighting is not a cause.

Dr. Weiss was asked, “Do we understand all causes of malignant melanoma as we sit here today?” He answered: “**No.**” CABR 479. [Emphasis added].

**3. The Superior Court deprived Lt. Spivey due process by failing to apply the burden of proof required by RCW 51.32.185.**

Even if whether the City rebutted the presumption was a question of law, the Superior Court did not apply the burden of proof required by RCW

51.32.185 in deeming the presumption rebutted. The record overwhelmingly establishes that the City cannot prove a non-occupational cause and cannot eliminate firefighting as a cause.

For example, the City attempts to blame UV rays for Lt. Spivey's malignant melanoma, a conclusion based on speculation and conjecture, given their lack of knowledge of the etiology of Lt. Spivey's malignant melanoma. Regardless, the City cannot distinguish occupational from non-occupational UV rays.

Even if the City could distinguish occupational UV rays from non-occupational UV rays, the City's attempt to rebut the presumption is speculative and conjecture - as their own experts establish: (a) it is unknown how a malignant melanoma cell comes into being, (b) all of the factors that are working to cause a cell to mutate into malignant melanoma are unknown, (c) it is impossible to know all of the causes of a person's malignant melanoma, (d) all the causes of a given cancer of any type in any person cannot be identified. MDR, Appendix B, Friedman Dec., Ex 5 - 6.

RCW 51.32.185 requires that the presumption be rebutted by a "preponderance of evidence." In this case, the Superior Court ignored this legislative requirement when it summarily ordered the presumption rebutted

without hearing all of the evidence. The Washington State Supreme Court makes clear that:

The burden, of course, rests upon appellant to prove his case by a preponderance of the evidence, **and in determining whether or not his burden has been met, all the evidence must be considered, and not merely that which seems to favor one side or the other.**

*Bresemann v. Hiteshue*, 151 Wn. 187, 189-190, 275 P. 543 (1929). [emphasis added]. The Superior Court rendered the protection of the burden-shifting mechanism in RCW 51.32.185 meaningless when it did not weigh all of the evidence and when it failed to uphold the legislative expectation that rebuttal requires disproving firefighting as a cause and also establishing a non-firefighting cause.

The burden on the City to rebut the presumption is a burden of persuasion.

While shifting the burden of production to the defendant requires him to present some evidence with respect to the fact in issue, shifting the burden of persuasion requires him to **affirmatively establish the fact in issue.**

*State v. Bishop*, 90 Wash. 2d 185, 188, 580 P.2d 259, 260 (1978). [emphasis added]. It is well settled by the Supreme Court – evidenced by *WPI 155.06* and caselaw such as *Hurwitz v. Dep't of Labor & Indus.*, 38 Wash. 2d 332, 229 P.2d 505 (1951); and *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 197 P.3d 127 (2008) – that one cause is not disproved simply because another

cause also exists. There can be more than one proximate cause of a condition. To that end, RCW 51.32.185 establishes the employment of firefighting as a cause of malignant melanoma.

Accordingly, understanding that there can be more than one proximate cause of a condition and understanding that the statutory presumption establishes firefighting as a cause, RCW 51.32.185 creates an **expectation** that to rebut the presumption the City must (a) establishes a non-firefighting cause, **and** (b) disprove firefighting as a cause. 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).

A “normal” occupational disease claim where the burden begins and remains with the worker is substantially different than an occupational disease claim involving RCW 51.32.185, which creates a burden-shifting protection to the firefighter that completely changes the balance of power in Lt. Spivey’s trial.

The Superior Court ordered that the presumption was rebutted, which renders Lt. Spivey’s trial on his presumptive occupational disease useless because the Court wrongfully extinguished the presumption of occupational disease. The trial Judge invaded the province of the jury and denied firefighter Spivey’s due process rights.

4. **The Superior Court erred when it went beyond the issues in the City and Department's motion and beyond the relief proposed in the City and Department's orders and ordered that the City rebutted the presumption.**

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).

- a. **The Superior Court deprived Lt. Spivey of due process by failing to provide him with notice and a meaningful opportunity to defend and be heard on the issue of whether the City rebutted the presumption.**

Fairness and justice demand that when one party is seeking relief from the court, the opposing party is not in-the-dark as to the issues and what, exactly, the moving party is seeking. The court rules require a motion state with particularity the grounds for the motion and convey the relief sought.

**(b) Motions and Other Papers.**

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

*CR 7(b)(1)*. This gives the opposing party a fair chance to defend the motion, with an understanding of what the motion is and what relief is being sought.

King County Local Rules require that the moving party set forth a concise statement of the issues of law on which the Court is requested to rule:

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

*KCLR7(b)(5)(B)(3)*. The City and Department's motions had a section entitled "Statement of the issues" and nowhere therein did the City or Department make the question of whether the City rebutted the presumption an issue. CP 22 and CP 158. The City's motion had a section entitled "Relief Requested" and nowhere therein did the City ask the Court to order that the City rebutted the presumption. CP 18. Both the City and the Department's proposed orders did not propose that the Court order that the City rebutted the presumption. CP 475-477, 456-458, 174-176, 306-308, 281-283. See also MDR, Appendix B, Friedman Dec, Ex 3. CP 172-173. See also MDR, Appendix B, Friedman Dec, Ex 3. *Respectively*.

"At a bare minimum, procedural due process "requires notice and an opportunity to be heard." *In re Bush*, 164 Wash. 2d 697, 704, 193 P.3d 103 (2008); citing *Soundgarden v. Eikenberry*, 123 Wash.2d 750, 768, 871 P.2d 1050 (1994). "The essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the

nature of the case.” *Ware v. Phillips*, 77 Wash. 2d 879, 884, 468 P.2d 444 (1970), quoting the Washington Supreme Court’s statement in *In re Hendrickson*, 12 Wash.2d 600, 123 P.2d 322, 325. “A judgment entered without notice and opportunity to be heard is void.” *Id.* “An order based on a hearing in which there was not adequate notice or opportunity to be heard is void.” *Esmieu v. Schrag*, 88 Wash. 2d 490, 497, 563 P.2d 203 (1977).

“A court abuses its discretion when its decision is based on untenable grounds or reasoning.” *Barr v. MacGugan*, 119 Wash. App. 43, 46, 78 P.3d 660 (2003).

Nonetheless, at the hearing on March 27, 2015, the Superior Court overreached and, despite a lack of notice to Lt. Spivey and a meaningful opportunity to be heard and defend, ordered that the City rebutted the presumption of occupational disease. CP 475-477,456-458,174-176, 306-308, 281-283.

The Superior Court’s error in ordering that the City rebutted the presumption without giving Lt. Spivey a meaningful opportunity to be heard and defend that issue has completely shifted the balance of power in his upcoming jury trial. The burden of proof is now misplaced.

5. **The Superior Court erred when it ordered that the City rebutted the presumption.**
  - a. **The Superior Court deprived Lt. Spivey of due process by failing to apply the burden of proof required by RCW 51.32.185.**

The Superior Court, without being fully informed of the record, and without giving Lt. Spivey notice and a meaningful opportunity to be heard and defend, erred when it ordered that the City rebutted the presumption. This error renders his upcoming trial (about whether his melanoma is occupational) useless because it **misplaces the burden of proof** and renders the protection of RCW 51.32.185 meaningless.

The burden of proof Lt. Spivey's trial is now misplaced because – due to the Court's overreaching order – the burden-shifting protection of RCW 51.32.185 was removed from the jury trial by the Superior Court.

It is undisputed that the presumption of occupational disease applies to Lt Spivey. Because the statutory presumption applies, Lt. Spivey has a **right** to receive the burden-shifting protection of 51.32.185(1).

“‘A liberty interest may arise from the Constitution,’ from ‘guarantees implicit in the word “liberty,” ’ or ‘from an expectation or interest created by state laws or policies.’ ” In re Pers. Restraint of McCarthy, 161 Wash.2d 234, 240, 164 P.3d 1283 (2007) (quoting Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)).

*In re Bush*, 164 Wash. 2d 697, 702, 193 P.3d 103 (2008).

“For a state law to create a liberty interest, it must contain ‘substantive predicates’ to the exercise of discretion and ‘specific directives to the decision maker that if the [law’s or policy’s] substantive predicates are present, a particular outcome must follow’.” In re Pers. Restraint of Cashaw, 123 Wash.2d 138, 144, 866 P.2d 8 (1994) (quoting Ky. Dep’t of Corr. v. Thompson, 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)).

*Id.* In this case, as in all firefighter presumptive disease worker’s compensation cases, RCW 51.32.185 creates a liberty interest in the burden shifting protection of the statute.

RCW 51.32.185 creates a specific “directive to the decisionmaker” that if the presumption of occupational disease applies, (a) the burden of proof must be placed on the employer, (b) the burden is to rebut the presumption, and (c) it must be rebutted by a preponderance of admissible evidence.

The burden-shifting protection in RCW 51.32.185 does not vanish when the Board’s decision is appealed to the Superior Court. The firefighter has a right to have a jury weigh the evidence and decide whether the City failed to meet its burden of rebutting the presumption. Article 1, §21 of the Washington State Constitution provides: “The **right to a trial by jury** shall remain inviolate, ...” [emphasis added]. The Industrial Insurance Act, at RCW 51.52.115, provides: “... In appeals to the superior court hereunder, either party **shall be entitled** to a trial by jury upon demand, ...”. [emphasis added].

For a jury to determine if the presumption was rebutted by a preponderance of the evidence, the jury must know which party bears the burden of proof to rebut the presumption. The burden of proof instruction, WPI 155.03, uses the phrase “on which that party has the burden of proof”. RCW 51.32.185 puts the burden to rebut the presumption on the City.

Neither this Court’s opinion in *Gorre v. City of Tacoma*, nor the Appellate Court’s opinion in that case held that the burden-shifting protection of RCW 51.32.185 vanishes on appeal to the Superior Court. In *Raum v. City of Bellevue*, the Court of Appeals upheld jury instructions that allowed the firefighter to argue that he was entitled to the presumption and that the City failed to rebut the presumption. *Raum v. City of Bellevue*, 171 Wash.App 124, 144, 286 P.3d 695 (2012).

This Court and all Appellate opinions in our State addressing RCW 51.32.185 support the notion that the burden-shifting protection of RCW 51.32.185 is not rendered moot simply by an appeal to the Superior Court.

The City, with the evidence it presented, cannot rebut the presumption that Lt Spivey’s malignant melanoma is occupational. This highlights the significance of correct placement of the burden of proof at trial and how detrimental it was to Lt. Spivey when the Superior Court deprived his due process rights.

The Superior Court, without giving Lt. Spivey notice and a meaningful opportunity to be heard and defend the issue of whether the City rebutted the presumption, has eliminated the presumption from Lt. Spivey's trial, thereby rendering his jury trial a "normal" occupational disease claim where the burden is on the firefighter. However, this is not a "normal" occupational disease claim -- but rather it is an occupational disease claim where the statutory presumption of RCW 51.32.185 applies, which places the burden on the City.

The Superior Court erred when it went beyond the issues in the City and Department's motion and beyond what they City and Department proposed in their orders - and summarily ordered that the City rebutted the presumption. This has deprived Lt. Spivey of his liberty interest in the proper application of the burden shifting protection of RCW 51.32.185 at his jury trial.

- b. The Superior Court wrongfully deprived Lt. Spivey from having a jury decide whether the presumption was rebutted by a preponderance of the evidence.**

By ordering that the City rebutted the presumption, the Superior Court invaded the province of the jury and denied Lt. Spivey his Constitutional and statutory right to a trial by jury.

RCW 51.32.185 creates a liberty interest in (a) the burden shifting protection of the statute **and the expectation that it not be rendered meaningless by the way it is applied**, and (b) the **right to a trial by jury** on the issue of whether the employer rebutted the presumption by a preponderance of the evidence. The firefighter's right to have a jury decide if the employer rebutted the presumption also arises out of the Washington Constitution as well as RCW 51.52.115.

Article 1, §21 of the Washington State Constitution provides: "The **right to a trial by jury** shall remain inviolate, ..." [emphasis added]. The Industrial Insurance Act, at RCW 51.52.115, provides: "... In appeals to the superior court hereunder, either party **shall be entitled to a trial by jury** upon demand, ...". [emphasis added].

**6. Attorney fees and costs.**

RCW 51.32.185(7)(b) is clear:

**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.

[Emphasis added]. RCW 51.52.130 also contemplates the Court fixing a fee for the attorney's services before the Department, the Board and the Court, when a decision of the Board is reversed on appeal to the Superior Court.

If it is determined on appeal that his claim for benefits is allowed, Lt. Spivey should not be excluded his costs and fees incurred at the Board, as that would contort the fee provisions of RCW 51.32.185 and the overriding policy of protecting workers as opposed to employers.

“The very purposes of allowing an attorney’s fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal **without the incurring of legal expense or the diminution of his award . . .**” *Harbor Plywood Corp. V. Department of Labor & Indus.*, 48 Wash.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co., v. Department of Labor & Indus.*, 26 Wash.2d 51, 57, 173 P.2d 164 (1946)). [Emphasis added].

The guiding principal in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the injured worker.

*Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467, 470 (1987). Lt. Spivey is entitled to fees and costs at all levels of appeal—the Board, Superior Court and Supreme Court. “We conclude that the plain language of ‘all reasonable costs of the appeal’ includes all, and not only some, of the costs required to succeed on a claims benefit under the industrial Insurance Act.” *Larson v. City of Bellevue*, at 884.

**Commentators have noted that limiting the amount of attorney fees awarded in workers compensation cases is inconsistent with the general purpose of the workers' compensation system. Obligating successful workers to cover their legal costs reduces the worker's already limited recovery.**

*Brand v. Dep't of Labor & Indus. of State of Wash.*, 139 Wash. 2d 659, 671, 989 P.2d 1111 (1999), as amended on denial of reconsideration (Apr. 10, 2000), as amended (Apr. 17, 2000). [emphasis added]. Lt. Spivey is entitled to fees and costs at the Board and all courts to which this matter has been appealed.

Lt. Spivey requests attorney fees and costs for all levels of appeal.

## V. CONCLUSION

Lt. Spivey was not given notice and a meaningful opportunity to be heard and defend on the issue of whether the City rebutted the presumption that his malignant melanoma was occupational. Lt. Spivey was deprived of his right to a jury trial on that issue. Lt. Spivey was deprived of his right to the proper application and burden shifting protection of RCW 51.32.185. Lt. Spivey's impending trial was rendered meaningless as it pertains to the issue of whether the City rebutted the presumption of occupational disease. Lt. Spivey's freedom to prosecute his case with the benefit of the burden-shifting

protection of RCW 51.32.185 has been taken away. Lt. Spivey respectfully requests that this Court allow Lt. Spivey's claim as a matter of law.

DATED: June 10, 2016

RON MEYERS & ASSOCIATES PLLC

By:   
\_\_\_\_\_  
Ron Meyers, WSBA No. 13169  
Matthew G. Johnson, WSBA No. 27976  
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THE SUPREME COURT OF THE STATE OF WASHINGTON

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DELMIS SPIVEY

Petitioner,

v.

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

Respondents.

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DECLARATION OF SERVICE  
PETITIONER'S BRIEF

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Matthew Johnson WSBA No. 37597  
Tim Friedman WSBA No. 37983  
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I certify under penalty of perjury under the laws of the State of Washington that on the date set forth below, I served the documents listed below on the following parties in each manner set forth:

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

Original To:   Washington State Supreme Court

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

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

Via US Mail

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

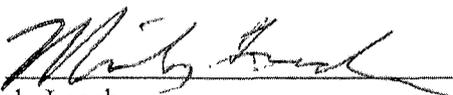
Anastasia Sandstrom  
Office of the Attorney General  
800 Fifth Ave., Ste 200  
Seattle, WA 98104-3188

Via US Mail

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

DATED: June 10, 2016, in Olympia, Washington.

**RON MEYERS & ASSOCIATES PLLC**

By:   
Mindy Leach  
Paralegal

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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**Cc:** CBarnes@bellevuewa.gov; Sandstrom, Anastasia (ATG); Ron Meyers; Tim Friedman; Darlene Langa  
**Subject:** RE: Delmis Spivey v. City of Bellevue et al; Supreme Court Case No. 91680-2

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

Dear Clerk:

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

Mindy Leach



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