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Washington State Supreme Court

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NO. 91680-2

SUPREME COURT OF THE STATE OF WASHINGTON

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE AND DEPARTMENT OF LABOR &
INDUSTRIES,

Respondents.

**DEPARTMENT'S COMBINED ANSWER
TO MOTION FOR DISCRETIONARY REVIEW AND
STATEMENT FOR GROUNDS FOR DIRECT REVIEW**

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I. INTRODUCTION

While RCW 51.32.185 gives firefighters a rebuttable presumption that certain cancers, including melanoma, are occupational diseases, that presumption was rebutted in this case through the testimony of several medical experts. Delmis Spivey's melanoma appeared on his back, in an area of sun-damaged skin that would normally be covered by a shirt while he was working as a firefighter. The Board of Industrial Insurance Appeals decided that the presumption was rebutted in this case by evidence that Spivey's melanoma was caused by non-work related sun exposure. The Board then found that he did not have an occupational disease because Spivey's sun exposure was not a distinctive condition of employment.

Spivey asked the superior court to decide whether the statutory firefighter presumption was rebutted. He can hardly complain when the superior court did as he requested. He shows no error committed by the superior court. Whether the burden of production created by the firefighter statute is rebutted is a question of law, and the superior court properly determined it was rebutted based on medical testimony establishing that his melanoma was caused by ultraviolet radiation and not by firefighting.

Spivey does not meet the standard for discretionary review. There is no obvious error under RAP 2.3(b)(1) because the trial court correctly

found that the presumption was rebutted as a matter of law. But also, RAP 2.3(b)(1) requires not only obvious error, it requires a showing that the error would render further proceedings useless. The superior court only decided that the presumption was rebutted. Because Spivey still gets a trial on whether he proved he had an occupational disease, further proceedings are not rendered useless. RAP 2.3(b)(2) is satisfied only when there is probable error, and there is none. This rule also requires a party to show that the decision will have an effect outside the courtroom—discretionary review is not granted when the trial court’s decision only affects the instant case. That is the situation here.

The trial court’s correct decision presents no issue warranting the extraordinary act of direct review by this Court under RAP 4.2. If the motion for discretionary review is granted, which it should not be, this is the sort of issue that the Court of Appeals routinely handles. In fact, there is a case with a similar issue pending at Division One now.

This Court should reject Spivey’s requests for interlocutory discretionary review and direct review.

II. ISSUES

Discretionary interlocutory review and direct review should not be granted, but if they were, the issues would be:

1. Did the trial court err in deciding that whether the firefighter presumption is rebutted is a question of law when burdens of production are routinely decided by a judge?
2. Did the trial court err in deciding that the presumption was rebutted by medical evidence that Spivey's melanoma was caused by ultraviolet radiation as confirmed by a pathology report?
3. Does application of the presumption implicate any due process issue or right to jury trial concern when the court may resolve the issue by interpreting the statute?

III. STATEMENT OF THE CASE

A. **Spivey Contracted Melanoma on His Back and Dr. Hackett Testified That It Was Caused by Ultraviolet Radiation as Confirmed by the Pathology Report**

Spivey contracted malignant melanoma on his back. BR Leonhardt 35-36.¹ When certain statutory requirements are met, firefighters receive a rebuttable evidentiary presumption that the condition he or she has is an occupational disease (referred to as the "firefighter presumption"). RCW 51.32.185(1). The presumption is rebuttable by the preponderance of the evidence. *Id.* If rebutted, the worker has to prove that the distinctive conditions of employment caused the alleged occupational disease. RCW 51.08.140. Here Spivey sought coverage for malignant melanoma, which is subject to a presumption that it is an occupational disease. RCW 51.32.185(1)(c), (3).

¹ Excerpts from the certified appeal board record are cited as "BR" followed by the witness name. All the cited excerpts and documents are found in the appendix to this brief.

At the Board of Industrial Insurance Appeals (Board) evidence was taken as to the cause of Spivey's melanoma. Spivey has no family history of melanoma. BR Spivey 177. He has sun freckles over various parts of his body. BR Spivey 154. He was exposed to sun as a child and had occasional sunburns. BR Spivey 15-56. He used a tanning bed for a total of 90 minutes. BR Spivey 163, 178. He had a history of actinic keratosis, low grade precancerous sun damage. BR Hackett 18, 23. The melanoma was on his back where it would normally be covered by a shirt when he was at work as a firefighter. BR Spivey 158, 170; BR Leonhardt 31-32. When Spivey was exposed to sun on the job, he was fully covered. BR Spivey 170.

Spivey sought medical treatment from dermatologist Janie Leonhardt, M.D. Dr. Leonhardt first saw him in January 2011 (before the melanoma was discovered). BR Leonhardt 25. At that time, she noted lentiginosities—sun freckles—on his head, neck, trunk, and upper extremities. BR Leonhardt 27. The cause of freckles is ultraviolet radiation. BR Leonhardt 27-28.

Dr. Leonhardt then saw him in December 2011, when she discovered the melanoma. BR Leonhardt 31. After the melanoma was discovered, she sent a biopsy for laboratory analysis. BR Leonhardt 36-37. The test revealed that the biopsy was of "sun-damaged skin" and

represented a melanoma. BR Leonhardt 41-42. Dr. Leonhardt testified that the medical literature supports the relationship between ultraviolet radiation exposure and the development of melanoma. BR Leonhardt 52. She was not aware of any scientific literature or medical evidence that would support a causal link between the development of melanoma and the inhalation of a substance or the presence of a substance on a person's skin. BR Leonhardt 46.

Dr. John Hackett, also a dermatologist, examined Spivey and reviewed Spivey's medical records and the medical literature. BR Hackett 4, 16, 23-24, 26, 50-54. He noted that Spivey's history included exposure to sun, including swimming as a child. BR Hackett 25. Dr. Hackett also noted the significance of the actinic keratosis found on Spivey—that they are reflections of excess ultraviolet exposure—which has been linked epidemiologically as the principal cause of melanoma. BR Hackett 18, 23; BR Chien 118. Dr. Hackett testified that Spivey's melanoma resulted from ultraviolet light exposure (sun damage). BR Hackett 27-28. This was because "the skin where the lesion developed had evidence of sun damage on biopsy." BR Hackett 28. He testified that the striking thing about Spivey was the presence of actinic keratosis in the past and evidence of sun damage in the skin on the pathology report. BR Hackett 25. He testified that the melanoma was not work related. BR Hackett 27-28. This

is because firefighters do not work with their shirts off, ruling out an occupational cause. BR Hackett 28. Spivey confirmed that when he was in the sun at work, his back was covered. BR Spivey 170.

Spivey offered the testimony of Dr. Ken Coleman, an emergency and family practice doctor and lawyer who specializes in medical malpractice cases. BR Coleman 4, 24. Dr. Coleman was retained solely to give an opinion on causation, he did not examine or treat Spivey. BR Coleman 5, 31, 48. Per Dr. Coleman's review of the literature, he believed that firefighting was a cause of the melanoma. BR Coleman 11-12. He also thought that because three other City of Bellevue firefighters had melanoma, this was a "cluster" that "lends support" to his belief that firefighting caused the melanoma. BR Coleman 22.

Dr. Hackett testified that Dr. Coleman's cancer cluster theory was not valid because the incident rate of one percent per year is consistent with the incidence of the general population. BR Hackett 31-32. Dr. Hackett did not believe that the studies Dr. Coleman relied upon proved that firefighting caused melanoma. BR Hackett 50-88.

Andy Chien, MD, a dermatologist specializing in melanoma research, testified that ultraviolet exposure accounts for 85 percent of melanoma. BR Chien 89, 97-98. Even a one-time use of a tanning bed increases the risk of developing melanoma. BR Chien 113. Dr. Chien

explained that there is no medical research to indicate that exposure to any substance, including smoke, soot, diesel fumes, or “polycyclic aromatic hydrocarbon” can lead to the development of malignant melanoma. BR Chein 113-15.

Noel Weiss, MD, an epidemiologist, testified that based on published research studies, it cannot be inferred that firefighting has the ability to increase the risk of melanoma, there is only the possibility that it might. BR Weiss 14-15, 24-25,85. He believes on a more likely than not basis that Spivey’s melanoma was not related to his firefighting. BR Weiss 86.

B. The Board Decided That the Presumption Was Rebutted and the Trial Court Agreed

After considering the evidence, the Board decided that the presumption was rebutted by evidence that Spivey’s melanoma was caused by sun exposure. *See* BR 4, 7. The Board then decided that he did not have an occupational disease because Spivey’s sun exposure was not a distinctive condition of employment. BR 5, 6-7.

At superior court, the City moved to have the trial court determine the issue of whether it is a question of law that the presumption is rebutted. Respondent City of Bellevue’s Motion; *see also* Department’s Reply. Spivey responded, arguing specifically that the presumption was

not rebutted. Pl's Resp. at 2, 10. Spivey stated: "There is no preponderance of relevant, admissible evidence with which to rebut the presumption in [Delmis] Spivey's favor The City's appeal should be dismissed." Pl's Resp. at 10. The superior court granted the City's motion and held that the City had met its burden to rebut the presumption. Mar. 27, 2015 Order. Spivey moved for reconsideration, which the superior court denied.

IV. ARGUMENT WHY DISCRETIONARY REVIEW SHOULD NOT BE GRANTED

Because malignant melanoma is a presumed occupational disease for a firefighter, RCW 51.32.185 placed a burden of production at the Board on the City to present evidence that Spivey's disease was not occupationally related. At the Board, the City met its burden of production, the burden then shifted to Spivey to present a preponderance of evidence establishing that his claim should be allowed. *See Raum v. City of Bellevue*, 171 Wn. App. 124, 147, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024 (2013). At superior court Spivey must show the Board was incorrect in deciding that the presumption was rebutted and that he did not prove occupational exposure. RCW 51.52.115; WPI 155.03. This Court should decline to grant interlocutory discretionary

review and direct review, and instead should allow the superior court trial to move forward.

A. Spivey Has Not Demonstrated He Meets the Standards Under Either RAP 2.3(b)(1) or RAP 2.3(b)(2) To Justify Discretionary Review

Discretionary review is an extraordinary procedure that should only be granted in exceptional cases. *See Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 820, 21 P.3d 1157 (2001); RAP 2.3. Discretionary review anticipates that there is something more than simply that the trial judge got it wrong. *See Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546-47 (1986).

As discussed below, Spivey has not pointed to any probable or obvious error of the trial court. But more specifically, he has not met the other requirements of RAP 2.3 to justify review. He seeks review under subsections (b)(1) and (b)(2) of RAP 2.3. Mot. for Discretionary Review (Mot.) at 7. These provisions allow for review only under carefully limited circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.

RAP 2.3(b).

Regarding RAP 2.3(b)(1), Spivey argues the trial was rendered “useless because it misplaces the burden of proof and omits the statutory presumption that his melanoma is occupational.” Mot. at 9-10. But Spivey has the opportunity to have the jury consider whether his occupational exposure caused his melanoma as his own witness opined. *See Raum*, 171 Wn. App. at 147. While Spivey would like the strategic advantage of the presumption, its loss does not render a jury trial on occupational disease “useless.” He may still prevail before the jury on this issue. Spivey can also re-raise his contention that the presumption was not rebutted at the close of evidence given that the trial court’s decision was interlocutory. CR 54(b).

Similarly, Spivey has not demonstrated the circumstances that would justify review under RAP 2.3(b)(2). This requires “probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 2.3(b)(2). Spivey claims the superior court’s decision substantially alters his case and “limits his freedom to prosecute his case with the benefit of the statutory presumption.” Mot. at 10. This is not sufficient. Under *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014), Spivey must show that the decision affected his ability to act outside this case:

[W]here a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). Errors such as these are properly reviewed, if necessary, at the conclusion of the case where they may be considered in the context of the entire hearing or trial.

Howland, 180 Wn. App. at 207. In *Howland*, the trial court was merely deciding how to proceed in a mental health conditional release proceeding, in terms of what process to apply. *Id.* While the trial court decision arguably limited the manner in which the litigation could be conducted, it had no effect beyond the immediate litigation. *Id.* Like *Howland*, the trial court's ruling here only affects this litigation and how it proceeds in this case. It is not, therefore, sufficient to justify discretionary review.

Because the trial court's decision only affects this case, Spivey cannot show that his freedom to act was substantially limited or the status quo was altered.

B. Spivey Placed the Merits of Whether the Presumption Was Rebutted at Issue and Cannot Now Claim Lack of Notice

Spivey invited the court to address the issue of whether the presumption was rebutted in his case. He therefore waived any argument that he lacked notice that the trial court would decide the issue.

Spivey claims that he did not receive notice that the trial court would decide whether the presumption was rebutted. Mot. at 4. But Spivey

brought the issue to the trial court. He argued to the trial court that the presumption was not rebutted, stating: “There is no preponderance of relevant, admissible evidence with which to rebut the presumption in [Delmis] Spivey’s favor.” Pl’s Resp. at 10. He then specifically asked for dismissal: “The City’s appeal should be dismissed.” Pl’s Resp. at 10. He placed the question of whether the presumption was rebutted squarely before the trial court and cannot claim error on notice grounds when the trial court decided not to rule in his favor. The local rules he cites do not prevent a trial court from ruling on an issue brought by a party. Mot. at 7.

Nor is there any due process violation. Spivey relies on the due process principle of notice and opportunity to be heard. Mot. at 8. But “due process does not require actual notice” rather, it requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Dellen Wood Prods., Inc. v. Dep’t of Labor & Indus.*, 179 Wn. App. 601, 627, 319 P.3d 847, *review denied*, 180 Wn.2d 1023 (2014). Constructive notice may be provided. *Id.* at 628. Here Spivey had notice of the issue because he brought it up and presented an argument that the presumption was not rebutted. There is no due process violation.²

² Because there is no due process violation given that Spivey had notice of the proceedings and placed the presumption at issue, there is no need to decide the novel

This is a workers' compensation appeal, where the evidence is heard on a certified appeal board record. RCW 51.52.115. Spivey's complaint goes to the timing of the trial court's decision. He now would prefer that the trial court decide whether the presumption was rebutted after the evidence is read to the jury, but such an action is not necessary when the record is prepared in advance. *See* RCW 51.52.102, .115. Significantly, Spivey moved for reconsideration, thus giving him a chance to argue his theory again to the trial court. After considering the evidence, the trial court declined to grant reconsideration. But the key is that the trial court had before it Spivey's claimed theories.

C. The Question of Whether the Presumption Was Rebutted Is a Question of Law

The trial court correctly decided that the question of whether the presumption was rebutted should be addressed as a matter of law. The firefighter presumption needs to be placed in its proper context. Spivey lost at the Board. Under the Industrial Insurance Act, "[i]n all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Thus it is Spivey who

proposition that the application of a statutory presumption creates a liberty interest. Mot. at 9.

carries the burden to show that the Board's decision is incorrect, including whether the Board correctly decided that the firefighter presumption was rebutted. In this context it does not make sense to have the jury decide a countervailing question regarding the firefighter presumption. Because of the competing presumptions in RCW 51.32.185 and RCW 51.52.115, the judge should decide the issue. To resolve the conflict, the superior court presumption would control as it is the more specific presumption at superior court. *See In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004).

At the Board, the City met its burden of production to present evidence that Spivey's disease was not occupationally related. The burden then shifted to Spivey to present a preponderance of evidence establishing that his claim should be allowed. *Raum*, 171 Wn. App. at 147. At superior court Spivey has to show the Board was incorrect in deciding that the presumption was rebutted and that he did not prove occupational exposure. RCW 51.52.115; WPI 155.03.

“The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.” *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d (1983)). As the *Indian Trail* Court pointed out, “its efficacy is lost when the other

party adduces credible evidence to the contrary. Presumptions are the “bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.” *Indian Trail*, 35 Wn. App. at 843 (quoting *Mockowik v. Kansas City, St. J. & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906)).

Whether a burden of production is met is decided by a judge, while the issue of whether the burden of persuasion is met is decided by the trier of fact. See *Carle v. McCord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992); Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 24:5 (2d ed. 2013) (“sufficiency of the evidence to take the case to the jury is a question of law”). RCW 51.32.185 creates a burden of production because it addresses what constitutes a prima facie case. RCW 51.32.185 (“there shall exist a prima facie presumption” that certain conditions are occupational diseases). Once a prima facie case exists, as it does here by virtue of RCW 51.32.185, the employer (or Department) has the burden of production—i.e., it must produce a preponderance of evidence that the firefighter’s disease is not occupational. “The employer’s burden at this stage is not one of persuasion, but rather a burden of production.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 364, 753 P.2d 517 (1988) (discussing the burden of production in age discrimination cases).

The fact that RCW 51.32.185 allows the applicable burden of production to be satisfied by a preponderance of the evidence does not transform the question of whether the burden of production was met into a jury question. It merely provides guidance to the trial judge as to what standard to use in determining whether the employer has met the burden of production. Ordinarily the standard on a burden of production would be whether the evidence is “sufficient” or “substantial.” *Carle*, 65 Wn. App. at 98. The Legislature, however, created a higher standard than is ordinarily used to satisfy a burden of production. But it is nonetheless a burden of production, and, therefore, is decided by a judge, not a jury.

Spivey argues RCW 51.32.185 is a burden of persuasion, relying on a cite from Karl Tegland’s Washington Practice series on civil procedure. Mot. at 14 (citing Karl B. Tegland, 14 *Washington Practice Civil Procedure* § 31.14 (2d ed. 2013)). He neglects to provide the complete quote. Tegland provides:

Some presumptions are rebutted by a preponderance of the evidence. Such a presumption relates to the burden of persuasion. *If the basic facts have not been rebutted as a matter of law, and if the presumed fact has not been rebutted as a matter of law, the judge should give an instruction to the jury on the presumption.*

14 Wash. Practice § 31.14 (emphasis added). Thus, it can be a question of law whether a presumption is rebutted, as the trial court decided here. In

any event, Tegland is incorrect that a burden of persuasion is necessarily established when the statute references the preponderance of the evidence. Here competing presumptions in RCW 51.52.115 and RCW 51.32.185 mean that the employer's burden to rebut the firefighter presumption can only properly be considered a burden of production.

Although the Department's position is that the firefighter presumption involves a burden of production that is a question of law and not a burden of persuasion that is a question of fact, determining whether this is correct is not necessary for this case. Because of the competing presumptions in RCW 51.32.185 and RCW 51.52.115, the judge should decide the issue.

Additionally, key to the analysis is that *only the evidence the City produced* is used in determining whether the presumption is rebutted. This is because the City's evidence is rebuttal evidence. RCW 51.32.185. This illustrates why the jury should not decide whether the presumption is rebutted.³

D. The City Rebutted the Presumption by Evidence that Spivey's Melanoma Was Caused by Ultraviolet Radiation as Confirmed by a Pathology Report

The trial court correctly decided that the presumption was rebutted.

³ Spivey also argues that there was a due process violation by taking the question from the jury and a deprivation of a right to trial by jury. Mot. 12-13. But these argument presuppose that the issue was a question of fact, and it was not.

The City provided a non-firefighting cause—ultraviolet radiation—and testimony that firefighting was not a cause of the melanoma. Dr. Hackett testified that ultraviolet radiation was the cause and that firefighting was not a cause. BR Hackett 27-28. The basis of his opinion was because “the skin where the lesion developed had evidence of sun damage on biopsy.” BR Hackett 28. He specifically stated that the melanoma was not work related. BR Hackett 27-28. This is because firefighters do not work with their shirts off, ruling out an occupational cause. BR Hackett 28.

Spivey claims that this testimony is based on “speculation and conjecture.” Mot. at 18. He points to testimony that says in 100 cases of melanoma a doctor would not know all the causes, that a doctor cannot identify all the causes of a given cancer, and that medical science does not know when a malignant melanoma cell comes into being. Mot. at 5-6, 18-19. What Spivey proposes to require is 100 percent certainty about the origin of cancer. But the law does not require 100 percent certainty; rather all that is required is testimony on a more probable than not basis that something is true. *See Sacred Heart Med. Ctr. v. Dep’t of Labor & Indus.*, 92 Wn.2d 631, 637, 600 P.2d 1015 (1979) (rejecting the argument that the claimant had to prove precise carrier of hepatitis because she only needed to prove that she contracted disease at work on a more likely than not basis); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d

538 (1984). By Spivey's reasoning, the Department or employer could never rebut a claim of cancer because medical science cannot say with 100 percent certainty what the cause of cancer is. But the Legislature simply required that the presumption is rebuttable by a preponderance of the evidence. RCW 51.32.185. It showed no intent to establish an irrebuttable presumption. *Raum*, 171 Wn. App. at 144 (the Legislature created a rebuttable presumption). Dr. Hackett's testimony was based on the more probable than not standard and that was sufficient. BR Hackett 27-28. His opinion that Spivey's cancer was not work related was echoed by Drs. Weiss, Leonhardt, and Chien who did not think there was a causal connection between his firefighting and melanoma. BR Weiss 86; BR Chien 113-16; BR Leonhardt 46.⁴

Spivey's theory is also that the City did not distinguish between occupational and non-occupational exposure to ultraviolet rays. Mot. at 18. But actually the City did distinguish with testimony that the melanoma was on the back, and Spivey's back was covered while working. But more fundamentally, Spivey cannot show that exposure to sunlight is a distinctive condition of his employment as a firefighter. To prove presence of an occupational disease, the occupational disease must arise naturally

⁴ In contrast, Spivey's expert testified generally about a possible causal relationship that may be supported by the literature and a debunked "cluster theory." BR Coleman 11-12; BR Hackett 31-32.

and proximately out of employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Under *Dennis*, the “arising naturally” prong of the occupational disease test requires the condition come about “as a matter of course as a natural consequence or incident of distinctive conditions” of the worker’s particular employment. *Id.* at 481. As the Court in *Dennis* explains, the naturally prong requires that “particular work conditions” more probably caused disability than conditions in everyday life or all employments in general. *Id.* The “particular work conditions” must be conditions of a particular occupation as opposed to conditions coincidentally occurring in the workplace. *Dennis*, 109 Wn.2d at 481; *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 316, 289 P.3d 727 (2012) (concluding that office remodels occur in all employments and are not distinctive). Sun exposure is not distinctive to Spivey’s employment; it occurs in everyday life and in employments in general. Thus, the City did not have to prove that the ultraviolet radiation was not occupational, since it is not a distinctive condition of employment.⁵

⁵ Spivey also seeks attorney fees under RCW 51.52.130 and RCW 51.32.185. Mot. at 20. Both statutes require that he obtain reversal of the Board’s decision to acquire fees, here he seeks only reversal of an interlocutory decision and the most he would obtain is a remand. No fees are awarded based on a remand. See *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012). Likewise he seeks fees for Board work, but he did not prevail at the Board, nor is there a final decision allowing the claim for benefits, and as such he is not entitled to fees for his work there. RCW 51.32.185(7).

Spivey shows no reason why discretionary review should be granted. He cannot show obvious or probable error and he meets none of the other RAP 2.3(b)(1), (2) criteria. This Court should deny discretionary review of the interlocutory trial order and allow the trial to go forward.

V. ARGUMENT WHY DIRECT REVIEW SHOULD NOT BE GRANTED

Even if the Court grants discretionary review, direct review by this Court should not be granted. Spivey has shown none of the RAP 4.2(a) standards to justify direct review. First, there is not a fundamental and urgent issue of broad public import raised by this case, which involves a minority subset of workers' compensation law, particularly when there is a Court of Appeals case pending on the same subject. Second, Spivey can point to no statute that has been held unconstitutional, thus there is no reason on constitutional grounds to grant review. Finally, he points to no conflict in the appellate cases.

A. A Routine Issue About Burden-Shifting Does Not Warrant Review

Not citing any rule of appellate procedure to justify this Court's acceptance of direct review, Spivey asks for an "authoritative determination" on whether the presumption rebuttal is a question of law. Statement at 4. Such a request satisfies none of the grounds provided in RAP 4.2(a), and certainly he has not shown an issue "involving a

fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” As shown above, the presumption rebuttal is a question of law. *See* Part IV.C, *supra*. Spivey argues that direct review should be taken because in one published case the City of Bellevue took the position that the firefighter presumption is a question for the jury and in another undecided case the City corrected this view by arguing that it is a question of law. Statement 4-5. He points to *Larson v. City of Bellevue*, No. 71101-6-I, where the issue of whether the presumption is a question of law is before Division One. Mot. at 5. But no need exists for Supreme Court direct review for an issue that is before the Court of Appeals. The Court of Appeals routinely decides issues regarding workers’ compensation matters, though there are a very small number of firefighter cases. Indeed, there are only two published cases despite almost 20 years of the presumption being operational. *Raum*, 171 Wn. App. 124; *Gorre v. City of Tacoma*, 180 Wn. App. 729, 324 P.3d 716 (2014), *review granted*, 180 Wn. App. 729 (2015); Laws of 1987, ch. 515, § 2. Nothing about the Spivey case is urgent and of broad public import, especially since *Larson* will address the issue.

B. The Superior Court Did Not Hold a Statute Unconstitutional and No Basis Exists for Review Under RAP 4.2(a)(2)

No constitutional issues warrant review. Spivey argues that there are constitutional violations in this case. Statement at 10. These claims do not present a reason for Supreme Court review as the trial court did not hold a statute unconstitutional. RAP 4.2(a)(2) requires such an action to justify review and none is present here and therefore review should not be granted under this rule.

The right to a jury is not implicated here because rebuttal of the presumption is a question of law for a judge to decide. Spivey claims the right to a jury trial is implicated because he believes that the rebuttal of the presumption is a question of fact. Statement at 8, 11. There is no such implication of the right to jury trials because juries do not decide questions of law and the trial court correctly decided that the question of whether the presumption was rebutted was a question of law, as argued above in Part IV.C.

Spivey also argues that there are due process implications in his case because he believes the City did not rebut the presumption using the correct quantum of evidence. Statement at 11-12. He believes that guidance is necessary as to what must be established to rebut the presumption. Statement at 5. But he is simply wrong that the City did not

rebut the presumption and that this presents an issue that requires Supreme Court direct review. The City provided a non-firefighting cause—ultraviolet radiation—and testimony that firefighting was not a cause of the melanoma, as discussed above in Part IV.D.

Here the statutory presumption was correctly applied. Although Spivey posits this issue as a due process one, it is not. The Court would not need to consider a due process question because resolution of this question turns on proper application of the statutory burden of proof. *See State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (courts do not reach a constitutional issue if it is not necessary to do so).

There is no due process violation about the notice for the hearing. Here Spivey had notice of the issue because he brought it up. There is no due process violation.

C. There Are No Conflicting Decisions

RAP 4.2(a)(3) also provides no basis for review. Spivey argues that there are conflicting appellate decisions, noting that there are three firefighter decisions, *Raum*, *Gorre*, and *Larson*—the last of which has not yet even been decided. Statement at 14. But he points out nothing in these decisions that conflict. There is no conflict in the decisions of the Court of Appeals.

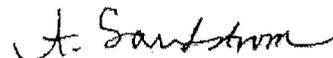
VI. CONCLUSION

Spivey does not demonstrate any reason under RAP 2.3 to grant interlocutory review. Not only does he not demonstrate obvious or probable error, he cannot show that this decision affects anything outside the courtroom or that it renders the proceedings useless. The Department asks the Court to deny discretionary review.

No reason exists under RAP 4.2 to grant review. Spivey cannot point to any error of the trial court. The trial court did not err in ruling that as a matter of law the firefighter presumption was rebutted by evidence that Spivey contracted this condition from sun exposure. More significantly, this issue does not present an urgent one of broad public import that needs immediate resolution by this Court. Instead, the Court of Appeals routinely handles similar cases and is doing so already. The Department asks the Court to deny direct review.

RESPECTFULLY SUBMITTED on the 1st day of July, 2015.

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Spivey Appendices

- Appendix A: Decision and Order
- Appendix B: Proposed Decision and Order (Excerpt)
- Appendix C: City of Bellevue's Motion to Renew Evidentiary Objections, Review Evidentiary Rulings and Correct the Record and [Proposed] Order Incorporated Within
- Appendix D: Dennis Spivey Testimony (Excerpts)
- Appendix E: Kenneth Coleman, M.D. Testimony (Excerpts)
- Appendix F: Janie Leonhardt, M.D. Testimony (Excerpts)
- Appendix G: Noel Weiss, M.D. Testimony (Excerpts)
- Appendix H: Andy Chien, M.D. Testimony (Excerpts)
- Appendix I: John Hackett, M.D. Deposition
- Appendix J: Order Granting In Part Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony
- Appendix K: Respondent City of Bellevue's Motion for Determination of Legal Standard of Review and to Strike Portions of Dr. Coleman's Testimony
- Appendix L: Plaintiff's Response in Opposition to City's Motion for Determination of Legal Standard on Review and Motion to Strike Portions of Dr. Coleman's Testimony
- Appendix M: Department's Reply to City of Bellevue's Motion re RCW 51.32.185 and to Motion to Strike Portions of Spivey's Brief and Its Reply to Spivey's Response to the City of Bellevue's Motion

**Appendix A:
Decision and Order**

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: DELMIS P. SPIVEY) DOCKET NO. 13 18842
2)
3 CLAIM NO. SG-05442) DECISION AND ORDER
4

5 APPEARANCES:
6

7 Claimant, Delmis P. Spivey, by
8 Ron Meyers & Associates, PLLC, per
9 Ron Meyers

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11 Self-Insured Employer, City of Bellevue, by
12 City of Bellevue, per
13 Chad R. Barnes
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15 The claimant, Delmis P. Spivey, filed an appeal with the Board of Industrial Insurance
16 Appeals on July 29, 2013, from an order of the Department of Labor and Industries dated June 5,
17 2013. In this order, the Department rejected the claim as an occupational disease as contemplated
18 by RCW 51.52.185 and RCW 51.08.140, and as an industrial injury. The Department order is
19
20 **AFFIRMED.**
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23 **DECISION**

24 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
25 review and decision. The claimant and employer filed timely Petitions for Review of a Proposed
26 Decision and Order issued on July 2, 2014, in which the industrial appeals judge reversed and
27 remanded the Department order dated June 5, 2013. The claimant also filed a Response to the
28 Employer's Petition for Review.
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31 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
32 no prejudicial error was committed. The rulings are affirmed. We granted review because we
33 disagree with our hearing judge that the City of Bellevue (City) did not rebut the statutory
34 presumption. The City rebutted the statutory presumption by proving by a preponderance of
35 evidence that Mr. Spivey's malignant melanoma was caused by other exposure, not the toxic fumes
36 and substances as argued by Mr. Spivey. Mr. Spivey's melanoma was caused by sun exposure,
37 and a preponderance of evidence shows that sun exposure is not a distinctive condition of
38 employment.
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44 The facts are adequately set forth in the Proposed Decision and Order. We will set forth
45 those facts most pertinent to our decision. Delmis Spivey began his firefighting career as a
46 volunteer on September 1, 1980. He has worked as a full-time firefighter with the City of Bellevue
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1 since January 1, 1995. Mr. Spivey has performed a full range of firefighting activities including
2 emergency and non-emergency responses. When Mr. Spivey has responded to fire emergencies,
3 he wore his full personal protection equipment. When he responds to calls for EMS services or
4 performs other non-fire activities, he wears a daytime uniform of a t-shirt and pants, and a jacket
5 when appropriate. Mr. Spivey is also involved in off-work activities of coaching football, hunting,
6 fishing, and bike riding. Mr. Spivey wears a shirt and jacket when engaged in these non-work
7 activities.
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11 Mr. Spivey's ethnic makeup is primarily English and Dutch, and possibly Native American.
12 He has freckles throughout his body and over 25 moles. He has no family history of melanoma.
13 He has had occasional sunburns in his lifetime. He has also used a tanning bed a couple of times
14 in his life. Mr. Spivey never smoked cigarettes, and he has not had an issue with physical fitness.
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17 The air monitors worn by Mr. Spivey and other firefighters monitor oxygen, carbon monoxide,
18 hydrogen sulfide, and explosives, but they do not monitor other airborne chemicals. The firefighters
19 do not always wear their self-contained breathing apparatus. Often after a fire, their bodies are
20 covered with soot and when they blow through their noses and/or cough, they expectorate a black
21 gooey substance. The firefighters are also often exposed to diesel fumes from the fire truck while
22 at the station house and out on calls. During responses to fires, firefighters can be exposed to
23 several unknown substances. Mr. Spivey has experienced no physical symptoms within two hours
24 after diesel exhaust exposure, and he has never complained about toxic substance exposure.
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27 In January 2011, Mr. Spivey visited Janie Leonhardt, M.D., who is certified in dermatology,
28 regarding a spot on his left chest area. Dr. Leonhardt found Mr. Spivey had sun freckles throughout
29 his body on his head, neck, trunk, and upper extremities, and a scattering of moles uniform in size,
30 color, and shape. On December 22, 2011, Dr. Leonhardt examined Mr. Spivey and discovered an
31 irregularly shaped, dark brown sun freckle on his back that after testing it was determined to be
32 melanoma.
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35 If a firefighter meets certain factors, there is a rebuttable statutory presumption that his/her
36 melanoma arises naturally and proximately out of the distinctive conditions of employment.¹ Under
37 the statutory presumption, the initial burden is on the employer to rebut the presumption by a
38 preponderance of evidence.² If the employer does not rebut the presumption, it has failed to prove
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¹ RCW 51.32.185.

² *City of Bellevue v. Michael A. Raum*, 171 Wn. App. 124 (2012)

1 that the worker's condition did not arise naturally and proximately out of the distinctive conditions of
2 employment. If the employer rebuts the presumption, the burden is on the worker to prove the
3 medical condition arose naturally and proximately out of the distinctive conditions of employment.
4 Mr. Spivey meets the statutory factors of RCW 51.32.185 necessary to apply the statutory
5 presumption. Subsection (3) provides that the presumption applies if a firefighter develops a listed
6 cancer after at least 10 years of service. Melanoma is one of the listed cancers. Because
7 Mr. Spivey has more than 10 years of experience and has been diagnosed with melanoma, the
8 presumption applies.
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13 In deciding whether the employer has successfully rebutted the presumption, we look to the
14 history of the statutory presumption. The extension of the statutory presumption to conditions such
15 as malignant melanoma began out of a concern that firefighters are exposed to unknown levels of
16 potentially harmful chemicals and toxic substances while fighting fires. Therefore, assessment of
17 Mr. Spivey's Application for Benefits begins with the presumption that his melanoma is caused by
18 occupational exposure. However, the statute also states the presumption can be rebutted by a
19 preponderance of evidence that the medical condition was caused by other exposures. We find
20 that a preponderance of evidence shows Mr. Spivey's malignant melanoma was caused by sun
21 exposure, not his work activities and exposures.
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27 Mr. Spivey's arguments in his questioning of experts, briefing, and testimony follow the
28 statutory presumption that his melanoma was caused by exposure to toxic substances exposed to
29 while working as a firefighter. Mr. Spivey's medical evidence was presented through Kenneth
30 Coleman, M.D. Dr. Coleman is an emergency room and family practice specialist, and an attorney.
31 Dr. Coleman testified from a general view that Mr. Spivey is a firefighter, and research shows a
32 causal link; therefore, Mr. Spivey's malignant melanoma must be related to work exposures.
33 Dr. Coleman's opinion is based solely on the fact that medical literature he reviewed says
34 melanoma **could** be related. Dr. Coleman did not meet with Mr. Spivey or review any of
35 Mr. Spivey's medical records. We would point out that Mr. Spivey has had no complaints about
36 exposures to toxic substances other than the expectoration of black substance when coughing or
37 blowing his nose after fire suppression, like other firefighters. Dr. Coleman also not has undergone
38 training or performed any research regarding the diagnosis of malignant melanoma or its causes
39 and risk factors. Dr. Coleman's research is limited to the articles suggested to him by Mr. Spivey's
40 counsel or articles found for this claim.
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1 The City presented the testimony of dermatologists and epidemiologists who have experience
2 in diagnosing, treating, and/or researching melanoma and its causes and risk factors. Each of
3 these experts testified that melanoma is caused by sun exposure. To support the application of this
4 general proposition specifically to Mr. Spivey, the evidence shows he has other findings and factors
5 that show that his melanoma was more probably than not caused by sun exposure. One of the
6 City's experts was John Hackett, M.D. Dr. Hackett is a certified dermatologist who treats patients with
7 melanoma and performs and reviews biopsies in his normal course of practice. Dr. Hackett testified
8 that Mr. Spivey's biopsy showed evidence of sun damaged skin and a malignant change linked to
9 ultraviolet light and not exposure to toxic substances. Further, Mr. Spivey rarely used sun protection
10 prior to his melanoma diagnosis. Mr. Spivey has sun freckles throughout his body on his head,
11 neck, trunk, and upper extremities, and a scattering of moles, which are risk factors for developing
12 melanoma.
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19 Mr. Spivey presented evidence that other firefighters in his station house have been
20 diagnosed with melanoma. Dr. Coleman opined this "cluster" of cancer diagnoses supports the
21 contention that Mr. Spivey's melanoma is related to his exposure to carcinogens as a firefighter.
22 However, Dr. Hackett opined the incident rate of this "cluster" is the same as for the general
23 population; therefore, it does not support a causal link.
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26 To have probative value expert opinions must be based on "full knowledge of all material facts"
27 established by, or inferable from, the record, including opinions given based on a hypothetical question
28 or review of medical history.³ We find Dr. Coleman's opinions have little probative value and are less
29 persuasive than the expert opinions provided by the City based on melanoma research; treatment of
30 melanoma; Mr. Spivey's examination and test results; and Mr. Spivey's characteristics.
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34 The statutory presumption is rebutted by a preponderance of evidence that Mr. Spivey's
35 melanoma was caused by sun exposure. Therefore, we turn our attention to whether the cause of
36 Mr. Spivey's malignant melanoma, sun exposure, is a distinctive condition of his employment. We
37 find a preponderance of evidence shows the sun exposure is not a distinctive condition of
38 employment.
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42 The distinctive conditions of employment must be conditions of the worker's particular
43 employment, not "everyday life or all employments in general."⁴ Also, the work conditions causing
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³ *Saylor v. Department of Labor & Indus.*, 69 Wn.2d 893 (1966).

⁴ *Dennis v. Department of Labor and Indus.*, 109 Wn.2d 467 (1987).

1 the medical condition must be actual conditions of employment, not conditions coincidental to the
2 employment.⁵
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4 Sun exposure is a condition of everyday life. The evidence shows there is ultraviolet
5 exposure even on a cloudy day. Washington State has an incidence rate of melanoma ranked at
6 number five in the country, and our region is behind only Australia and New Zealand worldwide.
7 Our general population has a greater chance of a melanoma diagnosis. Further, the incidence rate
8 of melanoma is higher in individuals exposed to intermittent prolonged sun exposure, rather than
9 those exposed at higher rates such as farmers, gardeners, and fishermen. Workers in gardening
10 and farming, occupations one thinks of when thinking of sun exposure as a condition of
11 employment, have a lower incidence of melanoma.
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16 The evidence does not show that Mr. Spivey is exposed to the sun in any manner as a
17 **condition of employment** as a firefighter more than throughout daily life. The evidence shows
18 that workers involved in more outdoor recreational activities have a higher degree of sun exposure
19 and are at a higher risk for melanoma. The risk is even higher when the outdoor activities occur in
20 higher elevations or while on the water, such as fishing.
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24 Mr. Spivey has testified that he is engaged in several outdoor recreational activities, and his
25 body is covered similarly, if not more, as a firefighter than during his non-work activities. Mr. Spivey
26 engages in biking; hiking; hunting; yard work; football coaching; and fishing. These activities are
27 performed for several hours at a time while Mr. Spivey is off work. As for work exposure, from
28 January 1, 2000, through December 16, 2013, Mr. Spivey responded to 269 fire calls and only 130
29 required over 30 minutes at the scene.
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33 The preponderance of evidence does not support a finding that Mr. Spivey's sun exposure is
34 a distinctive condition of employment. Instead, his intermittent prolonged sun exposure has more
35 probably than not occurred during his intermittent prolonged non-work activities.
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37 The statutory presumption applies to Mr. Spivey. This presumption was rebutted by a
38 preponderance of evidence that Mr. Spivey's malignant melanoma more probably than not arose
39 naturally and proximately out of exposure from other activities, specifically sun exposure. A
40 preponderance of evidence shows Mr. Spivey's sun exposure is not a distinctive condition of
41 employment. The Department order to reject the claim is correct.
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47 ⁵ *Dennis*, at 481.

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FINDINGS OF FACT

1. On October 29, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Delmis P. Spivey is a career firefighter who began working full-time with the City of Bellevue on January 1, 1995, and meets the factors necessary to apply the statutory presumption of RCW 51.32.185.
3. Delmis P. Spivey developed malignant melanoma on his back in December 2011.
4. Delmis P. Spivey underwent a biopsy that showed findings that his melanoma was more likely caused by sun damage and other malignant changes linked to ultraviolet light.
5. Delmis P. Spivey rarely used sun protection prior to his melanoma diagnosis; he has sun freckles throughout his body on his trunk, head, neck, and upper extremities; and he has a scattering of moles throughout his body.
6. Delmis P. Spivey wears similar clothing for his on and off work outdoor activities unless he has on additional personal protection equipment when responding to fires.
7. Delmis P. Spivey has had no complaints about exposures to toxic substances other than the expectorating of the black substance when coughing or blowing his nose after fire suppression, like other firefighters.
8. During the period of January 1, 2000, through December 31, 2013, Mr. Spivey responded to 269 calls, and 130 required over 30 minutes on the scene.
9. Delmis P. Spivey's non-work activities are outdoor activities, including hiking, biking, yard work, coaching, hunting, and fishing. He performs these activities for several hours at a time.
10. Delmis P. Spivey's malignant melanoma is due to sun exposure, not exposures while performing firefighting activities.
11. Delmis P. Spivey's sun exposure was not a distinctive condition of employment.
12. Mr. Spivey's malignant melanoma is not a condition that arose naturally and proximately out of the distinctive conditions of his employment as a firefighter for the City of Bellevue.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

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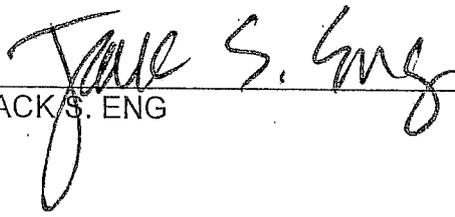
2. Delmis P. Spivey is presumed to have sustained an occupational disease within the meaning of RCW 51.32.185.
3. The statutory presumption that Delmis P. Spivey has an occupational disease has been rebutted within the meaning of RCW 51.32.185.
4. Delmis P. Spivey's disease diagnosed as malignant melanoma did not arise naturally and proximately out of distinctive conditions of employment as contemplated by RCW 51.08.140.
5. The Department order dated June 5, 2013, is correct and is affirmed.

Dated: October 9, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



JACK S. ENG Member

**Appendix B:
Proposed Decision and Order
(Excerpt)**

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DELMIS P. SPIVEY) DOCKET NO. 13 18842
CLAIM NO. SG-05442) PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Wayne B. Lucia

APPEARANCES:

Claimant, Delmis P. Spivey, by
Ron Meyers & Associates, PLLC, per
Ronald G. Meyers

Self-Insured Employer, City of Bellevue, by
The Office of the City Attorney, per
Chad R. Barnes, Assistant

The claimant, Delmis P. Spivey, filed an appeal with the Board of Industrial Insurance Appeals on July 29, 2013, from an order of the Department of Labor and Industries dated June 5, 2013. In this order, the Department rejected his occupational disease claim. The claimant is a full-time firefighter for the self-insured employer (SIE), City of Bellevue, since 1995. Mr. Spivey developed a treatable malignant melanoma on his back. RCW 51.32.185 creates a legal presumption the claimant's melanoma arose naturally and proximately because of the distinctive conditions of his employment as a firefighter for the SIE. The evidence introduced by the SIE was not sufficient to overcome the statutory presumption by preponderance. Mr. Spivey's malignant melanoma condition arose naturally and proximately from his employment conditions. The Department order is **REVERSED AND REMANDED**.

ISSUE

The issue presented on appeal is whether the claimant's malignant melanoma condition is an occupational disease, arising naturally and proximately out of the distinctive conditions of his work as a firefighter for the SIE.

PROCEDURAL AND EVIDENTIARY MATTERS

On October 29, 2013, the parties agreed to include the Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this appeal.

Claimant's evidence was presented at an April 2, 2014 hearing and with the March 10, 2014 deposition of Dr. Kenneth Coleman. The hearing witnesses were Wilfred Larson, William Santangelo, Blane Singleton, Doug Halbert, Valerie Spivey, and Delmis P. Spivey.

1 The SIE offered the April 3, 2014 hearing testimony of Dr. Noel Weiss and Dr. Andy Chien.
2 Depositions for the SIE were Dr. John P. Hackett (taken March 12, 2014), Kieron Gillmore
3 (March 13, 2014), Chief Michael Eisner (March 13, 2014), and Dr. Janie Leonhardt (March 28,
4 2014).
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7 All depositions taken to preserve testimony are published as provided by WAC 263-12-117.

8 Pretrial motions were made by each of the parties. Claimant's motion, filed March 20, 2014,
9 sought to exclude the testimony of Dr. Janie Leonhardt because Mr. Spivey's attorney was not able
10 to be at her discovery deposition. The judge presiding over the hearings, Judge Christopher
11 Swanson, deferred ruling on the motion. Claimant's motion is hereby denied. Dr. Leonhardt's
12 discovery deposition was not mentioned or referred to by the evidence. Her deposition to preserve
13 testimony was attended by counsel for both parties. Claimant is not prejudiced by this.
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16 The SIE filed its motion March 28, 2014, the issues being argued at the April 2, 2014
17 hearing. Seven specific remedies were requested by the SIE. They are:
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19 No. 1 is to preclude statements about the legislative history and intent behind
20 RCW 51.32.185. This motion is granted. All testimony or comments relating to the intent, meaning,
21 or history of RCW 51.32.185 is stricken from the record.
22

23 No. 2 asks to preclude comments, statements, or testimony about the substance of
24 published medical articles or learned treatises not used in the direct or cross-examination of any
25 witness. This motion is granted. All comments, statements, or testimony about the substance of
26 published medical articles or learned treatises not used in the direct or cross-examination of any
27 witness is stricken from the record.
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30 No. 3 sought to preclude evidence or testimony about other firefighters who have cancer.
31 The presiding judge granted this motion. 4/2/14 Tr. at 40. His ruling is reversed. Limited evidence
32 from other firefighters who have worked the same shift, attended the same fires together, and
33 whose exposure is similar or the same as Mr. Spivey is appropriate. Two of those firefighters have
34 malignant melanoma, which is relevant. The testimony addressing the common factors is removed
35 from colloquy.
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38 No. 4 seeks to prevent evidence of firefighter cancers in other areas of the nation. The
39 motion is granted in part. Comments by counsel about firefighter cancers who are not in the
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1 employ of the SIE are not allowed. Such comments are stricken from the record. My ruling does
2 not set aside the learned treatise rule.¹
3

4 No. 5 asks to exclude the testimony of Valerie Spivey (Claimant's wife), Blane Singleton, and
5 Doug Halbert. The exclusion was requested because the witnesses were identified after the due
6 date for Mr. Spivey's witness confirmation. The presiding judge allowed the testimony of
7 Ms. Spivey and took the testimony of Mr. Singleton and Mr. Halbert in colloquy, thereby granting
8 the SIE's motion in part. I reverse the ruling and remove those testimony portions from colloquy
9 relating to Mr. Singleton and Mr. Halbert having worked the same shifts, trucks, fires, and
10 exposures Mr. Spivey underwent. Evidence of their having cancer is also removed, but only as the
11 cancer is the same type the claimant has.
12

13 Excluding testimony is a sanction of last resort. It should only be used after considering
14 lesser sanctions, the willfulness of the violation, and a showing of substantial prejudice.² The
15 record is silent about the *Mayer* factors.
16

17 No. 6 would block reference to publications during Dr. Coleman's testimony. Ruling was
18 deferred at the hearing. 4/2/14 Tr. at 57. This motion is denied. Dr. Coleman, like most expert
19 witnesses appearing before the Board, may refer to documents, reports, and relevant literature
20 during his testimony. The Evidence Rules apply here and are sufficient to determine those
21 publications properly referenced.
22

23 No. 7 seeks to prevent Dr. Coleman from testifying in this matter. The hearing judge
24 deferred a ruling. 4/2/14 Tr. at 60(16). Dr. Coleman's education, training, and experience qualify
25 him as an expert witness within the meaning of ER 702. I found his testimony helpful. The SIE's
26 motion respecting Dr. Coleman is denied.
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28 Concerning Captain Larson, his testimony at 4/2/14 Tr. at 73, line 3, is removed from
29 colloquy.
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31 Portions of William Santangelo's testimony is removed from colloquy. They are: 4/2/14 Tr.
32 at 87, lines 1 through 14; page 93, line 9, through page 94, line 9; and page 95, line 6, through
33 page 97, line 3. Two objections sustained by the hearing judge are changed; rulings at page 93,
34 line 14, and at page 95, line 13, are changed with the noted objections overruled.
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46 ¹ER 803(a)(18).

47 ² *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 688 (2006) (citations omitted).

1 A number of objections during Blane Singleton's testimony were sustained by the hearing
2 judge. The rulings at 4/2/14 Tr. at 107, line 24; page 108, line 3; and page 108, line 16, are
3 changed with the noted objections overruled.
4

5 Regarding Doug Halbert's testimony, the rulings at 4/2/14 Tr. at 121, line 21, page 122,
6 line 8, and page 123, line 9, are changed with the noted objections overruled.
7

8 Regarding Dr. Coleman's deposition, the objections or motions made on page 32, line 11,
9 and page 35, line 16, are sustained or granted; the questions or testimony on page 35, lines 5
10 through 15, is stricken from the record; all other objections or motions are overruled or are denied.
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13 From the deposition of Dr. Hackett: the objections or motions made on page 20, line 17,
14 page 21, lines 1, 10, and 22, page 22, lines 3, 7, and 20, page 30, line 21, page 31, lines 4, 13, and
15 24, page 42, line 2, page 43, line 11, page 48, line 14, page 58, line 4, page 69, line 3, page 83,
16 line 1, and page 94, line 14, are sustained or granted. The following questions or testimony, is
17 stricken from the record: from page 20, line 3, through page 23, line 2; starting at page 41, line 2,
18 through page 42, line 1; page 43, line 4, through page 47, line 9; page 48, line 6, through page 50,
19 line 22; page 58, lines 2 and 3; and page 69, line 1, through page 70, line 4. All other objections or
20 motions are overruled or are denied.
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24 From Mr. Gillmore's deposition, the objections or motions made on 36, line 21, page 39,
25 line 1, and page 42, line 1, are sustained or granted; the questions and testimony on page 36,
26 line 17, through page 37, line 20, is stricken from the record; all other objections or motions are
27 overruled or are denied.
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31 During Chief Eisner's deposition, the objections or motions made on page 26, line 8,
32 page 27, line 15, page 29, line 14, page 39, line 18; page 40, line 4, and page 41, line 22, are
33 sustained or granted; the questions or testimony on page 25, line 19, through page 26, line 21,
34 page 27, line 12, through page 28, line 9, page 29, line 9, through page 30, line 3, page 39, line 15,
35 through page 40, line 14, and page 41, line 19, through page 44, line 18, is stricken from the record;
36 all other objections or motions are overruled or are denied.
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40 From Dr. Leonhardt's deposition, the objections or motions made on page 10, line 9,
41 page 32, line 20, page 33, line 7, page 55, line 13, page 56, line 18, page 65, line 1, page 66,
42 line 18, and page 72, line 9, are sustained or granted; the questions or testimony on page 10,
43 line 20, through page 20, line 5, page 56, lines 15 through 17, page 56, line 22, through page 61,
44 line 6, page 61, lines 16 through 23, page 66, line 13, through page 68, line 25, and page 71,
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1 line 19, through page 74, line 13, is stricken from the record; all other objections or motions are
2 overruled or are denied.
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4 Some deposition exhibits were identified; they are treated as follows:

5 Dr. Coleman's deposition Exhibit No. 1, is renumbered as Exhibit No. 22, and rejected;

6 A duplicate original deposition of Dr. Coleman was filed with the Board containing a duplicate
7 Exhibit No.1. That duplicate Exhibit No. 1 is renumbered as Exhibit No. 23 and is rejected.
8

9 Dr. Hackett's deposition Exhibit Nos. 1 and 2, renumbered as Exhibit Nos. 24 and 25, and
10 they are rejected;
11

12 Mr. Gillmore's deposition Exhibit Nos. 1 and 2, renumbered Exhibit Nos. 26 and 27, and they
13 are admitted; and
14

15 Dr. Leonhardt's deposition Exhibit Nos. 1 through 7, renumbered Exhibit Nos. 28 through 34,
16 Exhibit Nos. 29, 30, and 32 are admitted, the balance of the exhibits are rejected.
17

18 Each SIE's deposition witness reserved his or her signature. The depositions were filed with
19 the Board lacking those signatures. There have been no objections or motions to suppress. All
20 deposition defects are deemed cured.³
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23 EVIDENCE PRESENTED

24 The parties created a substantial record in this appeal. The facts described are limited to
25 those necessary for an understanding of this decision.
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28 SIE firefighters perform a variety of tasks, one of which is fire suppression. When
29 responding to a structure fire and the firefighter is within the fire or near it, a breathing apparatus is
30 worn to protect lungs and airways. They also wear protective clothing called bunker gear or
31 turnouts, a helmet, and face protection.
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34 After the fire has been extinguished and overhaul operation begins. The site is closely and
35 destructively examined to make sure there are no hidden hot or burning spots. Respirators are not
36 typically used during overhaul.
37

38 SIE firefighters also respond to grass fires. Those are generally fought without breathing
39 apparatus.
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41 The claimant's witnesses described being congested after a fire when respirators are used.
42 They typically cough up black or dark phlegm for several days. Black mucous comes out when
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47 ³ CR 32(d)(4).

**Appendix C:
City of Bellevue's Motion to Renew
Evidentiary Objections, Review
Evidentiary Rulings and Correct
the Record and [Proposed] Order
Incorporated Within**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE and
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

Cause No. 14-2-29233-3

CITY OF BELLEVUE'S MOTION TO
RENEW EVIDENTIARY OBJECTIONS,
REVIEW EVIDENTIARY RULINGS AND
CORRECT THE RECORD AND
[PROPOSED] ORDER INCORPORATED
WITHIN

The City of Bellevue makes this motion to renew evidentiary objects and/or seek review of the following evidentiary rulings made in the proceeding before the Board of Industrial Insurance Appeals:

The testimony that the City objects to and claims should be stricken is outlined below. The testimony to be reviewed is referenced in the first column, and the basis for the City's object is set forth in the second column, the third column is provided for the Court's convince to record its ruling and any additional instructions.

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I. Perpetuation Deposition Transcripts

Testimony of Kieron Gillmore

Page: Lines	Objection	Court's Ruling & Notes
24:22 – 25:1	Form; Relevance Presumptive Disease Statute is not at issue given the Court's ruling it has been rebutted. Move to Strike	
27:9- 28:15	Relevance The ability to run fire response reports for nonparties is irrelevant. Move to Strike.	
28:24 – 29:6	Form; Relevance The ability to run fire response reports for nonparties is irrelevant. It is also a compound question. Move to Strike.	
29:23-30:24	Form; Relevance; Asked and answered. The ability to run fire response reports for nonparties is irrelevant. Move to Strike.	
31:7-34:2	Form, Relevance, beyond the scope of the witness, beyond the direct. This line of questioning broadly and inaccurately references "skin cancers" in other firefighters. Pursuant to the ALJ's ruling on motions in limine evidence of other City firefighters having cancer or a precancerous condition other than melanoma is removed from the record. BR 59. Move to Strike	

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Fire Chief Michael Eisner

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Page: Line	Objection	Ruling & Notes
28:13-28:25	Relevance; Time period Whether a 40 year career firefighter ever blew "black mucous from his nose" is not relevant. The question is not confined to the time period Appellant Spivey was employed by the City of Bellevue and thus does not take into account the personal protective gear Mr. Spivey was issued vs. the state of personal protective equipment 40 years ago. Move to Strike	
34:12-34:23	Relevance; lack of personal knowledge. Information regarding a Hazmat response attended by the Fire Chief is irrelevant absent information Appellant Spivey attended the same hazmat response. Move to Strike	
38:21-39:10	Relevance, mischaracterizes both the law and prior testimony, ER 403. Reference to presumptive disease statute should be stricken base on Court's prior rulings in this matter and motion in limine. Move to Strike	
40:20-41:18	Relevance; ER 403 Testimony regarding other firefighters who have had "skin cancer" (generic term) verses melanoma is irrelevant and prejudicial. ALJ's ruling on motions in limine indicated that only other persons diagnosed with melanoma would be relevant. Additionally, the questioning asks in part about a firefighter named Randy Hart who did not testify in this matter. Move to Strike	
46:2-46:7	Relevance Monitoring of CO2 is irrelevant	

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	given that there is no testimony CO2 exposure is a risk factor for the development of melanoma. Move to Strike	
46:8-46:11	Relevance There is no medical testimony that the inhalation of a substance can lead to the development of melanoma. Move to Strike	
47:1-47:19	Form; Foundation No foundational testimony regarding whether the City uses MSA manufactured Self Contained Breathing Apparatus or even if they had been used the period of time such SCBA was in service with the City. Move to Strike	
49:11-49:20	Relevance, calls for medical testimony. No medical testimony from Appellant's expert regarding the "healthy worker effect" therefore irrelevant. Would require a lay person to discuss the medical concept of the "healthy worker effect" as it applies to firefighters. Move to Strike	
49:19-51:17	Form, Relevance, ER 403 Physical fitness and medical standard for hiring of a new firefighter is irrelevant. Move to Strike	
52:3-52:21	Form, Relevance, ER 403 No medical testimony that the inhalation of a substance can lead to the development of melanoma. Move to Strike	
53:1-53:23	Form, Relevance, ER 403 No medical testimony that the inhalation of a substance can lead to the development of melanoma. Move to Strike	
55:12-55:18	Form, Foundation, Relevance, ER 403	

1		No medical testimony that the inhalation of a substance can lead to the development of melanoma. Move to Strike	
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3	56:7-56:24	Lack of foundation, beyond the scope of the witness, calls for medical testimony. No foundation that the gases present at a fire are carcinogenic for melanoma. Beyond the scope of direct and would require medical testimony. Move to Strike	
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8	63:5-63:14	Objection Beyond the Scope of redirect, relevance, ER 403. Whether the Chief filled out an injury report is not relevant to whether Appellant's melanoma is an occupational disease. Move to Strike	
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John Hackett, M.D.

13	Page: Line	Objection	Court's Ruling & Notes
14	20:4-23:2	Respondent seeks review of the ALJ's ruling striking these portions of Dr. Hackett's testimony. Dr. Hackett testified based on his review of Appellant's pathology report. The pathology report is not hearsay under 803(a)(3) or as a business record RCW 5.45.020. Additionally, under ER 703 a medical provider may base his opinions on information that would be otherwise inadmissible. <i>State v. Ecklund</i> , 30 Wn.App. 313, 318, 633 P.2d 933 (1981) (upheld admission of expert opinion based on laboratory report because other experts relied on such reports in reaching conclusions and the procedures and data were used for purposes other than litigation). Detention of <i>Marshall v. State</i> , 156	
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	<p>Wn.2d 150, 125 P.3d 111 (2005) (Psychologist allowed to testify regarding opinions based on review of medical records, treatment records) Here, Dr. Hackett testified regarding whether the findings in a pathology report support his opinions on causation. Additionally, as foundation he testified it is important to review a person's medical records to determine the cause of their condition. TR 17:14-25. Respondent moves to admit.</p>	
<p>29:17-30:11</p>	<p>Relevance; foundation. Question subject to motion in limine, where in the ALJ ruled evidence of cancers other than melanoma is not relevant. Question addresses whether Dr. Hackett was aware of other City firefighter diagnosed with squamous cell (inaccurate) or basal cell cancers? Move to Strike:</p>	
<p>30:17-32:12</p>	<p>ALJ's ruling indicates several objections were sustained but does not specify the portions of the records stricken. Respondent requests 30:17-32:12 be stricken as it relates to general cancers among firefighters and not specifically confined to melanoma.</p>	
<p>47:15-47:25</p>	<p>Relevance The recurrence rate for malignant melanoma is not relevant to whether Appellant's condition is an occupational disease. Move to Strike.</p>	
<p>54:9 after coma to 55:23</p>	<p>Form; Relevance Questioning about an article related to general increase in "skin cancers" as with the occupation is irrelevant. At 55:25 the questioning about the article turns to melanoma specifically.</p>	

56:20-57:8	Relevance The potential causes of basal cell carcinoma or squamous cell carcinoma is not relevant to whether Appellant Spivey developed malignant melanoma.	
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Following are a number of objections based on foundation during Appellant's questioning from various articles. The basis for the foundation objection is as follows:

Under ER 803(a)(18) statements contained in published treatises and pamphlets on the subject of medicine, if established as authority, are made exceptions to the hearsay rule when used in cross or direct examination of an expert witness. The published works may be established as authoritative by the testimony or admission of the witness, by other expert testimony, or by judicial notice. ER 803(a)(18). *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986). However, it is not sufficient to show that a particular witness regards the publication as reliable. To establish a proper foundation, the proponent of the publication must offer testimony to the effect that the publication is generally regarded as authoritative among the audience to who it is directed. See 5C Wash. Prac., Evidenc Law and Practice §803.67 (5th ed.); *Schnedler v. Revici*, 817 F.2d 987 (2d Cir. 1987) (Excluding medical article where proper foundation was not laid and noting Fed.R.Evid. 803(18) advisory committee note. "Failure, therefore, to lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to view it as trustworthy.") In this case, Appellant's counsel did not lay a proper foundation for the admission of any of the articles that he read into the record.

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Page: Line	Objection	Court's Ruling & Notes
57:9-57:24	Foundation; Relevance No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. No medical testimony to establish the inhalation or dermal application of the chemicals mentioned can cause melanoma vs. being carcinogenic for other conditions. Move to Strike.	
58:23-60:5	Foundation; Relevance; Mischaracterizes prior testimony. No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike	
60:6-61:23	Foundation; Relevance; Improper use of a learned treatise under ER 803. No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike.	
62:11-65:16	Foundation; Relevance; Improper use of a learned treatise under ER 803. No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike.	
66:4-66:9	Foundation; Relevance No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed.	

		Move to Strike.	
1	66:10-66:25	Relevance; Foundation Whether other occupations, including oil workers, have higher incidents of cancer generally is irrelevant and invites speculation. Move to Strike.	
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5	67:1- 67:20	Foundation; Relevance No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike.	
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9	67:21-68:25	Foundation; Relevance; ER 803. No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike.	
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12	70:5-715	Foundation; Relevance; ER 803. No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Notably, counsel asked if the article was peer-reviewed and Dr. Hackett did not know. Move to Strike.	
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18	71:17-72:11	Relevance Whether chemicals such as Vitamin A, have the potential to make the skin sensitive to UV light is not relevant in the absence of evidence. Appellant Spivey was exposed to those particular chemicals with those properties. Invites the jury to speculate. Move to Strike.	
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23	72:12-74:8	Foundation; Relevance; ER 803 No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied	
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	on by experts, or peer reviewed. Move to Strike.	
74:9-75:15	Foundation; Relevance; ER 803 No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Move to Strike.	
75:16-76:9	Foundation; Relevance Whether polyvinyl chlorides have the potential to cause cancer generically is irrelevant. The issue is whether that particular chemical has been correlated to the development of malignant melanoma. Move to Strike.	
76:10-76:18	Foundation; Relevance Whether benzine has the potential to cause cancer generically is irrelevant. The issue is whether that particular chemical has been correlated to the development of malignant melanoma. Move to Strike.	
76:19-77:1	Foundation; Relevance; calls for speculation. Whether firefighters potentially come into contact with polychlorinated biphenyls is irrelevant, without medical evidence the substance has been established a cause of malignant melanoma. Move to Strike.	
77:2-78:5	Foundation; Relevance; ER 803 No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Additionally, there is no evidence Appellant Spivey has been exposed to dimethybenzanthracene. Therefore, Appellant is inviting the jury to speculate as to the cause of his melanoma.	

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	Move to Strike.	
78:13-79:11	Foundation; Relevance; ER 803 No foundation was laid to establish the article is considered authoritative in its field to qualify as a learned treatise, generally relied on by experts, or peer reviewed. Additionally, the article discusses whether certain occupations as a whole have an increased risk for melanoma. <i>Dennis v. Department of Labor and Industries</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987) specifies the inquire is the particular conditions of the employees work “not upon whether the disease itself is common to that particular employment.” (emphasis added). Move to Strike.	
84:6-85:17	Foundation; Relevance; Speculation. Skin absorption rates for “ultra fine particles” is irrelevant absent medical testimony that a recognized cause of melanoma is the dermal application of a substance that is absorbed through the skin. Invites speculation by the jury. Move to Strike.	
89:5-89:12	Relevance; ER 403 Particulate matter is irrelevant without medical testimony that it is a recognized cause of melanoma. Move to Strike.	
89:23-92:18	Relevance; ER 403 Long line of questions to Dr. Hackett regarding whether certain chemical or materials are “carcinogens” without any medical testimony the compounds or materials are carcinogenic for malignant melanoma. Invites the jury to speculate. Move to Strike.	
96:10-99:18	Correction to the record: This section of testimony deals with	

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	housekeeping matters related to Dr. Hackett's report. The ALJ struck an earlier section of testimony dealing with the report. (pgs. 43-47) This section should also be stricken.	
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Kenneth Coleman, M.D.

Respondent previously brought a motion to excluded Dr. Coleman's opinions based on foundation and an improper use of ER 803(a)18, which was denied by the Court. Given the Court's ruling, Respondent will only outline objections that go beyond foundation or ER 803(a)18.

Page:Line	Objection	Ruling & Notes
18:2-19:10	ER 403 The list of chemicals discussed are noted as probable carcinogens without further testimony or discussion that the chemicals are carcinogenic for malignant melanoma vs. other conditions. Invites the jury to speculate. Move to Strike.	
18:8-18:21	Correction to Record; Counsel reads portions of ER 803 into the record which should be stricken.	
22:6-24:6	Foundation; Relevance; Incomplete hypothetical, Beyond the scope of the witness. Discussion of other generically termed skin cancers among other City of Bellevue firefighters was disallowed by the ALJ pursuant to the motions in limine. Additionally, the hypothetical is factually inaccurate. <i>Abbott v. Dept. of Labor and Indus.</i> , 49 Wn.2d 774, 307 P.2d 254 (1956) ("We have held that the erroneous assumption of matters not included in a hypothetical question and not inferable therefrom	

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	can, under certain conditions, destroy the probative value of an expert's testimony.") Move to Strike.	
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Janie Leonhardt, M.D.

Page:Line	Objection	Ruling & Notes
10:20-20:5	ALJ sustained an objection based on foundation and relevance and struck the next ten pages of testimony. The testimony relates to an article Dr. Leonhardt located on her own and reviewed dealing with the risk factors for the development of melanoma. Foundation was established for using the article as a learned treaties under ER 803(a)(18). Move to admit. Notably: On cross Appellant's attorney questioned the doctor regarding the same article over a foundation objection. The rulings should be consistent. Additionally, the Exhibit is also testified about with several other experts.	
32:17-19	ALJ sustained an objection based on leading. Notably the ALJ did not order the testimony stricken. BR 60, lines 40-46. Respondent in an abundance of caution moves to admit the testimony.	
33:3-8	ALJ sustained an objection based on leading/foundation. Notably the ALJ did not order the testimony stricken. BR 60, lines 40-46. Respondent in an abundance of caution moves to admit the testimony.	
37:16	Move to admit Exhibit 4 to Dr. Leonhardt's deposition which	

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	<p>was renumbered as Board Exhibit 31. The exhibit is a medical pathology report requested by Dr. Leonhardt, kept in the ordinary course of business and qualifies as a business record. Move to Admit.</p>	
54:21	<p>Foundation As noted above Appellant's counsel questions Dr. Leonhardt regarding the same article that was excluded when Respondent was questioning the doctor from the article. The rulings should be consistent.</p>	
69:1-71:18	<p>Relevancy; ER 403 Appellants counsel runs through a litany of chemicals and compounds asking if the doctor knows if Appellant was exposed to the chemical or substance. In the absence of medical testimony that exposure to the particular chemicals is a recognized cause of melanoma the testimony is irrelevant and prejudicial. It is intended to introduce a parade of horribles inviting the jury to speculate on the cause of Appellant's melanoma. Move to Strike.</p>	
74:14-76:5	<p>Foundation; Relevance; Incomplete hypothetical. Questions related to coworkers diagnosis. Subject to motion in limine. Move to Strike.</p>	
78:2-78:6	<p>Foundation; Relevance. Dr. Leonhardt testified in the prior question she is not aware of a correlation between smoking and melanoma. Therefore, it is irrelevant whether the doctor knows if smoking was allowed in fire stations during the 90's. Move to Strike.</p>	
79:19-80:9	<p>ER 403 Appellant's Counsel failed to attend</p>	

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	<p>Dr. Leonhardt's discovery deposition due to a scheduling error on his office's part. It is prejudicial to suggest the doctor provided testimony "outside the presence of Del Spivey's lawyer" due to Appellant counsel's own error.</p> <p>See BR 179 et seq. Employers Response to Motion to Exclude the Deposition of Dr. Janie Leonhardt. Move to Strike.</p>	
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II. Hearing Transcripts

Wilfred Larson

Page:Line	Objection	Ruling & Notes
69:10-71:7	<p>Foundation; Relevance; Lack of Medical Evidence.</p> <p>There is no medical testimony that the inhalation of a substance can lead to the development of melanoma. Move to Strike.</p>	
73:3-4	<p>Testimony regarding Mr. Larson's diagnosis of malignant melanoma was originally taken in colloquy by the presiding ALJ pursuant to motion in limine. These lines were removed from colloquy by the ALJ who wrote the opinion.</p> <p>Mr. Larson's diagnosis of melanoma is irrelevant and prejudicial. Move to Strike.</p>	

William Santangelo

Page:Line	Objection	Ruling & Notes
87:1-87:16	<p>Beyond the scope of the witness; requires medical and scientific testimony; lacks personal knowledge.</p>	

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	<p>Answer was originally stricken, but the presiding judge's ruling was reversed by the ALJ who wrote the opinion. The question asks what Mr. Santangelo was taught by the City about toxins. His response starts with "I can't say for certain where I learned it. . ." He goes on to violate the motion in limine to mention other cancers in the City and reference someone who died from cancer. Move to Strike.</p>	
93:9-94:9	<p>Relevance Questioning regarding whether the measuring device samples for carcinogens. Originally sustained, reversed by subsequent ALJ. Move to Strike</p>	
95:6-97:3	<p>Section of testimony originally in colloquy. Removed from colloquy by ALJ who wrote the opinion based on their belief Mr. Santangelo has malignant melanoma. See Respondents Motions in Limine regarding factual inaccuracy. Mr. Santangelo was diagnosed with Lentigo maligna a pre-cancer.</p>	

Blaine Singleton

Mr. Singleton's testimony was originally taken in colloquy, due to his late disclosure on the day before hearing. The ALJ who wrote the opinion removed "those testimony portions from colloquy relating to Mr. Singleton and Mr. Halbert having worked the same shifts, trucks, fires, and exposures Mr. Spivey underwent. Evidence of their having cancer is also removed, but only as the cancer is the same type the claimant has." BR 59:10-15. Unfortunately, the ALJ did not specify

1 by page and line what testimony is now considered part of the record. Respondent
2 has renewed its motion in limine to exclude Mr. Singleton.

3 Since Respondent cannot tell what testimony is actually intended to be part
4 of the record given the imprecise nature of the ALJ's ruling, Respondent renews all
5 of the objections it made at the Board hearing. BR 101-118.

6 **Doug Halbert**

7 As noted above the circumstances are the same for Mr. Halbert. Since
8 Respondent cannot tell what testimony is actually intended to be part of the record
9 given the imprecise nature of the ALJ's ruling, Respondent renews all of the
10 objections it made at the Board hearing. BR 118-125. Respondent has renewed
11 its motion in limine to exclude Mr. Halbert.

12 **Valerie Spivey**

13 Respondent has renewed its motion in limine to exclude Ms. Spivey due to
14 her late disclosure.

15 **Delmis Spivey**

17	Page:Line	Objection	Ruling & Notes
18	147:12-147:17	Relevance The number of children Appellant has and their ages is irrelevant. Move to Strike.	
19			
20	168:10-168:16	Move to Admit Question regarding Appellant's belief whether he was exposed to carcinogenic substances.	
21			
22	173:13-175:25	Relevance; Lack of Medical Testimony No medical evidence that exposure to diesel can cause the development of melanoma. Move to Strike those portions taken out of colloquy.	
23			
24			
25			

1 2	179:23-180:7	Relevance; No medical testimony regarding exposure to particulate-matter as a cause of melanoma. Move to Strike.	
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Noel Weiss, M.D.

Page: Line	Objections	Ruling & Notes
6 7 8 9 10 11	52:3-52:26 Relevance; ER 403 Questioning relates to the observances of "ocular melanoma" which is a different condition than Appellant Spivey's malignant melanoma on his back. Suggesting that firefighters have a fivefold increase in the observed incidents of an unrelated form of cancer to Appellants is prejudicial. Move to Strike.	
12 13 14 15 16	61:22-62:7 Relevance: ER 403 Testimony regarding an increase in "skin cancers" among firefighters generally is prejudicial. The issue in this matter is malignant melanoma. To be relevant medical testimony would need to establish that melanoma and other "skin cancers" are caused in the same way. Move to Strike.	
17 18 19	86:17-87:7 <i>Dennis v. Depart. of L & I, Supra.</i> Incidental sun exposure at work is irrelevant to causation. Move to Strike.	

Andy Chien, M.D.

Page: Line	Objections	Ruling & Notes
21 22 23 24	144:14-145:3 Relevance: ER 403 Question and article referenced concerns general risk of all skin cancers and is not confined to melanoma. Move to Strike.	
25	146:2-146:11 Relevance Question about whether chemicals	

1 can cause cancer generally is
2 irrelevant since it is not tied to
3 melanoma specifically.
4 Move to Strike.

5 **III. Conclusion**

6 The Court should review and reverse the ruling made by the Industrial
7 Appeals Judge as requested above.

8 DATED this ____ day of May, 2015.

9 CITY OF BELLEVUE
10 OFFICE OF THE CITY ATTORNEY
11 Lori M. Riordan, City Attorney

12 /s/Chad R. Barnes
13 Washington State Bar No. 30480
14 Assistant City Attorney
15 Attorney for Respondent City of Bellevue
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ORDER

The Court having reviewed the evidentiary issues herein incorporates its rulings as noted above.

DONE IN OPEN COURT, this _____ day of May, 2015.

The Honorable Samuel Chung

Presented by:

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

Approved as to Form, Notice of
Presentation Waived:

RON MEYERS & ASSOCIATES, PLLC

Chad R. Barnes, WSBA #30480
Assistant City Attorney
Attorney for Respondent City of
Bellevue

Ron Meyers, WSBA #13169
Attorney for Appellant Spivey

Approved as to Form, Notice of
Presentation Waived:

ATTORNEY GENERAL OF WASHINGTON

Beverly Norwood Goetz, WSBA #8434
Attorney for Respondent Department of Labor and Industries

**Appendix D:
Dennis Spivey Testimony
(Excerpts)**

1 MR. MEYERS: No. I want to preserve my objection with anything
2 with respect to medical testimony is made unnecessary by the
3 causal link established by RCW 51.32.185. And I don't want
4 to for a moment lose track of that or think anything -- think
5 I am waiving it.

6 JUDGE SWANSON: Thank you for putting that on the record. You may
7 call your next witness.

8 MR. MEYERS: The claimant calls Del Spivey.

9 JUDGE SWANSON: I am going to go ahead and swear you in. If you
10 could raise your right arm.

11 (WITNESS SWORN)

12 JUDGE SWANSON: Go ahead, Counsel.

13 DELMIS P. SPIVEY, being first duly sworn under oath,
14 testified as follows:

15
16 DIRECT EXAMINATION

17 BY MR. MEYERS:

18 Q. Please tell us your name.

19 A. Delmis Paul Spivey.

20 Q. Where are you employed?

21 A. City of Bellevue Fire Department.

22 Q. How long have you been employed by the City of Bellevue Fire
23 Department?

24 A. January 1, 1995, is my one of three dates that I have with the
25 Bellevue Fire Department.

26 Q. Let's kind of back up. I want you to tell us when was the first

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factors.

JUDGE SWANSON: Okay. As I indicated earlier, I will be reviewing the testimony to make sure there's kind of linked up. At this point I am going to overrule the objection and you may continue with your question.

MR. MEYERS: May I have the continuing objection, so we can get done today, Your Honor?

JUDGE SWANSON: Yes.

A. As I understand it, I am of mixed ethnicity. My family has told me that English and Dutch was part of that. But also that's southeast Native American could be possibly be part of that. So Europe and -- but of yeah, mixed.

Q. (By Mr. Barnes) Would you agree that you do have freckles over your body?

MR. MEYERS: Objection; relevance, foundation.

JUDGE SWANSON: And this will get linked up.

MR. BARNES: This also goes to freckles are one of the recognized risk factors for the development of melanoma through UV sun exposure.

JUDGE SWANSON: I will overrule. You may answer.

A. Yeah, I do have them.

Q. (By Mr. Barnes) Would you agree that you have over 25 plus moles over your body?

MR. MEYERS: Objection; foundation, speculation, medical testimony.

JUDGE SWANSON: Okay. I will overrule at this point.

1 A. I am not sure.

2 Q. (By Mr. Barnes) Do you remember answering interrogatories in this
3 case?

4 A. I remember sitting for a long time answering questions during the
5 interrogatories.

6 Q. Interrogator No. 8 I am going to read to you and make sure that I
7 read correctly. The City asked you, "Do you have any of the
8 follow characteristics?" This is Interrogatory No. 8(G). "Have
9 more then 25 moles?" And your answer here for G was, "Yes." Did
10 I read the question or the interrogatory No. 8 and your response
11 correctly there, Mr. Spivey?

12 A. I guess I did answer it that way.

13 MR. MEYERS: I would cite the rule of completeness and ask that
14 every response and every question in Interrogatory No. 8 be
15 made part of the record at this time.

16 JUDGE SWANSON: I am going to deny that request.

17 MR. MEYERS: And I am going to ask to put in colloquy at this
18 time.

19 MR. BARNES: I would -- Mr. Meyers is welcome to do that on
20 cross-examination. But I will go forward with my
21 questioning, unless Your Honor needs to make it at this
22 point. If we would like to cross examine that on that point,
23 he is more than welcome to.

24 JUDGE SWANSON: Okay. Good point. If you want to cross examine
25 on all of that information, then you may.

26 Q. (By Mr. Barnes) Now, like most kids, you would agree that you had

1 at least a few sunburns as a kid?

2 A. I was exposed to the sun as a kid, yes.

3 Q. And that would include getting occasionally sunburned?

4 A. Yes.

5 MR. MEYERS: Objection; speculation.

6 JUDGE SWANSON: Overruled.

7 MR. MEYERS: Interrogatory No. 10 cites otherwise.

8 JUDGE SWANSON: Overruled.

9 MR. BARNES: Thank you, Your Honor.

10 Q. (By Mr. Barnes) And those occasions you would get a sunburn you
11 probably sprayed it with something like a Solarcaine?

12 MR. MEYERS: Objection; assumes facts not in evidence.

13 JUDGE SWANSON: I will sustain.

14 Q. (By Mr. Barnes) There were occasions that you received a sunburn
15 as a child and it was severe enough that you wanted to use a
16 product like Solarcaine; is that correct?

17 MR. MEYERS: Objection; foundation, speculation.

18 JUDGE SWANSON: Overruled.

19 A. As a kid, I don't recall. I know that I, you know --

20 MR. BARNES: Your Honor, I have the sealed deposition transcript
21 of Del Spivey, the discovery deposition, that was taken on
22 December 13, 2013. At this time I would move to submit the
23 deposition so it may be used for impeachment purposes.

24 MR. MEYERS: No objection. In the rule of completeness I will be
25 offering the rest of that deposition.

26 JUDGE SWANSON: Okay. Granted.

1 Q. (By Mr. Barnes) I am going to unseal your discovery deposition
2 that was taken on December 13, 2013, Mr. Spivey. At that point do
3 you recall having your deposition taken on that day?

4 A. Yes.

5 Q. And you were asked a question -- I am going to read the question
6 and then I am going to ask you to verify that I read the question
7 and your response correctly. It appears at Page 77 at your
8 deposition transcript. You were asked, Question: "Do you recall
9 ever receiving a sunburn where you needed to apply some sort of
10 after-burn medication, over-the-counter or otherwise?" Your
11 answer was, "I probably had like a Solarcaine or something spray
12 on it." Did I read it as it appears at Page 77 line 19 through
13 line 23 correctly?

14 MR. MEYERS: Objection; speculation, move to strike.

15 JUDGE SWANSON: Overruled.

16 A. You read it correctly.

17 Q. (By Mr. Barnes) And there were also times that you would apply
18 something like an aloe product because you dry out in the sun; is
19 that correct?

20 MR. MEYERS: Objection; relevance.

21 JUDGE SWANSON: Overruled.

22 A. I probably did that also.

23 Q. (By Mr. Barnes) Believe it or not we have been going for a while
24 and I don't think anybody has ever asked you where is your
25 melanoma at, Mr. Spivey, or where was your melanoma?

26 MR. MEYERS: Objection; form of the question, move to strike,

1 argumentative.

2 JUDGE SWANSON: I guess I will sustain.

3 Q. (By Mr. Barnes) Mr. Spivey, could you articulate where on your
4 body the melanoma that was excised as part of your claim today
5 where was it located on your body?

6 A. It was -- using C7 of the spine, it was probably, as the center
7 point of the clock, it was probably right about between seven and
8 eight o'clock to the left, so it would be to the left.

9 Q. I understand when you use C7, you are talking about the seventh
10 cervical vertebra. So that's going to get us down to a point
11 below the level of your collar; is that correct?

12 MR. MEYERS: Objection; form, speculation.

13 JUDGE SWANSON: Overruled.

14 A. Yes.

15 Q. (By Mr. Barnes) So it's in an area of your body that would not
16 normally be exposed to the sun unless you had your shirt off,
17 correct?

18 A. True.

19 Q. Now, I understand you work a 24-hour shift; is that correct?

20 A. Correct.

21 Q. And generally you will do a day on, day off, day on, day off, day
22 on, and then four days off; is that correct?

23 A. Correct.

24 Q. That's called, I guess, a modified Detroit schedule?

25 A. Correct.

26 Q. In that schedule, you are going to have at least some periods of

1 A. Yes.

2 Q. Now, I understand there were also times that -- earlier in your
3 life you did use a tanning bed?

4 A. Once or twice, yes.

5 Q. You used it a few times back when you were in your early 20s,
6 correct?

7 A. Once or twice back then, yes.

8 Q. Now, would you agree that generally for the City of Bellevue
9 roughly 80 percent of the calls you will go out on, Mr. Spivey,
10 are emergency medical services calls versus an active fire?

11 A. Yes.

12 Q. And if you are going to go out on an active fire or something that
13 has been coded by dispatch as potentially active fire, you will
14 respond to those in your personal protective equipment, correct?

15 A. Correct.

16 Q. That consists of a set of Nomex pants?

17 A. It consists of the Nomex pants and shirt issued by the Department.

18 Q. You also have your bunker jacket or your over jacket?

19 A. My bunker and coat, yes.

20 Q. Typically you are also required to wear your helmet?

21 A. Yes.

22 Q. You will also have your under hood on but not necessarily
23 deployed?

24 A. Correct.

25 Q. You will be carrying your SCBA equipment?

26 A. It will be on the rig for deployment.

1 snorkel, boots, booties, gloves.

2 Q. In other words, when you are training for any of your surface
3 water rescues, generally you don't train shirtless with your upper
4 body exposed?

5 A. Only in the indoor pool.

6 Q. And other than the indoor pool, when you are out exposed to the
7 sun or natural light, in those instance you are going to be fully
8 covered, correct?

9 A. Correct.

10 MR. BARNES: And that's all I have at this point. Thank you.

11

12

REDIRECT EXAMINATION

13

BY MR. MEYERS:

14

Q. Del, when you are coaching the kids or the teams that you coach,
15 do you take your shirt off?

16

A. No.

17

Q. Do you ever wear a coat?

18

A. In inclement weather, yes.

19

Q. When you are hunting deer and elk, do you do that with your shirt
20 off?

21

A. No.

22

Q. Do you have a shirt on?

23

A. Usually multiple layers.

24

Q. And do you have a coat on then?

25

A. Quite frequently.

26

Q. When you are hunting in Cle Elum and east Naches, are you wearing

1 JUDGE SWANSON: Counsel, might there be something that you could
2 use to help this witness refresh their recollection? I will
3 sustain the objection. I mean, actually a document or some
4 kind of object or something that might be help him refresh
5 his recollection?

6 MR. MEYERS: Well --

7 JUDGE SWANSON: You don't want to do that?

8 MR. MEYERS: Leave that question and come back.

9 Q. (By Mr. Meyers). You were asked whether you had freckles and you
10 said, yes, correct?

11 A. Yes.

12 Q. Do you have fair skin?

13 A. I wouldn't term it as fair skin.

14 Q. Do you have red hair?

15 A. No.

16 Q. Do you have blond hair?

17 A. No.

18 Q. Do you have blue eyes?

19 A. No.

20 Q. Do you have green eyes?

21 A. No.

22 Q. Do you have any family history of melanoma?

23 A. Not that I am way aware of.

24 Q. Prior to the date that you were diagnosed with malignant melanoma,
25 has anybody told you you had a history of actinic keratosis?

26 A. No.

1 Q. Have you ever sought treatment for a sunburn?

2 A. No.

3 Q. Now, you were asked whether you had ever used a tanning bed. Can
4 you tell us total of the time that you spent in a tanning bed, how
5 many minutes you were in the tanning bed?

6 A. 90ish.

7 Q. You said that there may be some southeast Native American in your
8 genetic mix. What kind of southeast Native American?

9 A. So the family story goes, it would be Seminole, very small part.

10 Q. To your knowledge, are the Seminoles blond or red haired?

11 A. Not to my knowledge.

12 Q. Do they have blue eyes or green eyes?

13 A. Not to my knowledge.

14 JUDGE SWANSON: Off the record.

15 (DISCUSSION OFF THE RECORD)

16 JUDGE SWANSON: Back on the record.

17 MR. MEYERS: Now, you were asked if you were exposed to chemicals
18 when you had your personal protective gear on. I want you to
19 tell us in overhaul when you have your SCBA off whether you
20 know whether you were exposed to any chemicals or any
21 carcinogens during that time during those follow ups to
22 active fire suppression?

23 MR. BARNES: Objection; calls for speculation, relevance.

24 JUDGE SWANSON: I will take -- I will sustain the question and
25 take the answer in colloquy. You may answer.

26 THE WITNESS: When allowed to take our SCBA off in overhaul is

**Appendix E:
Kenneth Coleman, M.D. Testimony
(Excerpts)**

1 BE IT REMEMBERED that the deposition upon oral
2 examination of KENNETH COLEMAN, M.D., was taken on
3 MONDAY, MARCH 10, 2014, at 8765 Tallon Lane Northeast,
4 Suite A, Olympia, Washington, before Dianne Wilson,
5 Certified Court Reporter, Registered Professional
6 Reporter.

7
8 (Start time: 10:30 a.m.)
9

10 KENNETH COLEMAN, M.D. having duly sworn or affirmed
11 to tell the truth, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. MEYERS:

14 Q Doctor, would you state your full name and professional
15 address?

16 A Kenneth H. Coleman, C-o-l-e-m-a-n, 421 West Riverside,
17 Suite 654, Spokane, Washington, 99201. My medical
18 practice address would be East Adams Rural Hospital in
19 Ritzville, Washington.

20 Q Dr. Coleman, would you tell us what your occupation is?

21 A I'm a physician and I'm an attorney.

22 Q And would you give us a brief summary of your educational
23 background, both medical and legal, Dr. Coleman?

24 A It was Loma Linda University for medical school, a
25 rotating internship at Hennepin County in Minneapolis.

1 And speaking only of education, then, I went to law
2 school at Gonzaga in 1987 to '92.

3 Q Would you give us a brief summary of your work background
4 coming out of medical school, including any residencies
5 or internships, Dr. Coleman?

6 A Following medical school, I did a rotating internship in
7 Minneapolis, then went into private practice, family
8 practice, took the board exam, grandfathered in to family
9 practice, and did emergency medicine and family practice
10 really ever since.

11 Q When you say "family practice," what is family practice?

12 A It covers a broad area. It covers taking care of
13 patients in a clinic setting, private -- in an office
14 setting, taking care of patients in the hospital, and
15 covering the emergency room as well and doing hospitalist
16 type work in terms of in-house patients.

17 Q And when you talk about emergency medicine, what is it
18 that you are talking about or what is it that you do in
19 emergency medicine, Dr. Coleman?

20 A Over the years I have been an emergency physician and
21 also been the director of emergency departments in
22 various locations, which means administrative as well as
23 working shifts in an emergency room.

24 Q In your practice since medical school, both in family
25 practice and emergency medicine, do you deal with

1 patients who have been diagnosed with cancer,

2 Dr. Coleman?

3 A Yes.

4 Q Have you previously testified as an expert medical
5 witness, Dr. Coleman?

6 A Yes.

7 Q And have you previously testified as an expert medical
8 witness in cancer cases?

9 A In relation to melanoma, yes.

10 Q And have you testified in cancer cases involving
11 professional firefighters?

12 A Yes.

13 I may have testified on cases that involved cancer
14 issues other than that as well. I just don't remember.

15 Q Understood.

16 What were you asked to do in this case, which is the
17 case of Del Spivey and his claim for malignant melanoma
18 against the City of Bellevue?

19 A I was asked to look at the -- to review the medical
20 literature in relation to the exposures of firefighters,
21 to read the deposition of Mr. Spivey, and to consider the
22 potential causes related to his melanoma.

23 Q And when you talk about review of the literature, are you
24 talking about medical literature, including peer-reviewed
25 journals and medical texts?

1 A I do.

2 Q (By Mr. Meyers) And, Dr. Coleman, in broadbrush strokes,
3 what's the significance of these types of articles in
4 considering whether or not in this case in particular Del
5 Spivey's malignant melanoma was caused at least in part
6 by his occupation as a professional firefighter for the
7 City of Bellevue Fire Department?

8 MR. BARNES: Objection; foundation, beyond the
9 scope of the witness. The expertise of the witness.
10 Excuse me.

11 A In general, this medical literature that we have
12 referenced, both those you asked me about as well as
13 other articles previously reviewed, are supportive that
14 the exposure experienced by firefighters is a cause of
15 the malignant melanoma.

16 Q (By Mr. Meyers) And in this case in particular, do you
17 have an opinion based on reasonable medical probability
18 as to whether the malignant melanoma diagnosed for Del
19 Spivey was caused in part by his exposures as a City of
20 Bellevue firefighter?

21 MR. BARNES: Objection; foundation.

22 A I have an opinion on that. It needs to be qualified in
23 that one can never determine the precise cause of a
24 malignant melanoma. It's beyond our ability because --
25 But there are risk factors that make it more likely that

1 a person will develop melanoma. And again, the chemical
2 exposures experienced by firemen, and in particular
3 Mr. Spivey, mean that the -- based on this literature --
4 that a cause of malignant melanoma in firefighters must
5 be considered to be the exposure to the carcinogen in the
6 workplace.

7 Q (By Mr. Meyers) And, Dr. Coleman, you raise I think an
8 important issue for the trier of fact. So I want you to
9 understand that in my asking you questions today I'm not
10 asking you for your opinion based on scientific
11 certainty, that 99.9 percent point of certainty, and I'm
12 not asking you to testify on the basis of beyond a
13 reasonable doubt like in a criminal case, for example.
14 I'm only asking you to give your opinions based on a
15 more-likely-than-not basis; for example, the opinion
16 questions that I have asked you in your professional
17 opinion based on reasonable probability, medical
18 probability, on a more-likely-than-not basis. And you
19 understand that distinction?

20 A Yes.

21 Q And so so far have your responses to my questions been on
22 a more-likely-than-not basis, that civil standard?

23 A Yes.

24 Q Because you are having a little trouble with your voice
25 today, Dr. Coleman, I'm going to call to your attention

1 occupation as firefighters?

2 MR. BARNES: Objection; foundation.

3 A The articles, the peer-reviewed articles, are reliable
4 and do establish that there is an association between
5 firefighters' exposure and malignant melanoma.

6 Q (By Mr. Meyers) Dr. Coleman, I want you to assume for
7 purposes of establishing additional facts in a
8 hypothetical that three other City of Bellevue
9 firefighters who worked with Del Spivey have also been
10 diagnosed with skin cancer. Two of those firefighters
11 have been diagnosed with malignant melanoma. One of them
12 has been diagnosed with squamous cell cancer.

13 Do the facts that I just provided to you in this
14 hypothetical have any bearing or significance with
15 respect to supporting or negating your opinion on
16 causation?

17 MR. BARNES: Objection; foundation, relevance,
18 incomplete hypothetical, beyond the scope of this
19 witness.

20 A The clustering, if you will, of cases makes it -- lends
21 support to the opinions I've expressed in terms of
22 exposure to the known carcinogens in the firefighting
23 environment.

24 Q (By Mr. Meyers) And further I want you to accept as true
25 for purposes of this hypothetical these four firefighters

1 worked some of the same shifts, responded to some of the
2 same fires, responded to some of the same exposures.
3 Would that have additional influence in formulating your
4 opinion on causation regarding malignant melanoma and
5 occupation as a professional firefighter for the City of
6 Bellevue Fire Department for Del Spivey?

7 MR. BARNES: Objection; foundation, incomplete
8 hypothetical, beyond the scope of this witness.

9 A Well, frankly, the literature is what it is in relation
10 to any individual firefighter. When you have more than
11 one firefighter in the same environment with the same
12 diagnosis of malignant melanoma, then it certainly does
13 not -- then it certainly supports, as opposed to
14 negating, any potential cause for the malignant melanoma.

15 Q (By Mr. Meyers) Do those facts that I have asked you to
16 assume in the hypotheticals regarding the other City of
17 Bellevue firefighters have any tendency to make the
18 existence of this causation more probable than it would
19 be without that additional evidence?

20 MR. BARNES: Objection; foundation, relevance,
21 incomplete hypothetical, lack of personal knowledge,
22 beyond the scope of the witness.

23 A The existence of other malignant melanoma in persons
24 exposed to the same environment would be an additional
25 supportive factor in tending to make the causation -- as

1 a causation here more -- It would tend to be supportive
2 of the -- what I've already said the literature says in
3 terms of the firefighting exposure being a cause of -- or
4 associated as a factor in the causation of malignant
5 melanoma.

6 MR. MEYERS: Dr. Coleman, I don't have anything
7 further at this time. I may have additional questions
8 after cross-examination. Thank you.

9 MR. BARNES: Good morning, Dr. Coleman. Again,
10 my name is Chad Barnes. I represent the City of Bellevue
11 in this case.

12 If you can't hear me, ask me to keep my voice up.
13 I'm going to practice asking questions from this
14 distance.

15 CROSS-EXAMINATION

16 BY MR. BARNES:

17 Q I understand that you have your own legal practice. Is
18 that correct, Doctor?

19 A That's correct.

20 Q Okay. And predominantly you handle medical malpractice
21 cases in your legal practice?

22 A That is correct.

23 Q And that legal practice is in Spokane, correct?

24 A Correct.

25 Q In addition to that legal practice, you also keep up with

1 Q Have you spoken with Del Spivey in the course of this
2 case, Doctor?

3 A No.

4 Q Have you examined Del Spivey in this case?

5 A No.

6 Q Have you reviewed Del Spivey's medical records in the
7 course of this case?

8 A I don't think I've seen any of his medical records.

9 Q I'm going to hand you -- I guess this would be Exhibit 1.

10 MR. BARNES: You haven't made anything an
11 exhibit, correct, Mr. Myers?

12 MR. MEYERS: That's true.

13 Q (By Mr. Barnes) I'm going to hand you what will be
14 marked then as Exhibit No. 1, a copy for yourself,
15 Dr. Coleman.

16 MR. MEYERS: Dr. Coleman, if you would give
17 that to the court reporter, she will mark that as
18 Exhibit 1 for opposing counsel.

19 (Exhibit No. 1 marked for identification.)

20 Q (By Mr. Barnes) Dr. Coleman, I'll represent to you,
21 since it sounds like you haven't reviewed this before,
22 this is a Virginia Mason Medical Center record.
23 Specifically I'm going to focus on the very bottom of
24 Exhibit No. 1, the first and second pages, the surgical
25 pathology report.

1 BY MR. MEYERS:

2 Q Dr. Coleman, is it possible to use a tanning bed and not
3 get malignant melanoma?

4 A Of course.

5 Q And, Doctor, just so there's no mistake in the trier of
6 fact's mind, you weren't asked to treat Del Spivey, were
7 you?

8 A No.

9 Q You weren't even asked to diagnose Del Spivey; that
10 diagnosis was already made, correct?

11 A That's correct.

12 Q You weren't asked to perform a physical examination on a
13 malignancy that had already been removed, were you?

14 A No.

15 Q What was it that you were asked to do by me?

16 A I was asked to look at the deposition of Mr. Spivey and
17 to consider whether the literature in relation to
18 firefighters related to his development of malignant
19 melanoma as a cause.

20 Q And is that what you did in this case?

21 A Correct.

22 Q And has anything that opposing counsel asked you about
23 changed your opinion that the City of Bellevue's
24 firefighter exposures to Delmis Spivey were a cause of
25 his melanoma?

Appendix F:
Janie Leonhardt, M.D. Testimony
(Excerpts)

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BELLEVUE, WASHINGTON; MARCH 28, 2014

3:04 P.M.

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JANIE LEONHARDT, M.D.,

sworn as a witness by the Notary Public,

testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q. Good afternoon, Doctor. My name is Chad Barnes. I represent the City of Bellevue in a worker's compensation matter brought by Delmis Spivey, related to his diagnosis of malignant melanoma. We're here today for your perpetuation deposition. In other words, this deposition will be used in any subsequent hearing or trial of the matter. Do you understand that, Doctor?

A. I do.

Q. Could you just state and spell your name for the record, Doctor.

A. Janie, J-A-N-I-E, Leonhardt, L-E-O-N-H-A-R-D-T.

Q. And who do you work for Dr. Leonhardt?

A. Virginia Mason Medical Center.



1 (a) (6); State versus Ziegler, 114 Wn.2nd 553 (1990),
2 which notes, Physician records made in the regular
3 course of business properly identified constitutes
4 competent evidence and the condition reported therein.

5 MR. MEYERS: Objection. Foundation,
6 relevance, and hearsay. Most of the document itself is
7 not relevant to the issue. The only issue, in this
8 case, is the causation of malignant melanoma.
9 Counsel's recitation is all fine and good, but it is
10 not on point.

11 Q. (BY MR. BARNES) Now that we've got ours out
12 of the way, Doctor. Did you see Del Spivey back on
13 January 3rd, 2011?

14 A. Yes.

15 Q. Now, what was the purpose of the visit that
16 time?

17 A. He reported his chief complaint to be a spot
18 on his left chest.

19 Q. Do you recall, was this before Mr. Spivey's
20 diagnosis with melanoma on his back?

21 A. I believe so, yes.

22 MR. MEYERS: Objection; relevance.
23 Objection; speculation.

24 Q. (BY MR. BARNES) And, Doctor, as part of your
25 regular exam, is a patient asked regarding their use of



1 sun protection?

2 A. Yes.

3 Q. Okay. And on this instance, was Mr. Spivey
4 asked about his use of sun protection?

5 A. He was.

6 Q. And what did he indicate --

7 MR. MEYERS: Objection. Relevance.

8 Q. (BY MR. BARNES) -- regarding his use of sun
9 protection?

10 MR. MEYERS: Move to strike.

11 A. It is documented here, he does not use sun
12 protection daily.

13 MR. MEYERS: Objection. Relevance.

14 Causation is not an issue. Move to strike.

15 Fault is not an issue. Excuse me, I misspoke.

16 Q. (BY MR. BARNES) As part of the visit back on
17 January 3rd, 2011, did you perform a physical exam on
18 Mr. Spivey?

19 A. Yes.

20 Q. And what's involved when you perform a
21 physical exam, dermatological physical exam, Doctor?

22 A. I examine the skin.

23 Q. And what are you looking for?

24 A. Skin findings.

25 Q. It is noted under the physical exam, that your



1 findings regarded to lentigos -- did I pronounce that
2 correctly, Doctor?

3 A. Yes.

4 Q. First, what is a lentigo?

5 A. It is a spot where there is increased pigment
6 production.

7 Q. What is the recognized cause for the
8 development of a lentigo?

9 MR. MEYERS: Objection. Relevance.

10 A. Chronic sun exposure. Ultraviolet radiation
11 exposure.

12 Q. (BY MR. BARNES) Is there a more common, or
13 layman's term, for lentigo, Doctor?

14 A. Sun freckle.

15 Q. You also noted during the exam -- well, first,
16 where did you note on Mr. Spivey that there were
17 lentigos located?

18 A. Head, neck, trunk, and upper extremities.

19 Q. And did you make any notation as to the amount
20 of lentigos that you found, Doctor?

21 A. Yes.

22 Q. What was that?

23 A. Many.

24 MR. MEYERS: Objection. Foundation.
25 Vague. Move to strike.



1 Q. (BY MR. BARNES) As part of the physical exam,
2 did you make any notations regarding any moles or nevi
3 on Mr. Spivey?

4 A. Yes.

5 Q. And what was -- what were your findings there?

6 A. Scattered nevi in fairly uniform size, color,
7 and shape.

8 (Reporter interruption for clarification.)

9 THE WITNESS: In fairly uniform size,
10 color, and shape.

11 Q. (BY MR. BARNES) Doctor, are lentigos thought
12 to be an indication of cumulative sun exposure over the
13 course of a person's life?

14 A. Yes.

15 MR. MEYERS: Objection. Improper
16 foundation. Improper question to the medical
17 professional. Move to strike.

18 (Reporter interruption for clarification.)

19 MR. MEYERS: Improper question to the
20 medical expert or doctor. Foundation.

21 Q. (BY MR. BARNES) I'll rephrase the question.

22 Doctor, in the course of your training as a
23 dermatologist, do you have an understanding as to what
24 the common cause of a lentigo is?

25 MR. MEYERS: Objection. Foundation.



1 A. Ultraviolet radiation.

2 Q. (BY MR. BARNES) Doctor, I'm going to hand you
3 what will be marked as Exhibit 3.

4 (Deposition Exhibit 3 was marked
5 for identification.)

6 Q. (BY MR. BARNES) Doctor, do you recognize
7 Exhibit Number 3?

8 A. Yes.

9 Q. What is it?

10 A. A dictated note by me for Delmis Spivey; his
11 visit date December 22, 2011.

12 Q. And is that dictated note something you do in
13 the regular course of your practice?

14 A. Yes.

15 MR. BARNES: We'll move to admit Exhibit
16 Number 3.

17 MR. MEYERS: Objection. Foundation.
18 Relevance. Hearsay. Double hearsay. Object to
19 admission.

20 Q. (BY MR. BARNES) Doctor, did you exam Del
21 Spivey back on December 22nd, 2011?

22 A. Yes.

23 Q. Okay. And what was the purpose of the visit
24 at that point?

25 A. To examine many spots over the body.



1 Q. Again, was Mr. Spivey asked about his use of
2 sunscreen at that visit?

3 A. Yes.

4 Q. And what did he indicate?

5 A. It is dictated here, he does not use sun
6 protection daily.

7 MR. MEYERS: Objection. Relevance.
8 Foundation. Move to strike.

9 Q. (BY MR. BARNES) It is noted here on the
10 record, that Mr. Spivey related to you that he is a
11 fireman; is that right?

12 A. Yes.

13 Q. Okay. Have you ever discussed with Mr. Spivey
14 what he does as a firefighter in the ordinary course of
15 his day?

16 A. Not that I recall.

17 Q. Have you ever discussed with Mr. Spivey any
18 exposures that he may have had to the smoke, for
19 example?

20 A. Not that I recall.

21 Q. Have you ever discussed with Mr. Spivey any
22 exposures that he may have had to potentially toxic
23 chemical?

24 A. Not that I recall.

25 Q. Have you ever discussed with Mr. Spivey any



1 exposures he may have had to, say, diesel fumes?

2 A. Not that I recall.

3 Q. I understand back on December 22nd, you,
4 again, performed a physical exam of Mr. Spivey on that
5 day?

6 A. Yes.

7 Q. Okay. And was there any abnormal findings
8 during that physical exam?

9 A. Yes.

10 Q. And what was that?

11 A. On the upper central back a four-by-six
12 millimeter irregularly-shaped, dark-brown macule.

13 Q. Was that macule that you found on the upper
14 back, was that below the level of Mr. Spivey's collar?

15 A. I believe so.

16 MR. MEYERS: Objection. Speculation.
17 Move to strike.

18 Q. (BY MR. BARNES) Is a macule -- can a macule
19 also be described as a lentigo, Doctor?

20 A. No.

21 MR. MEYERS: Objection. Leading.

22 Q. (BY MR. BARNES) What are the differences, if
23 any?

24 A. A macule is a description for a flat spot.

25 Q. Okay. Can you have a flat lentigo, then?



1 A. Yes.

2 Q. And the reason I ask is, we go on to the
3 assessment and plan section of the record, Doctor,
4 talks about an atypical lentigo on the central back.
5 Is that a macule on the upper central back that you
6 just discussed earlier?

7 A. Yes.

8 Q. Okay. So when we see both the term a brown
9 macule and an atypical lentigo or lentigo discussed,
10 those are the same things, Doctor, just describing
11 different portions?

12 A. One is a description for physical examination.
13 One is an assessment.

14 Q. And what was your assessment of the
15 irregularity found on Mr. Spivey's upper central back?

16 A. Atypical lentigo.

17 Q. When you observed that atypical lentigo on
18 Mr. Spivey's upper back, was that suggestive of UV
19 sun-damaged skin?

20 MR. MEYERS: Objection. Leading.

21 A. I don't really understand the question.

22 Q. (BY MR. BARNES) Sure. When you saw the
23 atypical lentigo on Mr. Spivey's upper central back,
24 were there any other findings related to that lentigo
25 that you made?



1 be melanoma.

2 Q. (BY MR. BARNES) Let me approach the question
3 slightly differently, Doctor. Did you make any
4 findings regarding this -- strike that.

5 Did you later make any findings regarding the
6 atypical lentigo that you diagnosed on January 22nd --
7 or excuse me, December 22nd, 2011?

8 MR. MEYERS: Objection. Form.

9 A. The irregularly-shaped, dark-brown macule
10 found to be a melanoma, not an atypical lentigo.

11 (Reporter interruption for clarification.)

12 THE WITNESS: Was not an atypical
13 lentigo.

14 Q. (BY MR. BARNES) I'll hand you what I'll have
15 marked as Exhibit Number 4, Doctor.

16 (Deposition Exhibit 4 was marked
17 for identification.)

18 Q. (BY MR. BARNES) Do you recognize Exhibit
19 Number 4, Doctor?

20 A. Yes, I do.

21 Q. And what is it?

22 A. It is the pathology documentation from a
23 biopsy of the left upper back.

24 Q. And is this pathology that you ordered,
25 Doctor?



1 A. Yes.

2 Q. And is it a pathology report that you would
3 request in the ordinary course of your practice?

4 A. Yes.

5 Q. And would this pathology report make its way
6 into Mr. Spivey's medical records in the ordinary
7 course of business for Virginia Mason?

8 MR. MEYERS: Objection. Foundation.
9 Speculation.

10 A. I don't understand the question.

11 Q. (BY MR. BARNES) Would the pathology report,
12 that's been marked as Exhibit Number 4, would that be
13 maintained as part of Delmis Spivey's medical records
14 at Virginia Mason?

15 A. Yes.

16 MR. BARNES: Move to admit Exhibit
17 Number 4.

18 MR. MEYERS: Objection, based on
19 foundation, relevance, hearsay and double hearsay. And
20 it is opinion testimony of a nontestifying medical
21 profession.

22 Q. (BY MR. BARNES) Explain to me, Doctor, how
23 you would go about biopsying an atypical lentigo that
24 you first encountered back on December 22, 2011.

25 A. What is atypical would be removed and



1 MR. MEYERS: Objection. Foundation --

2 A. There are two --

3 MR. MEYERS: -- medical testimony of a
4 nontestifying doctor.

5 A. Do you mean --

6 MR. MEYERS: Move to strike.

7 Q. (BY MR. BARNES) Sure. That's a good point,
8 Doctor. I was actually referring to the pathology that
9 was taken for the biopsy that was done on December 22,
10 2011. It appears at the bottom of Exhibit Number 4 and
11 on the second page of Exhibit Number 4.

12 A. I quote the microscopic description section:
13 Demonstrate a shave biopsy of the sun-damaged skin with
14 an atypical proliferation of melanocytes at the
15 dermal-epidermal junction.

16 MR. MEYERS: Objection. Medical
17 testimony. Double hearsay. It is the opinion of a
18 nontestifying expert. Move to strike.

19 Q. (BY MR. BARNES) The characterization of a
20 biopsy as -- of sun-damaged skin, is that consistent
21 with your observations when you took the biopsy,
22 Doctor?

23 MR. MEYERS: Objection. Foundation.
24 Speculation.

25 A. The -- in my physical exam there were many



1 lentigines over the head, neck, trunk, and extremities.

2 Q. (BY MR. BARNES) Including the lentigine [sic]
3 that you biopsied that was discussed here in the
4 pathology report, Doctor?

5 A. Including the area of biopsy.

6 Q. I'm going to hand you what will be marked
7 Exhibit Number 5, Doctor.

8 (Deposition Exhibit 5 was marked
9 for identification.)

10 Q. (BY MR. BARNES) Do you recognize Exhibit
11 Number 5, Doctor?

12 A. Yes, I do.

13 Q. What is it?

14 A. It is a dictation I dictated from patient
15 visit Delmis Spivey, visit date 9/21/2012.

16 Q. And was this dictation made in the regular
17 course of your practice?

18 A. Yes.

19 MR. BARNES: Move to admit Exhibit
20 Number 5.

21 MR. MEYERS: Objection, based on
22 foundation, relevance, hearsay, double hearsay.

23 Thank you.

24 Q. (BY MR. BARNES) When you saw Mr. Spivey back
25 on September 21st, 2012, this would have been after his



1 matters. Again, I want you to express those opinions
2 on a more-probable-than-not basis, Doctor. Do you
3 understand what I'm asking you there?

4 A. I believe so.

5 Q. Do you have an opinion whether Mr. Spivey's
6 potentially being exposed to smoke as a firefighter was
7 the cause of his melanoma, Doctor?

8 MR. MEYERS: Objection. Foundation.

9 A. I do not.

10 Q. (BY MR. BARNES) Are you aware of any
11 scientific evidence that would suggest the inhalation
12 of smoke can lead to the development of cutaneous
13 melanoma, Doctor?

14 A. I am not.

15 Q. Okay. Are you aware of any scientific or
16 medical evidence that would suggest the exposure to
17 toxic substances may develop into cutaneous melanoma?

18 A. It is not listed on the risk factors for
19 development of primary cutaneous melanoma.

20 Q. Are you aware of any scientific literature or
21 medical evidence that would suggest the presence of
22 soot, ash, or the other residuals of fire on a person's
23 skin may lead to the development of cutaneous melanoma?

24 A. It is not listed in the risk factors for the
25 development of primary cutaneous melanoma.



1 literature.

2 A. What I can say is that medical literature
3 supports the relationship between ultraviolet radiation
4 exposure and the development of melanoma.

5 Q. (BY MR. BARNES) Why did you include that last
6 sentence in your February 11th, 2013, letter, Doctor?

7 A. I can't remember.

8 MR. MEYERS: Foundation. Move to
9 strike.

10 Q. (BY MR. BARNES) Doctor, on a
11 more-probable-than-not basis, did Del Spivey's
12 occupation as firefighter have any role in his
13 development of melanoma?

14 MR. MEYERS: Objection. Foundation.

15 A. I don't feel I know enough about Mr. Spivey's
16 job or occupation to answer that question.

17 MR. BARNES: Okay. Thank you, Doctor.
18 That's all I have.

19 CROSS EXAMINATION

20 BY MR. MEYERS:

21 Q. Doctor, thank you for your patience so far.
22 I'd like you to take a look at Exhibit Number 3, which
23 was one of the two chart notes that you created before
24 the malignant melanoma was surgically treated. The
25 chart note of 12/22/2011. Do you have that?



**Appendix G:
Noel Weiss, M.D. Testimony
(Excerpts)**

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[BRIEFLY OFF THE RECORD]

JUDGE SWANSON: And, Mr. Barnes, you may call your first witness.

MR. BARNES: Thank you.

City of Bellevue would call Dr. Noel Weiss.

JUDGE SWANSON: Dr. Weiss, I'm going to swear you in. If you would raise your right arm.

[WITNESS SWORN]

JUDGE SWANSON: Okay. Go ahead.

NOEL WEISS, MD, being first duly sworn on oath,
testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q. Could I get you to introduce yourself to everyone, Dr. Weiss?

A. I'm Noel Weiss. I'm a professor of the Department of Epidemiology, School of Public Health at the University of Washington and also with an appointment at the Fred Hutchinson Cancer Research Center.

Q. What's your professional address, Dr. Weiss?

A. University of Washington, Box 357236, Seattle 98195.

Q. How long have you been affiliated with the University of Washington?

A. Forty-one years.

Q. When you first started with the University of Washington, what

1 was your role?

2 A. I was an assistant professor and at the same time an assistant
3 member at the Hutchinson Center where my research was located.

4 Q. Are there any particular areas of research that you specialize
5 in, Doctor?

6 A. Broadly speaking, my work gives a lot of emphasis to cancer
7 epidemiology and also an area called clinical epidemiology, the
8 study of the outcome of disease.

9 Q. Could you explain in laymen's term what is epidemiology?

10 A. Epidemiology is the study of the causes of disease in
11 populations. It seeks to document the occurrence of illness
12 and injury and then to try to draw from those observations --
13 makes inferences as to what the causes are.

14 Q. And does epidemiology deal with any population as a whole, or
15 does it look at it at a specific individual?

16 A. We, we -- We're trying to make statements about the population,
17 but in order to do that, we often makes observations on
18 individuals. So for example, studies looked at whether
19 cigarette smoking might be related to lung cancer, they
20 documented the incidents of lung cancer in cigarette smokers
21 one at a time and nonsmokers and made that comparison.

22 Q. Can you give me just a brief rundown what your education
23 background is, Dr. Weiss?

24 A. I have medical degree from Sanford University in 1967 and then
25 a master's degree and doctoral degree in epidemiology and
26 biostatistics from Harvard School of Public Health, 1969, 1971.

1 that body of literature on firefighters and the development of
2 certain cancers?

3 A. Well, there I'm not quite sure what your question is.

4 For an individual cancer, you know, there could be up to
5 several dozen studies. In some instances across the studies
6 there's a close -- there's a fair degree of consistency in the
7 findings. Others there's some wobble and some variability. It
8 depends on the cancer.

9 Q. Let me ask you it ask this way just to make sure we're on the
10 same page then, Doctor. Based upon your review of studies
11 dating back two decades to the present time, do you have an
12 expert medical opinion on a more-probable-than-not basis as
13 whether the results of any of those studies indicate that a
14 firefighter is at an increased risk of developing certain types
15 of cancer?

16 MR. MEYERS: Objection, foundation, speculation.

17 JUDGE SWANSON: Overruled.

18 A. At the present time I believe that it would not be correct to
19 infer that firefighting has the ability to increase the risk of
20 any form of malignancy.

21 Q. (BY MR. BARNES) Why do you hold that opinion, Doctor?

22 A. It's because I have examined the data from these several dozen
23 studies and feel that even though there are some suggestions of
24 associations, that for a variety of reasons, mostly they lack
25 consistency in the lack of strength of associations, that the
26 data falls short of what's needed for me to make an inference

1 of cause and effect.

2 Q. Based on your review of the studies over at least the 20 years,
3 do you have expert medical opinion on a more-probable-than-not
4 basis as to whether the results of those studies indicate that
5 a firefighter would be at an increased risk for the development
6 of melanoma?

7 MR. MEYERS: Objection, foundation, speculation.

8 JUDGE SWANSON: Overruled.

9 A. Well, since I just said that, you know, I didn't feel there was
10 any form of cancer for which it would be reasonable to make an
11 inference of cause and effect, melanoma would be in the group
12 of cancers that, specifically, they, for melanoma, fall short
13 of being adequate to make an inference of cause and effect with
14 respect to firefighting as a risk factor.

15 Q. (BY MR. BARNES) Have you looked at specific studies that have
16 tried to draw a causal link between melanoma and firefighting?

17 A. Well, again, there's a couple of dozen studies that are looking
18 to see if there's an association, and those are the studies --
19 not all several dozen have produced data on melanoma, but those
20 that have, that's what I'm basing my opinion on.

21 Q. The studies that you've reviewed related to firefighters and
22 the development of certain types of cancer, do those studies
23 control for a firefighter's family history of cancer?

24 A. No. None of the studies --

25 MR. MEYERS: Excuse me. Objection, foundation, speculation.

26 JUDGE SWANSON: Overruled.

1 well, when you're using a hypothetical question -- I guess
2 based on the testimony we heard, I'm not sure if those
3 questions would be helpful to the trier of fact when
4 they're directed specifically at Mr. Spivey, especially in
5 terms of the foundation that's been laid.

6 If you want to put it in colloquy, we can.

7 MR. BARNES: I'll take it from another tact, Your Honor. I
8 don't think we need to put in colloquy.

9 JUDGE SWANSON: Okay.

10 Q. (BY MR. BARNES) Doctor, do you have any opinion whether a
11 firefighter can develop melanoma due to an occupational
12 exposure?

13 A. Well, it's my opinion, as I've indicated, that an occupational
14 exposure sustained during firefighting -- you know we don't
15 know, we don't know if that does or does not increase the risk
16 of melanoma right. Now it's only a possibility.

17 Q. Okay. So on a more-probable-than-not basis you can't -- can
18 you say on a more-probable-than-not basis whether any of the
19 exposure that a firefighter may or may not encounter in the
20 course of firefighting would lead to the development of
21 malignant melanoma?

22 A. No.

23 MR. BARNES: That's all I have.

24 ///////////////

25 RE-CROSS-EXAMINATION

26 BY MR. MEYERS:

1 Q. Can you say on a more-probable-than-not basis that the exposure
2 to smoke fumes and toxic substances and other career exposures
3 in Del Spivey's career with the City of Bellevue and his prior
4 career as a firefighter are not a cause of his malignant
5 melanoma?

6 MR. BARNES: Objection, foundation, assumes facts not in
7 evidence, especially given Mr. Spivey's testimony
8 yesterday that he couldn't recall any time when he
9 suffered an exposure.

10 JUDGE SWANSON: I guess, I guess in this case I'm going to
11 overrule and let the witness answer.

12 A. Even if I were assume for the moment that there truly was a
13 causal association between the exposure sustained as a
14 firefighter and the development of malignant melanoma, I would
15 still believe that it's more likely than not Mr. Spivey's
16 illness was not related to his firefighting.

17 Q. (BY MR. MEYERS) Do you know how much sun exposure Del Spivey
18 received in his 20 plus years doing the occupation of
19 firefighter?

20 MR. BARNES: Objection, relevance, at this point we're at
21 Dennis v. Labor & Industries. The inquiry is into the
22 specific aspects of Del Spivey's occupation, not the
23 occupation as a whole.

24 And beyond that the Dennis case also discusses that
25 in proving the causation and the natural prong of that
26 argument that exposures incidental to the job is not

**Appendix H:
Andy Chien, M.D. Testimony
(Excerpts)**

1 Q. Doctor, could you introduce yourself to everybody in the room
2 today?

3 A. My name is Andy Chien. That's C-h-i-e-n.

4 Q. What kind of doctor are you, Doctor?

5 A. I'm a dermatologist.

6 Q. And where are you working at, Dr. Chien?

7 A. I currently work at three sites. I have a clinical practice at
8 Group Health Cooperative in Bellevue. I work up at the Hall
9 Health Medical Clinic on University of Washington's main
10 campus. And I also have a research group down at South Lake
11 Union's Research Campus for the University of Washington at 850
12 Republican Street.

13 Q. Let's take those in turn. What do you do at Group Health,
14 Doctor?

15 A. I see patients at Group Health for dermatologic diseases.

16 Q. What would you do at Hall Health? What would be your position
17 there?

18 A. I also see patients for skin disease at Hall Health as a
19 consultant working with primary care providers to see difficult
20 dermatologic cases that they refer.

21 Q. Would you both -- diagnose a disease in those two different
22 clinical capacities?

23 A. Yes.

24 Q. Do you also have occasion to treat dermatological diseases?

25 A. Yes, I do.

26 Q. Would that include the diagnosis and/or treatment of melanoma?

1 A. Yes.

2 Q. Let's talk about a little bit about your research work. What
3 type of research are you engaged in, Doctor?

4 A. I have two research affiliations. I'm with the Group Health
5 Research Institute, which is a group that looks more at
6 population-based studies in health care.

7 And then I also run a basic science research lab at the
8 University of Washington, which is my primary research focus to
9 date. And there we study melanoma in the laboratories using
10 cell-based mechanisms, animal models, and a variety of
11 molecular, biological, and pharmacological techniques to try
12 and either find new therapies for melanoma or to enhance
13 existing therapies in melanoma cells.

14 Q. Doctor, just for your reference, those are the two individuals
15 that need to you hear the most.

16 A. So should I look this way?

17 Q. Yeah, if you could keep --

18 JUDGE SWANSON: Actually, the court reporter is the best, so we
19 can get a good record.

20 Q. (BY MR. BARNES) How long have you been involved in melanoma
21 research, Doctor?

22 A. Since 2004.

23 Q. Was there a time in your career that you were doing more
24 melanoma research versus clinical practice or vice versa?

25 A. Up until 2000 -- mid-2013 I was 90 percent in the laboratory
26 doing melanoma research. And now my research is about

1 Q. (BY MR. BARNES) What about the presence of freckles on
2 somebody; does that play any role in being a risk factor for
3 the development of melanoma?

4 A. I think when you look at studies statistically, it's listed as
5 a risk factor, and it probably represents a surrogate indicator
6 of how much sun exposure a person has had.

7 Q. Does the number of -- I understand the terms -- dysplastic nevi
8 or moles, does that have any predictive qualifications for
9 somebody's development of melanoma?

10 A. So dysplastic moles or atypical moles -- If you look at studies
11 the risk of melanoma goes up linearly with the number of moles
12 that you have, particularly if the moles are dysplastic,
13 meaning that they look either atypical on a clinical exam or
14 atypical under a microscope when you look at them after a
15 biopsy.

16 Q. In the course of your study and research have you had the
17 opportunity to learn about the processes by which melanoma
18 develops in an individual?

19 A. Yes.

20 Q. How does that work?

21 A. There are certain, there are certain genes that are very
22 important for melanoma. And when you look at -- More recently
23 people have been able to perform comprehensive DNA sequencing
24 of melanoma genomes. Meaning that they take a person's
25 melanoma, and they sequence every single piece of DNA in that
26 cancer. And then they compare it to a normal cell from that

1 patient that's not skin cells, for example, a circulating blood
2 cell.

3 Then they look at the differences between what you see in
4 the melanoma cell and the circulating blood cell, and then you
5 come up with what we call mutation rate because you would
6 assume that the differences that arise in the melanoma occurred
7 as a result of some sort of external stimulus.

8 And within the past three years they've been able to look
9 at these mutations, and there's a certain type of mutation that
10 constitutes what's called an ultraviolet signature. And when
11 they look at melanomas from -- they've sequenced over 100
12 patients. They found that melanomas harbor somewhere around
13 30,000 mutations, and of these, 85 percent on average exhibit
14 this ultraviolet light signature. So this provides strong
15 molecular evidence that ultraviolet light plays a large role in
16 causing mutations in melanoma.

17 Q. So is that sequencing of the genome suggesting that UV exposure
18 has led to mutations within the genes?

19 MR. MEYERS: Objection, leading.

20 JUDGE SWANSON: I'm going to overrule.

21 A. When you look at it, since you don't see this in the cells that
22 are circulating inside a person's body that haven't been
23 exposed to ultraviolet and you see the characteristic
24 nucleotide sequence, and it would appear that those mutations
25 are caused by ultraviolet light.

26 Q. When you say ultraviolet light, Doctor, what are the different

1 potential sources for ultraviolet light that a person may
2 commonly come into contact with?

3 A. The most common would be sunlight, and then other types of
4 artificial ultraviolet light, which in this society is
5 primarily tanning beds. There's medical tanning lights too,
6 but those are not utilized by the general population on a
7 regular basis.

8 Q. So you mentioned it appeared -- roughly 85 percent of the
9 mutations were attributable to UV exposure. What about the
10 other 15 percent?

11 A. We're not sure about the other 15 percent.

12 Q. What areas of the body does melanoma affect, Doctor?

13 A. Melanoma affects pretty much all the externally exposed surface
14 area of the skin, including areas that are not sun exposed,
15 such as around the anus. It can also involve the eye, both
16 inside the eye and the eyeball itself.

17 Q. So can melanoma develop on sites other than the skin?

18 A. Other than the skin and the eye, no, not to my knowledge.

19 Q. What about internally; can a melanoma ever develop internally?

20 A. You know up until the last couple of years it's been well known
21 that about 2 to 3 percent of patients presenting with
22 metastatic melanoma had no outside melanoma that they could
23 find on the skin. These are termed melanomas of unknown
24 primary, or MUP.

25 But subsequently, now that we can sequence melanomas,
26 they've looked at these melanomas at the genetic level and

1 JUDGE SWANSON: Overruled.

2 A. I think that there is clear evidence linking tanning bed usage
3 to melanoma.

4 And I'm not sure what the other part of the question is
5 but...

6 Q. (BY MR. BARNES) Let me ask you this then, Doctor. Are you
7 aware of any research on use of tanning beds and the
8 development of melanoma?

9 A. Yes.

10 Q. What do you recall about that research?

11 A. There's numerous studies that have come out showing that
12 tanning bed usage is correlated with increased risk for
13 melanoma, and there's even studies that show that even one time
14 use of a tanning bed increases your risk for melanoma within a
15 population.

16 Q. So is there any -- is there any level of tanning bed usage that
17 would then be safe as far as it would not be a predictive risk
18 factor for the development of melanoma?

19 A. I think the only person where it might be not a significant
20 risk would be someone who is black or someone who had very dark
21 skin, but for an individual who is white, I think any level of
22 tanning bed usage is associated with a risk, an increased risk
23 for melanoma.

24 Q. Doctor, I'm going to ask you some questions for your opinions,
25 and I want to make sure you express those opinions on a
26 more-probable-than-not basis. Would you agree to do that,

1 Doctor?

2 A. Yes.

3 Q. Is there any medical research to indicate that the inhalation
4 of a substance can lead to the development of malignant
5 melanoma?

6 A. Not to my knowledge.

7 Q. Is there any medical research to indicate that the inhalation
8 of, say, a polycyclic aromatic hydrocarbon can lead to the
9 development of melanoma?

10 A. Not to my knowledge.

11 Q. Is there any evidence that the inhalation of just smoke in
12 general can lead to the development of melanoma?

13 A. Not in the research I -- not in the research I did. There's --
14 it's not that it hasn't been looked at, but there hasn't been
15 an association that was found.

16 Q. What do you mean when you say, "It's not that it hasn't been
17 looked at," Doctor?

18 A. I'd say people have looked to see -- People have been looking
19 at occupational risks for melanoma. And they've looked at
20 various types of chemical exposures, including compounds you
21 usually find as products of combustion, like, polycyclic
22 aromatic hydrocarbons or soot, and they've not found an
23 increase incidence. And sometimes -- there's at least two
24 studies on soot that have found a decrease incidence of
25 melanoma within people who were exposed to those compounds.

26 Q. Doctor, is there any evidence that the inhalation of diesel

1 fumes or the constituent parts of -- strike that. That was
2 going to come out horribly, Doctor.

3 Is there any evidence that the inhalation of diesel fumes
4 can lead to the development of melanoma?

5 A. Not to my knowledge. It's been looked at, but I didn't see any
6 increased risk for melanoma in some of the populations, such
7 as, like, diesel locomotive operators. They didn't see a huge
8 incident risk.

9 Q. I've asked you about inhalation, Doctor. I want to change
10 these questions now to exposure just to transdermally, or on
11 the skin, say, absorption through the skin, Doctor. Is there
12 any evidence to exposure to soot or ash can lead to the
13 development of melanoma if it's found on a person's skin?

14 A. Not to my knowledge.

15 Q. Is there any evidence that exposure to diesel fumes, the
16 constituents of which may land or come in contact with
17 somebody's skin can lead to the development of melanoma?

18 A. Not to my knowledge.

19 Q. Doctor, are there medical studies which examine whether a
20 firefighter has an increased risk of developing melanoma?

21 A. I'd say there's like -- there's studies have shown that
22 melanoma is diagnosed at a higher rate in firefighters compared
23 to the general population.

24 Q. But that doesn't necessarily mean that it was caused by an
25 inhalation or an exposure?

26 MR. MEYERS: Objection, leading.

1 JUDGE SWANSON: I'll sustain.

2 Q. (BY MR. BARNES) I'll ask a better question.

3 Doctor, can you draw any inferences from those studies
4 that show potentially a higher reported incidence of melanoma
5 versus their occupational exposures?

6 A. I don't think you can. I don't think you can link it causally
7 to an occupational exposure based on the data I've seen.

8 Q. Why is that?

9 A. I think there's other confounding factors that aren't accounted
10 for in the study, such as, the demographics of the population,
11 what the individual risk factors are for that population. And
12 I think there's a lot of, there's a lot of factors outside of
13 occupations that involve sun exposure. I think those are very
14 difficult to quantify for any population, so I think proving
15 causality for occupational exposures has been very difficult.

16 Q. Do you know if the studies that you've reviewed in the course
17 of this case or in your work life in general, Doctor, do those
18 studies dealing with firefighters, did they control for things
19 such as the firefighter's gender in those studies?

20 A. I think some of them did control for gender.

21 Q. What about for age?

22 A. I think some of them did control for age in the course of their
23 analysis.

24 Q. As we work down those list, do those same studies also control
25 for other risk factors, such as, national origin or heredity?

26 A. I didn't see that data in those studies.

1 actinic keratosis prior to the diagnosis of malignant
2 melanoma.

3 JUDGE SWANSON: Response?

4 MR. BARNES: It doesn't matter whether it was prior or not
5 since we're dealing with a subject that's a person's
6 cumulative sun exposure over the course of their lifetime,
7 so it would be relevant to exposures over the course their
8 life.

9 MR. MEYERS: That allows for sun exposure after the date of
10 diagnoses and it's cumulative.

11 JUDGE SWANSON: I'll overrule.

12 A. What was it? Can I have the question read again?

13 JUDGE SWANSON: Can you read it back?

14 [PAGE 17, LINES 24-26 WERE READ]

15 A. I think that actinic keratosis again reflect cumulative
16 lifetime sun exposure. I think, you know, actinic keratosis do
17 not necessarily reflect sun exposure in the near past. I think
18 they're more reflective of cumulative lifetime sun exposure.

19 Q. (BY MR. BARNES) Doctor, are you familiar with what's called
20 the healthy worker effect in medical science?

21 A. Yes.

22 Q. What is that?

23 A. Healthy worker effect, it's actually -- there's no good
24 accepted overall definition that's used, but it's the -- it's
25 kind of the assumption that certain populations will be -- in a
26 certain job will have a higher baseline state of health than

Appendix I:
John Hackett, M.D. Deposition

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In re: DELMIS SPIVEY)

Claim No: SG-05442)

) Docket No.
) 13 18842
)
)
)

DEPOSITION UPON ORAL EXAMINATION OF

JOHN HACKETT, M.D.

12:03 P.M.

MARCH 12, 2014

1001 BROADWAY, SUITE 300

SEATTLE, WASHINGTON



REPORTED BY: PATSY D. JACOY, CCR 2348



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ALSO PRESENT: NONE



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SEATTLE, WASHINGTON; MARCH 12, 2014

12:03 P.M.

--oOo--

JOHN HACKETT, M.D.,

sworn as a witness by the Certified Court Reporter,
testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q. Good afternoon, Dr. Hackett, my name is Chad Barnes, I represent the City of Bellevue in this matter. We've had a chance to talk briefly before we got started today, but could I have you say and spell your name for the record.

A. John, J-O-H-N, P., Hackett, H-A-C-K-E-T-T.

Q. And what is your occupation, Dr. Hackett?

A. I'm a physician.

Q. Okay. What type of physician are you?

A. I practice dermatology.

Q. And how long have you practiced dermatology?

A. I've been in practice since 1975.

Q. And do you currently have an active practice or a patient load, Doctor?

A. I am doing IME's and I have a clinic at the



1 University of Washington where I'm an associate
2 professor.

3 Q. Okay.

4 A. And I closed my office I guess about two years
5 ago.

6 Q. The clinic that you teach at at the University
7 of Washington, could you explain a little bit about
8 what that is?

9 A. It's a dermatology clinic where I am involved
10 in teaching the residents at the university and the
11 medical students who take a dermatology elective.

12 Q. And how long have you taught for the
13 University of Washington?

14 A. Since 1975.

15 Q. And can you give me a brief thumbnail sketch
16 of what your medical training and background is,
17 Doctor?

18 A. Yeah, I have a bachelor's degree from Holy
19 Cross College in Worcester, Massachusetts in 1963, an
20 M.D. from Georgetown University in 1967, a year of
21 internship and medical residency at Georgetown
22 University Hospital, '67 to '69. I was then a medical
23 officer in the U.S. Navy for two years, deployed, I
24 came back and was a fellow at Johns Hopkins Hospital in
25 internal medicine and dermatology from 1972 to 1975. I



1 am board certified in internal medicine as of 1974 and
2 dermatology as of 1976.

3 Q. What does it mean to be board certified,
4 Doctor?

5 A. Complete a prescribed period of training and
6 then pass a -- generally an oral and written exam.

7 Q. Okay. You mentioned that you do IME's or
8 independent medical exams, Doctor; is that right?

9 A. Yes, that's correct.

10 Q. Who generally do you perform those independent
11 medical exams for?

12 A. For whomever asks for one.

13 Q. And do you perform medical exams for both
14 plaintiffs at times --

15 A. Yes.

16 Q. -- or at the request of plaintiffs' attorneys?

17 A. Absolutely.

18 Q. Do you also perform them at the request of
19 defendants --

20 A. Yes.

21 Q. -- or defendants' attorneys?

22 A. Yes.

23 Q. Do you ever perform independent medical exams
24 for the Department of Labor and Industries?

25 A. Yes, I do.



1 Q. And does your opinion change depending upon
2 who's employing you or who has retained you, Doctor?

3 MR. MEYERS: Objection, leading.

4 A. No.

5 Q. (BY MR. BARNES) When you were in private
6 practice, Doctor, where was your dermatology practice
7 located?

8 A. Several different places over the years.
9 Initially in the Cobb Building downtown, then for a
10 number of years up on First Hill in the Cabrini Tower.
11 For the last 12 years of the practice it was in
12 Bellevue on 116th Street.

13 Q. And in the course of your practice have there
14 been occasions where you've treated patients with
15 melanoma?

16 A. I've diagnosed it. The treatment of melanoma
17 is surgical.

18 Q. Can you estimate for me over the course of
19 your career how many patients you've diagnosed with
20 melanoma?

21 A. I would say on an average of five to seven a
22 year.

23 Q. And can you describe for me what your training
24 or -- what training you've had in the diagnosis of
25 melanoma?



1 A. Well, my dermatology residency primarily.

2 Q. Okay.

3 A. And you become sensitized to a pigmented or
4 even any lesion which is exhibiting fairly rapid change
5 like, you know, six months to a year, it's different,
6 and you focus on those.

7 Q. As part of being a physician, are you required
8 to take any ongoing medical education?

9 A. Yes.

10 Q. Okay. Is that something that you've done
11 since you've been licensed --

12 A. You can't renew your license without that.

13 Q. And does any of that training or ongoing
14 medical education that you've had over the years, has
15 that dealt with the diagnosis of melanoma?

16 A. Not much specifically.

17 Q. Do you try to stay current with the
18 developments in the field of melanoma?

19 A. I subscribe to journals, both in general
20 medicine and in dermatology, and yes, I do.

21 Q. Doctor, what are the generally medically
22 accepted risk factors for the development of a
23 cutaneous melanoma?

24 A. The generally accepted risk factors for a
25 cutaneous melanoma are genetic predisposition, fair



1 skin and ultraviolet light.

2 Q. And how does medical science go about
3 determining the risk factors or causes of a disease
4 like cutaneous melanoma?

5 A. It's a review of lots and lots of cases and a
6 fairly rigid statistical analysis that is
7 peer-reviewed.

8 Q. Is there a particular field of medicine or
9 field of science that deals with reviewing those
10 studies and trying to draw inferences from them?

11 A. Several: Public health, pathology,
12 dermatology, oncology.

13 Q. Is there a medically recognized risk factor
14 that's most strongly associated with the development of
15 cutaneous melanoma?

16 A. Ultraviolet light.

17 Q. I got ahead of myself there a little bit,
18 Doctor, but I understand Del Spivey was diagnosed with
19 cutaneous melanoma; is that correct?

20 A. He was diagnosed with a melanoma in situ,
21 which is an emerging melanoma that hasn't gotten out of
22 the epidermis, it hasn't gotten out of the barn.

23 Q. And is that a type of cutaneous melanoma,
24 Doctor?

25 A. Yes.



1 Q. Before I went off track there for a moment,
2 you mentioned UV exposure as a recognized risk factor.
3 What are the potential sources of UV radiation, Doctor?

4 A. Prime one is sunlight, second one would be
5 tanning beds. Those are the principal sources of
6 significant ultraviolet light.

7 Q. And do you have any experience in teaching
8 about the effects of UV exposure?

9 A. Yes.

10 Q. Okay. Tell me about that.

11 A. You -- ultraviolet light, both A and B, comes
12 through the atmosphere, they impact on the skin, they
13 do several things. They generate pigment formation,
14 that's why you tan; in excess they can damage the skin,
15 generally manifested by increased elastin fibers,
16 decreased collagen and changes in the epidermis. And
17 ultimately they've been linked to basal cell carcinoma,
18 squamous cell carcinoma and melanoma.

19 Q. And what you just talked about, the effects of
20 UV exposure, do you teach, as part of any clinics at
21 the University of Washington, that area or that study?

22 A. It depends what walks in the door. The
23 student or the resident will see a patient and present
24 it to me, I'll go see the patient with the resident and
25 then we'll talk about how one should evaluate this, so



1 yes, we have intermittently over the years.

2 Q. Coming back generally to UV exposure, is there
3 a difference in UV exposure from a natural source, say
4 the sun, versus a tanning bed?

5 A. Not much. You -- most of the tanning beds are
6 UVA, the more carcinogenic is UVB, but it's
7 carcinogenic in very low levels, so even though it's
8 one, two, three percent of the tanning bed, it's a
9 significant hit.

10 MR. MEYERS: Objection, form,
11 foundation, move to strike.

12 Q. (BY MR. BARNES) Doctor, generally is a
13 blistering sunburn necessary to cause the type of
14 damage to skin that can lead to the development of
15 melanoma?

16 A. Not necessarily.

17 Q. Does a person receive UV exposure simply by
18 being outside even on a cloudy day?

19 A. Yes.

20 Q. And can that be a risk factor in the
21 development of melanoma?

22 A. Absolutely.

23 Q. Does an individual need constant exposure to
24 the sun or UV rays in order to lead to a higher risk of
25 melanoma?



1 A. Actually there's some very good studies from,
2 I believe from the UK, that show the rates of melanoma
3 in office workers are higher than the rates in farmers
4 and fishermen, suggesting that intermittent bashes of
5 ultraviolet light, say a vacation, Hawaii or the
6 Mediterranean or whatever, might be more harmful than
7 somebody who is out in it every day and getting
8 hardened in.

9 Q. What about a person's skin type, can that be a
10 risk factor for the development of melanoma?

11 A. Absolutely.

12 Q. Could you explain how that works?

13 A. Well, you have Fitzpatrick's I through V. One
14 are fair skinned people who burn and don't tan; two are
15 fair skinned people who burn and tan; three are densely
16 pigmented Caucasians, Mediterranean types, Italian,
17 Greek, whatever; four are Asians or American blacks who
18 are generally only 50 percent African; and five is the
19 densely pigmented person.

20 Q. And how does that difference in a person's
21 skin type affect their chances of developing a
22 melanoma?

23 A. It not only affects their chances, it affects
24 the way the melanoma behaves. One, two and three are
25 prone to melanomas, probably one a little better than



1 two and two a little better than three, but I was at a
2 talk about eight years ago when a gal from Naples
3 talked about melanoma in Southern Italy and here were
4 these people with black hair, brown eyes, swarthy skin
5 and they got them too. Asians will get melanoma
6 occasionally, and interestingly in the Japanese, about
7 15 percent of them are brain tumors, I can't explain
8 that at all.

9 Melanoma in Africa is not a lethal disease.
10 Your Sub-Saharan African who gets a melanoma generally
11 is just going to get a big fungating localized tumor
12 that doesn't spread and poses no threat to his life,
13 his or her life.

14 MR. MEYERS: Objection, form, relevance,
15 move to strike.

16 Q. (BY MR. BARNES) Does age seem to play a
17 factor in the development of melanoma, Doctor?

18 A. Mostly, yes.

19 Q. Why do you say "mostly, yes"?

20 A. If you're a fair-skinned redhead and you grow
21 up on a beach in Hawaii you're a candidate for melanoma
22 in your early 20's. If you're an average Caucasian,
23 the threshold peaks around age, oh, 40 to 50, so that's
24 where the preponderance of risk is.

25 Q. Does it -- from your understanding, Doctor,



1 does it appear that melanoma develops generally in
2 Caucasians later in life?

3 MR. MEYERS: Objection, form, leading.

4 A. Depends on where the Caucasian is. As I said,
5 your freckled redhead in Hawaii is probably in serious
6 risk by the time he gets out of college. An office
7 worker in Seattle is going to peak between 40 and 50
8 generally. Some before and some trailing off
9 afterwards, but the Bell Curve peaks between 40 and 50
10 years of age.

11 Q. (BY MR. BARNES) If a person has UV exposure
12 over the course of their life, Doctor, does that
13 manifest itself in physical changes within the skin?

14 A. It generally does, yes.

15 Q. How does that occur; what would we see in a
16 person's skin?

17 A. If you are exposed to UV to excess, you're
18 going to see a couple of things. The first thing
19 you're going to see is a shift in the ratio of elastin
20 fibers to collagen fibers in the dermis. That's going
21 to be followed by some irregularities in the epidermis.
22 That most commonly is going to be followed by what's
23 called an actinic keratosis or ultimately one of the
24 forms of skin cancer, but it's a slow, progressive
25 thing.



1 Q. As a general matter, Doctor, is cutaneous
2 melanoma most often associated with skin that is
3 exposed to UV light?

4 MR. MEYERS: Objection, form, asked and
5 answered.

6 A. Statistically, yeah. Head and neck is
7 probably the most common, exposed arms and trunk are
8 next. Ladies' lower legs is a significant factor
9 because prior when ladies wore skirts all the time that
10 was a light-exposed area and silk stockings were --
11 blocked ultraviolet light, nylon doesn't.

12 MR. MEYERS: Objection, relevance, move
13 to strike.

14 Q. (BY MR. BARNES) Is it uncommon, Doctor, for
15 an adult male to have a cutaneous melanoma on their
16 trunk, be it their front or back?

17 A. No. Less so than head and neck, but not...

18 Q. I understand you performed an independent
19 medical exam of Del Spivey, Doctor?

20 A. Yes, I did, I did that in -- October 24th of
21 2012.

22 Q. Before we get into the specifics of your exam,
23 Doctor, could you explain to me generally how you go
24 about performing an independent medical exam?

25 A. You are provided with hopefully adequate



1 records so you can see what led up to the present
2 problem. You then talk with the patient, you take a
3 history, what happened, what were you doing when it
4 happened, what's your background on this, what's your
5 family history of various diseases, what's your other
6 health problems, are you seeing a doctor for anything
7 else? Do you smoke, do you drink, do you use street
8 drugs, are you married, single? Educational level,
9 military service? And then you examine the patient.

10 MR. MEYERS: Objection, relevance, move
11 to strike.

12 Q. (BY MR. BARNES) Were you provided with
13 materials related to Del Spivey in this case, Doctor?

14 A. Yes, I was.

15 Q. What were you provided?

16 A. Medical records and a number of articles.

17 Q. And the medical records that you were
18 provided, Doctor, do you recall who the primary care
19 physician was that generated those records?

20 A. Not immediately, but there was a dermatologist
21 I believe in Bellevue who did the biopsy, there was a
22 Virginia Mason pathologist and I believe surgeon, and
23 also Dr. Miyata I think was taking care of his diabetes
24 if I'm not mistaken.

25 Q. Is there a portion of --



1 MR. MEYERS: Objection, response,
2 relevance, move to strike any reference to any
3 condition other than malignant melanoma.

4 Q. (BY MR. BARNES) Doctor, is there a portion of
5 the report that you prepared following your medical
6 exam of Mr. Spivey that would detail what records you
7 referred to or examined as part of your examination?

8 A. Well, in my report I did a review of the prior
9 records which dated from 1994 to 2012.

10 Q. As part of the records that you reviewed in
11 this case, were those medical records from
12 Dr. Leonhardt, Virginia Mason in Bellevue?

13 A. Yes.

14 Q. And generally, Doctor, why is it important to
15 review a person's medical records as part of attempting
16 to determine a cause of his or her medical condition?

17 A. You want to know what kind of life they had,
18 you want to know what kind of exposures they had, what
19 other health issues they have.

20 MR. MEYERS: Objection, form, and as to
21 the response, move to strike on the basis of relevance
22 anything other than malignant melanoma.

23 Q. (BY MR. BARNES) As part of forming your
24 opinions in this case, were there any medical records
25 that were significant in helping you form your



1 opinions?

2 A. The -- well, just incidentally, in May of
3 1998, Mr. Spivey was hit by a baseball with injury to
4 his jaw and his ear, that suggested he had outdoor
5 recreational exposure, and he had yearly skin exams and
6 had a history of actinic keratosis in the past, those
7 are low grade precancerous sun damage, and his yearly
8 skin exam in December of 2011, a pigmented lesion was
9 noted on his left upper back.

10 Q. Okay.

11 MR. MEYERS: Objection, relevance, move
12 to strike the issue with respect to baseball and any
13 injury arising out of baseball.

14 Q. (BY MR. BARNES) And I guess what's the
15 significance of those records -- significance to you,
16 Doctor, of those records that you just mentioned?

17 A. That there probably was some recreational
18 outdoor exposure in his past and that he had a
19 dermatologist who recognized the melanoma, did an
20 appropriate biopsy and sent him for appropriate
21 therapy.

22 Q. And you mentioned that -- the biopsy of
23 Mr. Spivey's melanoma in this case, Doctor. Did you
24 review the biopsy report that was done?

25 A. Yes, I did.



1 Q. And who, if you recall, Doctor, performed the
2 biopsy?

3 A. Dr. Leonhardt, L-E-O-N-H-A-R-D-T.

4 Q. And could you explain generally what occurs in
5 a biopsy or what -- how the biopsy was performed in
6 this case?

7 A. Well, you administer a local anesthetic,
8 generally Xylocaine, then you either take a punch or a
9 scissors and you either punch a plug out of the lesion
10 or shave a portion of it.

11 Q. Okay. And in this case was it a punch or a
12 shave?

13 A. I believe a shave.

14 Q. And after a dermatologist would take a biopsy
15 like that, what's the standard protocol or what would
16 they do next with that biopsy?

17 A. Send it to a pathologist.

18 Q. What is a pathologist going to do in looking
19 at a shaved biopsy?

20 A. Okay, they are going to process it with
21 several chemicals to fix the tissue, they are then
22 going to slice the tissue in very thin sections, mount
23 it on a slide and then look at it under the microscope
24 to see the microscopic features.

25 Q. When they mount the biopsy under -- or on a



1 slide and look at it under the microscope, can they
2 detect any changes at the cellular level?

3 A. Yes, certainly.

4 Q. Could you explain what changes they might see
5 on a biopsy?

6 A. Oh, you can see changes in the epidermis, is
7 there more or less scale, is it thicker or thinner than
8 it should be? You can look at the dermis, the shoe
9 leather of the skin and see if there's any inflammation
10 in there, if there are any cells that shouldn't be
11 there. If there's a change in the hair follicles, the
12 sweat glands, the nerves, whatever.

13 Q. In this case, Doctor, did the pathologist note
14 any changes in the skin at a cellular level when they
15 did that microscopic examination?

16 A. Yes.

17 MR. MEYERS: Objection, foundation,
18 hearsay, double hearsay. Move to strike the question
19 and the forthcoming response.

20 Q. (BY MR. BARNES) Go ahead, Doctor.

21 A. The quote, the Dr. Danenhowe, M.D. from
22 Virginia Mason stated, The sections demonstrate a
23 shaved biopsy of sun damaged skin with an atypical
24 proliferation of melanocytes at the dermal-epidermal
25 junction.



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MR. MEYERS: Move to strike.

Q. (BY MR. BARNES) The description that you reviewed there, Doctor, is that consistent with UV exposure?

A. Yes.

Q. And Doctor, does the biopsy that you reviewed suggest on a more-probable-than-not basis with a reasonable degree of medical certainty what the cause of Mr. Spivey's melanoma was in this case?

MR. MEYERS: Objection, foundation, hearsay, double hearsay.

A. Yes.

MR. MEYERS: Upon which the opinion testimony is based, move to strike. You'll get your chance, Doctor.

Q. (BY MR. BARNES) Go ahead, Doctor.

A. Could you repeat the question?

Q. Sure. Does the biopsy that you've reviewed in this case suggest on a more-probable-than-not basis with a reasonable degree of medical certainty what the cause of Mr. Spivey's melanoma was?

MR. MEYERS: Objection, foundation, hearsay, double hearsay, move to strike.

A. Yes. There was microscopic evidence of sun damaged skin and there was microscopic evidence of



1 atypical melanocytic cells in the epidermis.

2 Q. (BY MR. BARNES) And are those --

3 MR. MEYERS: Move to strike.

4 Q. (BY MR. BARNES) The melanic cells that you
5 described, Doctor, is that consistent with cells being
6 exposed to UV light, be it artificial or natural?

7 MR. MEYERS: Objection, form,
8 foundation.

9 A. It's a malignant change which
10 epidemiologically has been linked to ultraviolet light.

11 Q. (BY MR. BARNES) Are you aware of any
12 epidemiological links to a change similar to that being
13 caused by exposure to toxic substances?

14 A. No.

15 Q. Beyond the biopsy report that we've talked a
16 little bit, were there any other medical records that
17 you reviewed in the course of this case that were
18 suggestive of a UV exposure being a cause of
19 Mr. Spivey's malignant melanoma?

20 MR. MEYERS: Objection, form,
21 foundation.

22 A. The fact that he had pathologic evidence of
23 sun damage in the skin and the fact that he had in the
24 past actinic keratoses which were treated by his
25 dermatologists.



1 Q. (BY MR. BARNES) What did --

2 A. Suggesting excessive ultraviolet exposure.

3 Q. And what is actinic keratosis, Doctor?

4 MR. MEYERS: Objection to the form of
5 the question and the response doesn't meet the medical
6 testimony requirements, move to strike.

7 A. Actinic keratoses are precancers. They're red
8 scaly bumps that appear on the skin generally in a
9 light exposed area and over time they degenerate into
10 either a basal cell carcinoma or a squamous cell
11 carcinoma.

12 Q. (BY MR. BARNES) Can the development of an
13 actinic keratosis be --

14 MR. MEYERS: Objection, form,
15 speculation, move to strike.

16 Q. (BY MR. BARNES) Can the development of an
17 actinic keratosis be evidence of cumulative sun
18 exposure, Doctor?

19 A. Absolutely...

20 Q. As part of your exam in that case, did you
21 actually meet with Mr. Spivey?

22 A. Yes, I did.

23 Q. And why is it important to actually meet with
24 a person if you're attempting to diagnose or
25 determine -- excuse me, the cause of a condition? Let



1 me make sure I got an intelligent question out there,
2 Doctor.

3 Why is it important to actually meet with the
4 person if you're attempting to determine the cause or
5 origin of a particular condition?

6 MR. MEYERS: Let me move to strike the
7 compound question.

8 A. Medical records only tell you so much. You
9 would like to meet the person, see what they're like,
10 see what they look like, do a physical exam on them and
11 all of that is input that will help you come to your
12 conclusion.

13 Q. (BY MR. BARNES) Okay. Is that part of
14 obtaining history or is a history separate from that,
15 Doctor?

16 A. No, history is part of it.

17 Q. And I guess, what is obtaining a history from
18 a person, Doctor?

19 A. What happened, what do you do, are you on any
20 medicines, operations, childhood diseases, family
21 history, review of systems, to see other health
22 problems, drug allergies, personal habits, tobacco,
23 alcohol, etcetera. Social history, married, single.
24 Educational level, military service, all has a role.

25 Q. Okay.



1 MR. MEYERS: Objection, relevance, move
2 to strike. None of the responses pertained to
3 malignant melanoma, so I move to strike all of it.

4 Q. (BY MR. BARNES) As part of obtaining the
5 history from Mr. Spivey, were there any particular
6 factors or things that were discussed in the history
7 that were significant to you in terms of assessing the
8 cause of his melanoma?

9 A. No, the striking thing to me was the presence
10 of actinic keratosis in the past, evidence of sun
11 damage in the skin on the pathology report and then the
12 melanoma itself.

13 Q. Okay. And as part of that history did
14 Mr. Spivey ever discuss with you his coaching football,
15 youth football?

16 A. In the course of his past medical history we
17 found out the patient was born in Seattle and lived
18 west of the mountains, had routine outdoor sun exposure
19 as a child with some swimming and sports, enjoyed
20 hiking and hunting as an adult, also did yard work.
21 Played softball, but that was generally in the
22 evenings.

23 Q. Okay. As part of taking Mr. Spivey's history,
24 did you get into discussing what particular job duties
25 Mr. Spivey may have as a firefighter?



1 A. Only in general terms. He had worked for
2 Bellevue, for the City of Renton as an EMT for an
3 ambulance company, so there were multiple functions.

4 Q. Did the level of your discussion get to the
5 point where he identified what his specific job duties
6 would be in the course of fighting a fire, Doctor?

7 A. No.

8 Q. Was there ever any discussion of what
9 protective equipment he would wear as a firefighter if
10 he was actively involved in fighting a fire?

11 MR. MEYERS: Objection, form,
12 foundation.

13 A. I'm aware of that, but not from Mr. Spivey.

14 Q. (BY MR. BARNES) Did you perform a physical
15 exam of Mr. Spivey in this case, Doctor?

16 A. Yes, I did.

17 Q. And why is it important to perform a physical
18 exam on somebody if you're attempting to determine the
19 cause of a condition?

20 A. You want to look at any other melanomas that
21 could be there or be developing, you would like to look
22 at any evidence of sun damage and any other potentially
23 premalignant lesions.

24 Q. In this case, Doctor, do you recall where
25 Mr. Spivey's melanoma was located on his body?



1 A. Upper back, I believe. Upper back.

2 Q. Were there any findings that were significant
3 to you in determining the cause of Mr. Spivey's
4 melanoma once you had done the physical exam?

5 A. Not on examination.

6 Q. Can the presence of nevi, which I understand
7 to be moles, Doctor, can that be a risk factor for the
8 development of melanoma?

9 MR. MEYERS: Objection, attorney
10 testimony, leading, move to strike.

11 A. Yes and no. We all have moles. Occasionally
12 one will develop a malignancy. More often than not the
13 malignancy is a new event.

14 Q. (BY MR. BARNES) Following your review of
15 Mr. Spivey's medical records, after taking a personal
16 history from Mr. Spivey, your exam of Mr. Spivey, did
17 you form an opinion on a more-probable-than-not basis
18 within a reasonable degree of medical certainty as to
19 what caused Mr. Spivey's cutaneous melanoma in this
20 case?

21 A. Yes, I thought this was a tumor which probably
22 resulted from ultraviolet light exposure and I did not
23 feel it was work-related.

24 Q. And, Doctor, you're familiar with testifying
25 on a more-probable-than-not basis; is that right?



1 A. Yes.

2 Q. And in this case, is it your opinion on a
3 more-probable-than-not basis that Mr. Spivey's
4 cutaneous melanoma on his upper back developed as a
5 result of UV exposure?

6 MR. MEYERS: Objection, leading, move to
7 strike. Objection, asked and answered, move to strike.

8 A. Yes.

9 Q. (BY MR. BARNES) And as part of your prior
10 answer, Doctor, you said you believed -- you did not
11 believe, excuse me, that his occupation played a role
12 in the development of his cutaneous melanoma. Why is
13 that?

14 A. A number of reasons. I've never seen a
15 firefighter work with his shirt off.

16 MR. MEYERS: Objection, form,
17 speculation, move to strike.

18 A. The skin where the lesion developed had
19 evidence of sun damage on biopsy.

20 MR. BARNES: Thank you, Doctor, that's
21 all the questions I have at this point.

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CROSS EXAMINATION

BY MR. MEYERS:

Q. Dr. Hackett?

A. Yes, sir.

Q. You've testified against a number of firefighters with malignant melanoma in the state of Washington, haven't you?

A. Testified against two others.

Q. That would be City of Bellevue Firefighter Larson, Captain Larson, correct?

A. Yes.

Q. And Firefighter Weaver, City of Everett, correct?

A. Yes.

Q. Del Spivey here in this case, correct?

A. Yes.

Q. Did you know when you sat down with Del Spivey that three of his colleagues with whom he had served shifts together and responded to fires together had developed either malignant melanoma or squamous cell or basal cell cancers?

MR. BARNES: Objection, relevance, foundation.

A. Well, I have to ask you some questions in return of that.



1 Q. (BY MR. MEYERS) Well, you don't get to, I'm
2 just asking you to answer yes or no.

3 MR. BARNES: Same objections.

4 A. I will comment on the --

5 MR. MEYERS: And I'll move to strike
6 anything that's not responsive to the question. Let me
7 ask the question again so the doctor can get it clear
8 in his mind what I asked him. So just read it back if
9 you would.

10 (Reporter read back as requested.)

11 A. No.

12 Q. (BY MR. MEYERS) Dr. Hackett, did you read Del
13 Spivey's deposition testimony?

14 A. I believe so.

15 Q. Is it in your records?

16 A. Somewhere.

17 Q. Did you make any note about the fact that his
18 colleagues were also developing cancer, including
19 himself, three of them were actually malignant melanoma
20 from City of Bellevue on the same shifts?

21 MR. BARNES: Objection, relevance,
22 argumentive.

23 A. If you look at this mathematically it's not a
24 relevant issue.

25 MR. MEYERS: I'm going to move to



1 strike, ask to -- please read the question back to the
2 doctor and I'll get him to answer that question.

3 (Reporter read back as requested.)

4 MR. BARNES: Objection, relevance,
5 argumentive.

6 A. No.

7 Q. (BY MR. MEYERS) I believe you were about to
8 testify that the fact that four firefighters serving on
9 the same shift during the same periods of time with the
10 same exposures for the City of Bellevue Fire Department
11 was not relevant to your opinions regarding causation;
12 is that fair?

13 MR. BARNES: Objection, mischaracterizes
14 testimony that's not actually been given; two,
15 relevance; three, argumentative.

16 Q. (BY MR. MEYERS) Go ahead and answer,
17 Dr. Hackett.

18 A. Okay, I didn't think it was relevant for a
19 number of reasons. We're looking at four people over
20 several years in a population of 100 or more
21 firefighters.

22 Q. Let me stop you there and ask if you know when
23 they developed their cancers?

24 MR. BARNES: Object.

25 Q. (BY MR. MEYERS) The four firefighters?



1 MR. BARNES: Objection, relevance.

2 A. I don't know.

3 MR. BARNES: Foundation.

4 Q. (BY MR. MEYERS) All right. If they were all
5 developed within a three-year period or a four-year
6 period, would that change your opinions at all?

7 MR. BARNES: Objection, relevance,
8 foundation.

9 A. That would give me an incidence of one percent
10 per year roughly, which is about the incidence for the
11 general population. No, it wouldn't.

12 Q. (BY MR. MEYERS) How many City of Bellevue
13 firefighters are there?

14 A. I believe around 100.

15 Q. Do you know how long Del Spivey had been a
16 City of Bellevue firefighter?

17 MR. BARNES: Objection, relevance.

18 A. He's worked for the City of Bellevue since
19 January of 1995.

20 Q. (BY MR. MEYERS) So 19 years as we sit here
21 today?

22 A. Yes.

23 Q. And then he had worked for other fire
24 departments before that, correct?

25 MR. BARNES: Objection, relevance.



1 MR. MEYERS: Move to strike. Please
2 read back the question and we'll get the doctor's
3 answer to that question.

4 (Reporter read back as requested.)

5 MR. BARNES: Objection, relevance.

6 A. Yes.

7 Q. (BY MR. MEYERS) Do you know how long he had
8 worked for other fire departments before he went to
9 work for the City of Bellevue fire department in 1995?

10 MR. BARNES: Objection, relevance.

11 A. He worked as a firefighter for the City of
12 Renton from 1993 to 1994, King County Fire District
13 Number 25 from 1986 to 1993, and prior to that was an
14 EMT.

15 Q. (BY MR. BARNES) So he had been a firefighter
16 since 1986, correct, Dr. Hackett?

17 MR. BARNES: Objection, relevance.

18 A. That's what my records suggest.

19 Q. (BY MR. MEYERS) Did you talk to him at all
20 during your history or your physical about his
21 exposures to ultraviolet light as a firefighter?

22 MR. BARNES: Objection, relevance.

23 A. Only in the fact that as a firefighter, unless
24 we're talking about his aquatic issues, he was fully
25 clothed with protective equipment.



1 Q. (BY MR. MEYERS) Did he tell you that?
2 A. That's what firemen wear.
3 Q. Did he tell you that, Dr. Hackett?
4 A. I can't recall.
5 Q. Did you read his deposition with respect to
6 how he was clothed at all times as a firefighter?
7 MR. BARNES: Objection, relevance,
8 argumentative in tone.
9 A. I'll have to refresh my memory.
10 Q. (BY MR. MEYERS) And it could be that he
11 wasn't always fully clothed as a firefighter?
12 A. I believe only when he was doing his aquatic
13 things.
14 Q. And that's your recollection, only when he was
15 swimming or doing water activities?
16 A. Yeah. Well, he was in a wet suit or dry suit
17 during that time so it was fairly brief and I think he
18 had a total of 60 or 70 hours in his career.
19 Q. We're going to come back to that a little more
20 often.
21 How often are you seeing patients at the UW
22 clinic?
23 A. I have a clinic this year, I'm there four
24 months a year.
25 Q. And when you're there four months a year, how



1 many hours a day are you there?

2 A. Six to eight.

3 Q. And how many days a week are you there?

4 A. One day.

5 Q. And so you're there four days a month for four
6 months a year?

7 A. Yeah.

8 Q. How many residents do you teach?

9 A. All the ones that are there.

10 Q. How many are there?

11 A. Three -- well, three per year generally and
12 they're three years of residency, so nine.

13 Q. When did you close your practice, Dr. Hackett?

14 A. Two to three years ago.

15 Q. Do you remember the date you closed your
16 practice?

17 A. No, I don't.

18 Q. What did you do with your practice?

19 A. I gave the charts to a dermatologist that I
20 thought was competent.

21 Q. Now, you had been at Johns Hopkins in 1972 and
22 '75 --

23 A. '72, '73, '74, '75.

24 Q. '72 to '75?

25 A. Yes.



1 Q. So were you ever involved in the International
2 Association of Firefighters' work with Johns Hopkins
3 University while you were there?

4 A. No.

5 Q. Were you aware of the relationship between
6 John Hopkins and the International Association of
7 Firefighters?

8 A. Not until I reviewed the articles.

9 Q. And in those articles Johns Hopkins has been
10 involved in injury activities and assessments and in
11 occupational disease assessments; isn't that true?

12 A. That's true.

13 MR. BARNES: Objection, relevance.

14 Q. (BY MR. MEYERS) What journals do you
15 subscribe to?

16 A. The New England Journal of Medicine, the
17 American Academy of Family Practice Journal, the
18 American Academy of Dermatology and Journal of the
19 American Medical Association.

20 Q. Why do you subscribe to the American Family
21 Practice?

22 A. Comes to the house, my wife is a family
23 practitioner, I read it.

24 Q. So you read it, but it's not your
25 subscription?



1 A. No.

2 Q. Now, you had talked about, with respect to
3 causation, wanting to do a physical and take a history,
4 correct?

5 A. Correct.

6 Q. Epidemiologists deal with causation in cases
7 like this, in fact even in some of the cases we've had
8 where we were on opposite sides, correct?

9 A. Uh-huh.

10 MR. BARNES: Objection, relevance.

11 Q. (BY MR. MEYERS) And the epidemiologists come
12 to opinions about causation without having to meet with
13 the cancer patient, firefighter or without having to do
14 a physical of those individuals; isn't that true?

15 MR. BARNES: Objection, relevance.

16 A. Generally, yes.

17 Q. (BY MR. MEYERS) And generally they're not
18 M.D.'s, they're Ph.D.'s with specialties in
19 epidemiology, correct?

20 A. Some are M.D.'s too.

21 Q. Well, understood.

22 A. MPH's.

23 Q. But my point was that they come to causation
24 opinions all the time routinely, that's why they're
25 hired, and they don't do the physical or the history,



1 correct?

2 A. Correct.

3 MR. BARNES: Objection, relevance.

4 Q. (BY MR. MEYERS) Now, isn't it true that Del
5 Spivey has no family history whatsoever of malignant
6 melanoma?

7 A. So he says.

8 Q. Do you have reason to think he's lying to you?

9 A. No, I'm just going on what he told me.

10 Q. Well, you didn't see anything in the records
11 that would indicate differently, did you?

12 A. No.

13 Q. Isn't it true that Del Spivey has no history
14 of squamous cell carcinoma?

15 MR. BARNES: Objection, relevance.

16 A. True.

17 Q. (BY MR. MEYERS) And isn't it true that Del
18 Spivey has no family history of basal cell carcinoma?

19 MR. BARNES: Objection, relevance.

20 A. I don't know.

21 Q. (BY MR. MEYERS) Did you ask him?

22 A. In general terms I'm sure I did. Whether I
23 specified basal cell, I'm not sure.

24 Q. Did you see anything in his records to
25 indicate that he or any of his family members had basal



1 cell or squamous cell carcinoma?

2 MR. BARNES: Objection, relevance.

3 A. He had evidence of precursors to those given
4 the fact he had a number of actinic keratoses that were
5 treated.

6 Q. (BY MR. MEYERS) And does every actinic
7 keratosis turn into basal cell carcinoma?

8 A. Over time a lot of them do.

9 Q. And my question was, do they all?

10 A. No.

11 Q. How about with respect to squamous cell, do
12 every one of those actinic keratoses turn into squamous
13 cell carcinoma?

14 MR. BARNES: Objection, form.

15 A. Not every one, but a number of them.

16 Q. (BY MR. MEYERS) Do every one of those actinic
17 keratosis turn into malignant melanoma?

18 A: Probably none.

19 Q. And so we've talked a lot about actinic
20 keratosis, but your testimony right now is that with
21 respect to actinic keratosis, those don't really turn
22 into malignant melanoma, do they?

23 A. You're misstating things, sir.

24 Q. I don't mean to. You go ahead and straighten
25 me out.



1 A. Actinic keratoses are a reflection of excess
2 ultraviolet exposure which has been linked
3 epidemiologically as the principal cause of melanoma.

4 Q. And that ultraviolet light, it's no different
5 for people who are working or people who are
6 recreating, is it, Dr. Hackett, exposure is exposure?

7 A. Where are they working? Exposure is exposure.

8 MR. BARNES: Objection.

9 Q. (BY MR. MEYERS) Do you know how much of Del
10 Spivey's time as a City of Bellevue firefighter is
11 spent on outdoor activities as a firefighter?

12 A. I can't give you a number --

13 MR. BARNES: Objection, relevance.

14 A. -- but I have to assume that Mr. Spivey was
15 clothed.

16 MR. BARNES: Incomplete.

17 Q. (BY MR. MEYERS) Do you know what clothing he
18 wears for his daily uniform?

19 A. I would assume a shirt and a pair of trousers.

20 Q. Do you know what type of shirt?

21 A. No.

22 Q. Do you know whether the shirt is a light shirt
23 or a shirt that blocks out ultraviolet rays?

24 A. Virtually all shirts do.

25 Q. Do all shirts?



1 A. No.

2 Q. Do you know if there are ever times when City
3 of Bellevue firefighters go shirtless?

4 A. I would think in his case when he was changing
5 into his aquatic equipment.

6 Q. Do you know where that would occur?

7 A. No, I don't.

8 Q. Do you know how long it would take?

9 A. I would assume five to 15 minutes.

10 Q. And what's the basis for your assumption?

11 A. I dive myself.

12 Q. And do you know what the City of Bellevue Fire
13 Department dive equipment is?

14 A. Not specifically, but I would assume given
15 where we live it would be a wet suit or a dry suit,
16 some floatation device and possibly a breathing device.

17 Q. And that's your only exposures that you think
18 that Del Spivey has to UV would be changing into his
19 dive suit or out of his dive suit during the course of
20 his occupation as a City of Bellevue firefighter?

21 MR. BARNES: Objection, foundation,
22 relevance.

23 A. Well, I think perhaps as a firefighter that
24 was his only exposure involving skin of his back.
25 However, we have sports, we have yard work, we have



1 hunting, hiking.

2 MR. MEYERS: Move to strike,
3 nonresponsive.

4 Q. (BY MR. MEYERS) Did you review any of Del
5 Spivey's interrogatory answers, Dr. Hackett?

6 A. Yes, I have.

7 Q. And did you see the activities that he listed
8 with respect to his solar exposure, his UV exposure as
9 a City of Bellevue firefighter?

10 A. I don't recall specifically.

11 Q. Well, do you recall any of those things other
12 than what you just talked about with respect to dive?

13 A. No.

14 Q. Now, you testified that you're aware of no
15 relationship between chemical exposures and malignant
16 melanoma; is that an accurate recollection of your
17 testimony --

18 MR. BARNES: Objection.

19 Q. (BY MR. MEYERS) -- Dr. Hackett?

20 A. Yes.

21 MR. BARNES: Form, relevance,
22 mischaracterized his prior testimony.

23 Q. (BY MR. MEYERS) And so in your review of the
24 three journals that you subscribe to and the family
25 practice journal that your wife physician subscribes



1 to, you've never seen anything linking chemical
2 exposures to malignant melanoma; is that fair?

3 A. That's fair.

4 Q. And Doctor, with respect to linkage, for you
5 to be convinced, because in your report you said, you
6 actually said, The evidence used to support the
7 RCW 51.32.185 is based on rather poor and anecdotal
8 evidence with no statistical validity.

9 Do you remember writing that --

10 A. Yes.

11 MR. BARNES: Objection, relevance.

12 Q. (BY MR. MEYERS) -- on October 24th of 2012?

13 MR. BARNES: Objection, relevance.

14 Q. (BY MR. MEYERS) I'm on Page 6 of your report,
15 Dr. Hackett.

16 A. Page 6.

17 Q. Down at the bottom.

18 A. No, my Page 6 of October 24th stops with the
19 end of the physical examination.

20 Q. You don't have the questions that you were
21 asked by the City of Bellevue and the responses to
22 that? Did they give me a different report than you
23 have, Dr. Hackett?

24 A. My answers are --

25 MR. BARNES: Objection, argumentative,



1 mischaracterizes prior testimony.

2 A. My answers are on Page 8.

3 Q. (BY MR. BARNES) The actual question -- so
4 let's take a look at this here. You have a report that
5 you provided to the City of Bellevue and Berkley Risk
6 Administrators dated October 24th, right?

7 A. Yes.

8 Q. And then you go to how many pages in that
9 report?

10 A. There were nine pages and I have my answers to
11 the responses on Page 8 and 9.

12 Q. And so if I have a report that was provided to
13 me in discovery that only has Pages 3 of 7 -- excuse
14 me, Page 7 of 7, I don't have the same report you have,
15 do I?

16 A. You'll have to take that up with whoever gave
17 it to you.

18 Q. Well, I'm taking it up with you because I've
19 got a report dated the very same day you do, but my
20 report is seven pages and the one you've been using to
21 testify is nine. How did that happen?

22 A. That is what I did give --

23 MR. BARNES: Objection, relevance.

24 Q. (BY MR. MEYERS) So did you give the City of
25 Bellevue two reports, one was a seven-page report --



1 A. No.

2 Q. -- and one was a nine-page report?

3 A. No, I didn't.

4 Q. Well, you would agree with me here that I'm
5 looking right here on your conclusions at Page 5 of a
6 seven-page report, wouldn't you, Dr. Hackett?

7 A. If you look at the size of the type, yours is
8 compressed.

9 MR. BARNES: For the record, the doctor
10 is comparing the Panel of Consultants IME report dated
11 October 24, 2012 that he's been referring to to the
12 report that was handed to him by Mr. Meyers.

13 Q. (BY MR. MEYERS) And so your response to this
14 is that it's the same report, I just got a different
15 format?

16 A. May I read the report? Then I can answer that
17 question.

18 Q. I want you to tell me what your thinking is
19 about how I got a seven-page report and how you got a
20 nine-page report.

21 A. My thinking is that your type is about half
22 the size of this.

23 Q. And my point of that is, did you print out two
24 different reports with two different font sizes?

25 A. I didn't print anything.



1 Q. How did this report get to Berkley
2 Administrators and the City of Bellevue, Doctor?

3 A. Take that up with the people in the next room.

4 Q. So you look at these reports before you sign
5 them, don't you?

6 A. Yes.

7 Q. And did you look at this report before you
8 signed it?

9 MR. BARNES: Objection, relevance.

10 A. Let me see my signature.

11 Q. (BY MR. MEYERS) Well, look at this, it's
12 Page 7 of 7, and there's your signature, Dr. Hackett,
13 so I'm thinking you signed a seven-page report here,
14 but you're testifying off of a nine-page report.

15 A. Let me take a look.

16 Q. And I want that -- wait a minute, Dr. Hackett,
17 I don't want you looking at my notes. I've been
18 writing on this to ask you questions.

19 A. Okay, the type is half the size, I believe
20 it's the same report. Why you got a different type,
21 you can take it up with the people who gave it to you.

22 Q. And my question is, how would a signature on
23 Page 9 of that report end up being the signature on
24 Page 7 of a reduced report unless you signed both of
25 them?



1 A. It could be it's the same signature, but as I
2 said, your print has been compressed. The type is
3 about half the size of this.

4 MR. MEYERS: Well, for purposes of
5 impeachment and getting this right, I'm going to put
6 that exhibit into evidence. I'm not admitting it for
7 purposes of the jury, but just to get to the bottom of
8 this in motion in limine, so that needs to go with this
9 transcript.

10 MR. BARNES: Let's go off the record for
11 a second.

12 (Discussion off the record.)

13 (Deposition Exhibit 1 was
14 marked for identification.)

15 Q. (BY MR. MEYERS) Dr. Hackett, what's the
16 recurrence rate for malignant melanoma?

17 A. It depends on a number of factors, the
18 thickness of the initial lesion, the presence or
19 absence of sentinel node involvement, and to some
20 extent the immune status of the patient involved.

21 Q. Any subsequent exposures of concern in a
22 recurrence of malignant melanoma?

23 MR. BARNES: Objection, relevance.

24 A. Could you explain that? I'm not sure I
25 understand what you're asking.



1 Q. (BY MR. MEYERS) Sure. From the moment you
2 diagnose malignant melanoma and surgically excise that,
3 is the individual who had the malignant melanoma at
4 risk due to subsequent UV exposure?

5 A. More probably, yes.

6 Q. And you were criticizing at the bottom of
7 Page 6 of 7 of my report. It said -- maybe you can
8 find it, it was Item 6 in -- it might be the same in
9 there, but you wrote, The evidence used to support the
10 RCW 51.32.185 is based on rather poor and anecdotal
11 evidence with no statistical validity.

12 Do you recall writing that?

13 A. Yes.

14 MR. BARNES: Objection, relevance.

15 A. I see it right here on Page 9.

16 Q. (BY MR. MEYERS) Did you attend any of the
17 hearings or workshops that the legislature held on this
18 issue?

19 MR. BARNES: Objection, relevance.

20 A. No, I didn't.

21 Q. (BY MR. MEYERS) Did you review any of the
22 exhibits that were submitted to the legislature with
23 respect to malignant melanoma in firefighting?

24 MR. BARNES: Objection, relevance.

25 A. I reviewed the literature, I did not review



1 the materials submitted to the legislature.

2 Q. (BY MR. MEYERS) Now, when you say you
3 reviewed the exhibits, you're talking about the
4 exhibits in this case, correct?

5 A. Yes.

6 Q. You're not talking about the exhibits that
7 were submitted to the legislature back when the statute
8 was passed?

9 A. No.

10 MR. BARNES: Objection, relevance.

11 Q. (BY MR. MEYERS) And you didn't attend any of
12 the testimony or listen to any of the testimony that
13 the legislature heard when they were deciding this
14 issue, did you?

15 A. No.

16 MR. BARNES: Same objection.

17 Q. (BY MR. MEYERS) And you didn't look at any of
18 the work that was actually done on the presumptive
19 disease statute by the Department of Labor and
20 Industries, one of the people you work for -- groups
21 you work for, did you?

22 A. No.

23 MR. BARNES: Objection, irrelevant to
24 the issues before us.

25 Q. (BY MR. MEYERS) So you don't really know the



1 basis for which the Washington State legislature found
2 a presumed connection between malignant melanoma and
3 firefighting, do you, Dr. Hackett?

4 MR. BARNES: Objection, relevance.

5 A. I would question the relevance of that because
6 you don't have physicians making this decision.

7 Q. (BY MR. MEYERS) And so to make a law in
8 Washington we should all be physicians or just with
9 respect to this issue?

10 MR. BARNES: Objection, relevance,
11 argumentative.

12 A. Just with respect to this issue.

13 Q. (BY MR. MEYERS) So you don't know whether
14 doctors even testified in front of the legislature, do
15 you?

16 MR. BARNES: Objection, relevance.

17 A. I don't.

18 Q. (BY MR. MEYERS) You didn't read the testimony
19 from the Johns Hopkins people who testified before the
20 legislature, did you?

21 MR. BARNES: Objection, relevance.

22 A. No, I didn't review their testimony.

23 Q. (BY MR. MEYERS) Now, you had talked about a
24 number of articles that you did review and one of them
25 I believe, if you have the same ones that I have, is



1 the Cancer Incidence Among Firefighters in Seattle and
2 Tacoma of Washington, Cancer Causes Control was the
3 publication. Did you read -- review that?

4 MR. BARNES: Objection, relevance,
5 mischaracterizes prior testimony.

6 A. Yes, I did.

7 Q. (BY MR. MEYERS) Do you know whether
8 polycyclic aromatic hydrocarbons carcinogenics have
9 been linked to malignant melanoma, Dr. Hackett?

10 MR. BARNES: Objection.

11 A. I'm not aware of any substantial evidence.

12 Q. (BY MR. MEYERS) Are you aware of any
13 evidence, whether you regard it to be substantial or
14 not?

15 A. Well, I'm aware of speculative comments, I am
16 not aware of any peer-reviewed evidence.

17 Q. Well, are you aware of, in that study, for
18 example, there was a 20 percent increase in standard
19 incidence ratio between City of Tacoma and City of
20 Seattle firefighters and the general public?

21 MR. BARNES: Objection, form, relevance.

22 Q. (BY MR. MEYERS) You did see that on Page 131,
23 didn't you?

24 A. Yes, I did.

25 Q. And then you're also aware of the



1 Registry-based case control study of the cancer in
2 California firefighters?

3 A. Yes.

4 Q. And that actually had a standard incidence
5 ratio of 50 percent greater incidence of malignant
6 melanoma than the general public in California,
7 correct?

8 MR. BARNES: Objection, relevance, form.

9 A. Might not best represent the fact you're
10 comparing the Northwest to California.

11 Q. (BY MR. MEYERS) Well, Doctor, I'm asking you
12 to assume what it says right here that this California
13 study compared California firefighters to other
14 Californians and came up with a 1.5 odds ratio, meaning
15 there was a 50 percent increase in malignant melanoma
16 in California firefighters compared to the general
17 population in California.

18 MR. BARNES: Objection, relevance.

19 Q. (BY MR. MEYERS) You read that, didn't you?

20 A. I read that, but you have to question the
21 structure of the study, the numbers involved and the
22 statistical relevance of it.

23 Q. And I'm not asking you to do that, but I
24 appreciate your testimony in that regard, but it did
25 say that is what I'm asking you to acknowledge,



1 Dr. Hackett.

2 MR. BARNES: Objection, relevance.

3 A. There are people that say the world is coming
4 to an end tomorrow, people can say a lot of things.

5 Q. (BY MR. MEYERS) Well, this was published in
6 the American Journal of Industrial Medicine and that's
7 peer-reviewed, isn't it?

8 MR. BARNES: Objection, relevance, calls
9 for speculation.

10 A. Marginally.

11 Q. (BY MR. MEYERS) So you're challenging the
12 marginal nature of it, but it's a peer-reviewed
13 journal, isn't it?

14 MR. BARNES: Objection, foundation.

15 A. I believe so.

16 Q. (BY MR. MEYERS) And so this met the test of
17 scrutiny when it was submitted to its peers and this
18 was published and it does say there's a 50 percent
19 increase in malignant melanoma in California
20 firefighters compared to other Californians?

21 MR. BARNES: Objection.

22 A. That's what they say.

23 MR. BARNES: Form.

24 Q. (BY MR. MEYERS) And here's another one. You
25 are familiar with the Journal of Occupational Medicine,



1 aren't you?

2 A. Yes.

3 Q. And you read that study which was Cancer
4 Incidence in Florida Professional Firefighters, 1981 to
5 1999; you saw that one too, didn't you?

6 A. Yeah.

7 Q. And in that case on -- excuse me, that study,
8 that peer-reviewed journal, Cancer Incidence in Florida
9 Professional Firefighters 1981 to 1999, the standard
10 incident ratio showed skin cancers in general 3.01,
11 three times higher than the general public.

12 MR. BARNES: Object --

13 Q. (BY MR. MEYERS) Would you agree that that's
14 what the statistic says whether you accept the study or
15 not?

16 MR. BARNES: Objection, form,
17 mischaracterizes prior testimony, attorney testimony.

18 Q. (BY MR. MEYERS) Excuse me, Doctor. Doesn't
19 that say skin cancers and it says 3.01 for standard
20 incident ratio; I didn't misrepresent that to you, did
21 I?

22 MR. BARNES: Same objections with the
23 addition of relevance as it lumps skin cancers totally.

24 A. Well, actually male professional firefighters
25 had a 1.17 increase in incidence.



1 Q. (BY MR. MEYERS) At what age?

2 A. Doesn't break it down by age, it breaks it by
3 male or female.

4 Q. So --

5 A. And the females, of whom five were observed,
6 had a three times incidence.

7 Q. You know, I appreciate that, you've got my
8 book, go ahead and make your point, but I --

9 A. Look at the numbers.

10 Q. Well, I am looking at the numbers. Those are
11 all firefighters, though, correct? Female and male
12 firefighters?

13 A. Yeah, but if you take a sample of five people,
14 it's not statistically as valid as a sample of 99
15 people.

16 Q. Well, we're talking about the cancer incidence
17 in Florida professional firefighters over a 19-year
18 period of time and we're talking about five females who
19 got malignant melanoma, but we're not talking about a
20 small group of firefighters here?

21 MR. BARNES: Objection, form.

22 A. We're not talking about malignant melanoma,
23 we're talking about skin cancer.

24 Q. (BY MR. MEYERS) Well --

25 A. And we're talking about 99 men who had a



1 barely increased incidence over the general population.

2 Q. But they had an increase over the general
3 population, that's what this says.

4 A. 0.17.

5 Q. So 17 more of those for every 100 would
6 develop malignant melanoma compared to the general
7 public?

8 MR. BARNES: Objection, form --

9 Q. (BY MR. MEYERS) Based on that statistic?

10 MR. BARNES: Objection, form,
11 mischaracterizes the document as well as prior
12 testimony.

13 Q. (BY MR. MEYERS) Isn't that what it says,
14 Doctor?

15 A. The validity, again, you're dealing with small
16 numbers in both groups, you are dealing with an
17 extremely small number in the thing you were pointing
18 out as three times as great, so I'd like to see bigger
19 data.

20 Q. We've got plenty of data here that we're going
21 to go through, Doctor, but let's go back to that just
22 for a moment.

23 Can squamous cell carcinoma develop as a
24 result of firefighters' exposure to smoke, fumes and
25 toxic substances?



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MR. BARNES: Objection, relevance.

A. Not to my knowledge.

Q. (BY MR. MEYERS) Can basal cell carcinoma result in firefighters as a result of their exposures to smoke, fumes and toxic substances in the course of their employment?

MR. BARNES: Objection, relevance.

A. Not to my knowledge.

Q. (BY MR. MEYERS) Now, you also read the Cancer Incidence Among Massachusetts Firefighters and that was conducted in 1982 through 1986, correct?

A. Correct.

Q. You saw that one. And in that one -- let me ask you if I'm reading this right. Firefighting is a strenuous and often dangerous occupation. In addition to the obvious safety hazards such as smoke inhalation, falls and burns, firefighters are exposed to a variety of toxic substances. These include various carcinogens such as asbestos, benzene and polycyclic aromatic hydrocarbons.

Did I read that part of the article correctly?

A. Yes.

MR. BARNES: Objection, foundation, mischaracterizes prior testimony, relevance.

Q. (BY MR. MEYERS) Dr. Hackett, what are



1 polycyclic aromatic hydrocarbons?

2 A. It's a family of chemicals and that article
3 begs the question as to whether they're causative.

4 MR. MEYERS: Well, I'm going to move to
5 strike the part about causative, I'll give you a chance
6 to say that in a minute.

7 Q. (BY MR. MEYERS) But I asked you what
8 polycyclic aromatic hydrocarbons are and I'd like you
9 to you confine your answer to that.

10 MR. BARNES: Objection, relevance.

11 A. They are ring structures containing carbon and
12 hydrogen and have multiple rings.

13 Q. (BY MR. MEYERS) And they're the by-product of
14 incomplete combustion; is that fair?

15 A. Yes.

16 Q. Because if everything burned completely there
17 wouldn't be any polycyclic aromatic hydrocarbons left,
18 correct?

19 A. You're getting past my expertise.

20 Q. All right. But you agree they're residual of
21 combustion?

22 A. Yeah.

23 Q. And in that Massachusetts study, the melanoma,
24 the standardized morbidity odds ratio for malignant
25 melanoma was actually 2.92, wasn't it?



1 MR. BARNES: Objection, foundation,
2 relevance.
3 A. May I?
4 Q. (BY MR. MEYERS) Yeah, I don't want you
5 turning pages because I've written notes there.
6 A. Okay.
7 Q. This has already been testified to as being
8 generally reliable authority in --
9 MR. BARNES: Objection.
10 Q. (BY MR. MEYERS) -- the field of causation of
11 cancer.
12 MR. BARNES: Objection,
13 mischaracterizes --
14 Q. (BY MR. MEYERS) So my foundation has been --
15 MR. MEYERS: Excuse me, Counsel.
16 Q. (BY MR. MEYERS) My foundation has been laid
17 and so I just want you to look at --
18 MR. BARNES: Okay, before -- time out.
19 Before we move on, objection, relevance,
20 mischaracterizes. There's been no prior ruling on
21 foundation or anything else. Mr. Meyers, you may
22 believe you've laid the foundation, I stand on my
23 objection that we do not have a proper foundation for
24 any of those.
25 MR. MEYERS: If you'd like to stand and



1 address the Court, holy cow, Counsel, you've made your
2 objection. You done?

3 MR. BARNES: For the record, your
4 objection is foundation, mischaracterizes prior
5 testimony, relevance.

6 Q. (BY MR. MEYERS) Well, this study actually
7 says that, Standard mortality odds ratio -- I'm going
8 to read this quote to you for the record -- Standard
9 mortality odds ratios for nine cancer types examined
10 among 315 white male firefighters are presented in
11 Table 2. Statistically significant elevations were
12 observed using the state reference group for melanoma
13 with a standard mortality odds ratio for firefighters
14 at 292 -- 2.92, correct?

15 MR. BARNES: Objection, relevance,
16 foundation, improper use of a learned treatise under ER
17 803.

18 A. If you look at the number of firefighters, you
19 can place statistics with that number, but it's a small
20 enough number not to be relevant.

21 Q. (BY MR. MEYERS) Well, you said it's not
22 relevant, but my question to you was that it was
23 actually 2.92 times the general population, wasn't it?

24 MR. BARNES: Objection, mischaracterizes
25 prior testimony.



1 A. Given a small sample.

2 Q. (BY MR. MEYERS) And this article actually
3 pointed out, let me read that into the record. Because
4 occupational information is available for only
5 approximately 50 percent of all cases, the actual
6 number of cancer cases among firefighters may be up to
7 twice as high as reported here.

8 Did you find that of any significance,
9 Dr. Hackett?

10 MR. BARNES: Objection --

11 A. Struck me as speculation.

12 MR. BARNES: Doctor, let me get my
13 objection out there.

14 THE WITNESS: Sorry.

15 MR. BARNES: Objection, relevance,
16 improper use of a learned treatise under ER 803,
17 foundation.

18 A. Struck me as speculative.

19 Q. (BY MR. MEYERS) And did you note that they
20 referenced previous reports that were consistent with
21 excess melanoma and other cancers among firefighters?

22 MR. BARNES: Same objections.

23 A. Yes.

24 Q. (BY MR. MEYERS) And did you read any of the
25 articles that were cited in this American Journal of



1 Industrial Medicine article that were cited in the body
2 of the article or did you just read this?

3 A. Just read the article.

4 MR. BARNES: Objection, form.

5 Q. (BY MR. MEYERS) Now, there was an objection
6 about form so let's just make sure that -- I was asking
7 you whether you just read this article or whether you
8 read any of the additional citations and I thought you
9 answered --

10 A. Just read the article.

11 Q. And then there was another study that you were
12 provided and that was Cancer Incidence Among Male
13 Massachusetts Firefighters from 1987 to 2003, correct?

14 A. Yes.

15 Q. And in that article, for firefighters in
16 Massachusetts they found 25 cancers were regarded of
17 cancers -- as cancers of concern including malignant
18 melanoma, fair?

19 MR. BARNES: Objection.

20 A. Yes.

21 MR. BARNES: Foundation, improper use of
22 a learned treatise under ER 803.

23 Q. (BY MR. MEYERS) And so in this case, skin
24 melanoma was actually broken down by age group and
25 counsel's objection about the other cancers, I'm only



1 concerned about skin melanoma and so I appreciate the
2 other 24 --

3 A. May I see it closer?

4 Q. Yeah, sure.

5 A. I won't turn your pages.

6 Q. I know. Let me make sure that I highlighted
7 this; and you can tell me what the incident ratio was
8 for the firefighters for malignant melanoma between 18
9 and 54 and then those 55 to 74 and then those who were
10 over 75.

11 MR. BARNES: Objection, relevance, form,
12 foundation.

13 A. I think if you look at these data, it actually
14 suggests that being a firefighter over time diminishes
15 your risk of melanoma because if ten years of
16 firefighting gives you one number, 20 years of
17 firefighting gives you a smaller incidence, further
18 years of firefighting or post firefighting gives you an
19 even smaller incidence.

20 Q. (BY MR. MEYERS) Well, that would be true if
21 they all worked out until age 75 so let me ask you
22 this, Dr. Hackett: I want you to assume that the
23 average age for retirement of a firefighter in the
24 state of Washington is 53 years of age. I want you to
25 assume that to be true. And so the real relevant



1 number then becomes this 18 to 54 and it's 1.88 times
2 standard incident ratio, that's 188 percent increase
3 over the general population.

4 MR. BARNES: Objection, foundation.

5 Q. (BY MR. MEYERS) Correct?

6 MR. BARNES: Relevance.

7 A. Are you asking me a question or are you making
8 a statement?

9 Q. (BY MR. MEYERS) I am. I'm asking you a
10 question based on this standard incident ratio, 1.88.

11 MR. BARNES: Same objection.

12 A. Well, you have to look at the assumptions. If
13 toxic materials you've experienced as a firefighter are
14 causing cancer, which is what you're pushing, duration
15 of exposure and persistence of the exposures changes
16 would cause for increased melanoma as you got older and
17 such is not the case.

18 Q. (BY MR. MEYERS) Well, it is actually greatest
19 from ages 18 to 54 to a 1.88 standard incident ratio on
20 this table, that was my question. Right?

21 MR. BARNES: Objection, foundation,
22 form, relevance.

23 A. Well, as mentioned in my -- as mentioned in my
24 testimony before with Mr. Barnes, melanoma peaks
25 between age 40 and 50, that's true of the general



1 population as well as firefighters. Now, if
2 firefighters were exposed to some mysterious toxin for
3 which there's no hard data as causative, the longer
4 they live with that history of exposure, the more
5 melanomas they should get, their incidence of melanoma
6 should increase. It clearly doesn't.

7 MR. MEYERS: Move to strike,
8 nonresponsive.

9 Q. (BY MR. MEYERS) My question to you was, under
10 the age bracket 18 to 54 for skin melanoma, the
11 standard incident ratio was 1.88, correct?

12 MR. BARNES: Objection -- same
13 objections.

14 A. That's what they say.

15 Q. (BY MR. MEYERS) But you don't accept that?

16 A. I question the relevance of it.

17 Q. Did you read the Journal of Occupational
18 Medicine, Cancer Risk Among Firefighters: A review and
19 meta-analysis of 32 studies?

20 A. If you gave it to me I did, yes.

21 Q. I didn't give it to you, it would have been
22 given to you by the City of Bellevue. I've never
23 worked with you.

24 A. Yes.

25 Q. Do you know how many of the studies of those



1 32 actually dealt with malignant melanoma?

2 MR. BARNES: Objection, relevance.

3 A. I couldn't tell you offhand.

4 Q. (BY MR. MEYERS) Do you know whether generally
5 they found an increase in malignant melanoma with
6 respect to firefighters compared to comparable
7 residents of the same areas?

8 MR. BARNES: Objection, foundation,
9 relevance.

10 Q. (BY MR. MEYERS) Are you aware of any
11 occupations where workers have higher incidents of
12 cancer even though they're fully clothed?

13 MR. BARNES: Objection.

14 Q. (BY MR. MEYERS) When working?

15 MR. BARNES: Relevance.

16 A. Occupations, I'm not sure I do.

17 Q. (BY MR. MEYERS) For example, in oil refinery
18 workers, do you know whether they have higher
19 incidences of cancer, including malignant melanoma?

20 MR. BARNES: Objection, relevance,
21 foundation.

22 A. Principally squamous cell carcinoma, but
23 evidence of causative links have been established
24 there. There's animal data and human data to support
25 that.



1 Q. (BY MR. MEYERS) And let me reference the
2 American Journal of Industrial Medicine article Organic
3 Chemicals in Malignant Melanoma. In particular I want
4 to direct your attention to, Occupational exposures
5 have also been suggested as causes. In the United
6 States people who live in counties with chemical
7 industries have had an elevated mortality from
8 malignant melanoma.

9 Do you recall reading that in the article?

10 A. Yes.

11 MR. BARNES: Objection, foundation,
12 relevance.

13 A. Yes.

14 Q. (BY MR. MEYERS) So you agree that there are
15 some chemical exposures that can cause malignant
16 melanoma, but you don't believe them to be present in
17 firefighters; is that fair?

18 MR. BARNES: Objection, foundation,
19 relevance, mischaracterizes prior testimony.

20 A. Yes.

21 Q. (BY MR. MEYERS) Did you review the article in
22 the American -- excuse me, the International Journal of
23 Dermatology entitled Non-Sunlight Risk Factors for
24 Malignant Melanoma, Part 1, Chemical Agents, Physical
25 Conditions and Occupation?



1 A. Yes.

2 Q. Did you note that firefighters are identified
3 as a risk that is -- or at risk of malignant melanoma
4 for occupational exposures in this dermatology article?

5 MR. BARNES: Objection, foundation,
6 relevance.

7 A. The comment was made, yes.

8 Q. (BY MR. MEYERS) And you don't accept the
9 comment?

10 A. I'd have to look at the article again and look
11 at the data that they purport supports this.

12 Q. Well, would you agree that in the
13 International Journal of Dermatology article it
14 actually starts out, and I bring to your attention this
15 part, The role of sunlight in the etiology of malignant
16 melanoma has been established. There is a rapidly
17 growing literature that identifies many other malignant
18 melanoma risk factors besides sunlight.

19 That's the premise of this non-sunlight risk
20 factors article, isn't it, Dr. Hackett?

21 MR. BARNES: Objection, foundation,
22 relevance, ER 803.

23 A. It fails to give hard data to give -- to
24 suggest a causative relationship. We're getting a lot
25 of opinions.



1 Q. (BY MR. MEYERS) These are peer-reviewed
2 articles, though; you're a dermatologist, aren't you?

3 MR. BARNES: Objection, foundation,
4 relevance.

5 Q. (BY MR. MEYERS) Excuse me, I know you're a
6 dermatologist, you're a board certified dermatologist.
7 The International Journal of Dermatology is one of the
8 peer-reviewed article publications that dermatologists
9 refer to, correct?

10 MR. BARNES: Objection, calls for
11 speculation.

12 A. Not very often, it's not very good.

13 Q. (BY MR. MEYERS) So you don't like the
14 International Journal of Dermatology?

15 A. I don't know too many people who do.

16 Q. Do you know whether the journal articles are
17 peer reviewed as others have testified?

18 MR. BARNES: Objection, calls for
19 speculation.

20 A. It was questioned by who are the peers and how
21 was the review.

22 Q. (BY MR. MEYERS) But you don't argue that it's
23 a peer-reviewed publication, do you?

24 MR. BARNES: Objection, asked and
25 answered, calls for speculation.



1 A. If it is a peer-reviewed journal, and I'm not
2 sure it is, it's one of poor quality that has a poor
3 reputation in the medical community, at least in the
4 dermatologic community.

5 Q. (BY MR. MEYERS) Have you read the article
6 published in Cancer Causes and Controls entitled
7 Environmental Factors and the Etiology of Melanoma,
8 which was also provided to the City of Bellevue?

9 A. Yes.

10 Q. And would you agree that in this
11 peer-reviewed -- you agree that that's peer-reviewed,
12 Cancer Causes and Controls?

13 A. I'd have to check.

14 MR. BARNES: Objection, calls for
15 speculation.

16 Q. (BY MR. MEYERS) You don't know whether it is
17 or isn't?

18 A. No.

19 Q. So you would be speculating with respect as to
20 whether it's peer-reviewed or not?

21 A. Yes.

22 Q. So do you agree or disagree with this
23 statement? Let me call it to your attention.
24 Moreover, the distribution of the incident of melanomas
25 is often higher on parts of the body least exposed to



1 sunlight.

2 MR. BARNES: Objection, foundation,
3 relevance, ER 803.

4 A. It would depend on the data they used to
5 generate that conclusion.

6 Q. (BY MR. MEYERS) You are familiar, though,
7 with cases where malignant melanoma appears on the body
8 other than in those areas exposed to ultraviolet light?

9 A. Yes, they're very uncommon, though.

10 Q. But they do occur?

11 A. Principally genitalia and rectal melanomas and
12 they are quite rare.

13 Q. But they do occur?

14 A. Yes, they do.

15 Q. And they're still called malignant melanoma?

16 A. Well, they are malignant melanomas.

17 Q. Are you aware of chemicals that cause the skin
18 to be particularly sensitive to ultraviolet light?

19 MR. BARNES: Objection, relevance.

20 A. Yes.

21 Q. (BY MR. MEYERS) What kinds of chemicals can
22 make the skin more susceptible or more sensitive to
23 ultraviolet radiation, Dr. Hackett?

24 A. The most common would be vitamin A.

25 Q. And how does that -- what's your understanding



1 of how that process works?

2 MR. BARNES: Objection, relevance.

3 A. I'm not sure I do understand how it works.

4 Q. (BY MR. MEYERS) Are you aware of anything
5 other than vitamin A as a chemical that causes the skin
6 to be more susceptible to the effects of ultraviolet
7 radiation?

8 A. There are derivatives of vitamin A such as
9 Accutane and other acne treatments, also there are some
10 antibiotics which can either make you prone to sunburn
11 or actually be photosensitizers.

12 Q. Let me call your attention to this summary.
13 In this piece -- this is Melanoma Risk Factors in the
14 Cancer Causes and Controls, Environmental Factors and
15 Etiology of Melanoma, and then we'll move on. It says,
16 In this piece we have argued that despite educational
17 programs designed to prevent melanoma, mortality and
18 incident rate for the disease have soared steadily.
19 Even on a conventional interpretation of the data, just
20 more than half of the presented cases of melanomas can
21 be explained solely as sun caused.

22 MR. BARNES: Objection, foundation,
23 relevance.

24 A. I question that statement. I think if you
25 look at probably the best database in the United States



1 on cancer, which is the Connecticut database, that's
2 the one the American Cancer Society uses, melanoma has
3 been increasing, it's been moving like compound
4 interest since about 1900. The cause of that has not
5 been clarified at all.

6 Q. (BY MR. MEYERS) That does correlate with the
7 industrial age, doesn't it, Dr. Hackett?

8 MR. BARNES: Objection, calls for
9 speculation, relevance.

10 A. No, you would have to go back to the late
11 1700's to do that.

12 Q. (BY MR. MEYERS) We have argued -- let me
13 continue here with this melanoma risk factors section.
14 We have argued that the dominant interpretation in
15 which increasing exposure to sunlight account for the
16 increasing incidence of melanomas is a misleading
17 oversimplification.

18 MR. BARNES: Objection, foundation,
19 relevance, ER 803.

20 A. I think the -- it's a foolish statement which
21 ignores several -- several basic things that have
22 changed since the early 1900's. Now, if you lived in
23 Seattle in 1910 and you started walking around with
24 your shirt off, you would probably get arrested. If a
25 woman in 1910 showed up in a tank top and a pair of



1 shorts, she would probably get swept away. Customs and
2 dress have led to significantly more light exposure in
3 people. You can walk around wearing things today that
4 could probably get you arrested a hundred years ago.

5 MR. MEYERS: Move to strike as
6 nonresponsive.

7 Q. (BY MR. MEYERS) Dr. Hackett, let me move on
8 to another article.

9 Did you review the Clinics in Dermatology
10 article, Non-Solar Factors in Melanoma Risk?

11 A. Yes.

12 Q. And the primary argument set forth in this
13 article is that a variety of non-solar factors have
14 been suggested and studied as possible causes of
15 cutaneous melanoma.

16 Would you agree that that's the thrust of the
17 article?

18 MR. BARNES: Objection, foundation, ER
19 803 relevance.

20 A. Yes.

21 Q. (BY MR. MEYERS) And they write, In contrast,
22 in a review of the literature on the association
23 between occupation and melanoma risk, Austin and
24 Reynolds drew attention to the consistency of studies
25 with respect to the increased risk of melanoma that was



1 found in some chemicals and technically advanced
2 industries and appeared to be associated with exposure
3 to unusual chemicals or ionizing radiation.

4 MR. BARNES: Objection --

5 Q. (BY MR. MEYERS) Do you recall that being
6 developed in this article?

7 A. Yes.

8 MR. BARNES: Objection, foundation,
9 relevance, ER 803.

10 Q. (BY MR. MEYERS) Do you agree with that?

11 A. The application -- it's a very general
12 statement. The specific applications of that will vary
13 and by and large are lacking on data, with the
14 exception of the oil industry and some chemical
15 industries.

16 Q. What about polyvinyl chlorides, is there an
17 association that you recognize between those chemical
18 materials and cancer?

19 MR. BARNES: Objection, foundation,
20 relevance.

21 A. Yes.

22 Q. (BY MR. MEYERS) And do you know what
23 percentage of furniture or carpeting or other
24 components of a house are made out of vinyl chlorides?

25 MR. BARNES: Objection, foundation,



1 relevance.

2 A. I couldn't tell you.

3 Q. (BY MR. MEYERS) Do you know whether
4 firefighters, in responding to fire suppression
5 activities in homes, come into contact with vinyl
6 chlorides in any form?

7 MR. BARNES: Objection, foundation,
8 relevance.

9 A. I don't know.

10 Q. (BY MR. MEYERS) Do you know if they come into
11 contact with benzine?

12 MR. BARNES: Same objections.

13 A. I'm not sure.

14 Q. (BY MR. MEYERS) Do you recognize benzine as a
15 carcinogenic -- as a carcinogen?

16 MR. BARNES: Objection, relevance,
17 foundation.

18 A. I would have to look at that.

19 Q. (BY MR. MEYERS) Are you familiar with
20 polychlorinated biphenyls?

21 A. I've heard of them.

22 Q. Are you aware of whether firefighters come
23 into contact with polychlorinated biphenyls?

24 MR. BARNES: Objection, foundation,
25 relevance, calls for speculation.



1 A. I'd have to check on that.

2 Q. (BY MR. MEYERS) Let me call your attention to
3 the -- this provision set forth in the Clinics in
4 Dermatology article on Non-Solar Factors in Melanoma
5 Risk. Morpurgo and Maggini drew attention to a
6 possible role of aromatic compounds in the induction of
7 melanoma. They mentioned three compounds that might be
8 partly responsible for the increasing trend in melanoma
9 incidence: Polychlorinated biphenyls, Levadopa and 712
10 dimethylbenzanthracene,
11 D-I-M-E-T-H-Y-L-B-E-N-Z-A-N-T-H-R-A-C-E-N-E.

12 Dr. Hackett, are you aware of whether any of
13 those three chemicals is found in household fires?

14 MR. BARNES: Objection, foundation,
15 relevance, ER 803.

16 A. I have to give you two answers to that.
17 Number 1, I don't know. Number 2, I would point out
18 two words in that statement, "possible" and "might."

19 Q. (BY MR. MEYERS) I understand that, thank you.
20 Are you aware of that portion of the article
21 that says, Repeated applications of 712
22 dimethylbenzanthracene on to the skin of albino guinea
23 pigs produced metastasizing melanomas with clinical
24 characteristics similar to those of human melanoma?

25 MR. BARNES: Objection.



1 Q. (BY MR. MEYERS) Do you remember reviewing
2 that?

3 A. Yes.

4 MR. BARNES: Objection, foundation,
5 relevance, ER 803.

6 Q. (BY MR. MEYERS) Dr. Hackett, can we go around
7 subjecting human beings to malignant melanoma for test
8 purposes or trial purposes?

9 A. No, but you can think about that data a
10 minute. And the reason I say that is, if that were the
11 case, I'd probably be a little more receptive about
12 firefighters who had melanomas on their face or neck.

13 Q. Now, you talked about some of the British
14 articles. Are you familiar with the British Journal of
15 Industrial Medicine?

16 A. Marginally.

17 Q. Are you familiar with the article that
18 opposing counsel has provided to you, Melanoma and
19 Occupation, Results of a Case-Control Study in the
20 Netherlands?

21 A. Yes.

22 Q. Are you familiar with this portion of that
23 article, and I bring to your attention: Other
24 occupational groups in which more or less consistently
25 increased risks of melanoma have been found are



1 firemen, the armed forces and healthcare workers such
2 as veterinarians, dentists, pharmacists and doctors.

3 Do you recall that?

4 MR. BARNES: Objection, foundation,
5 relevance, ER 803.

6 A. Yes.

7 Q. (BY MR. MEYERS) Does that change your
8 opinions with respect to a relationship between
9 malignant melanoma and firefighting?

10 MR. BARNES: Same objections.

11 A. No.

12 Q. (BY MR. MEYERS) And I asked you this on one
13 article, but to be fair let me ask you, on many of
14 these articles there are footnotes and there are a
15 number of other articles that are cited at the end in
16 the appendix to this article or a table of authorities.
17 Fair to say that you didn't go look those up
18 independently?

19 A. That's correct.

20 Q. That saves us some time, Dr. Hackett.

21 A. Got all afternoon.

22 Q. Are you familiar with the portion of the
23 Textbook of Clinical, Occupational and Environmental
24 Medicine that was provided to you in this case?

25 A. Yes.



1 Q. Are you familiar with and do you recall, let
2 me bring this to your attention, Cutaneous malignant
3 melanoma has been associated with polycyclic aromatic
4 hydrocarbon exposure. High rates of death from
5 malignant melanoma have been found in the petrochemical
6 and oil refinery industries as well as in workers
7 exposed to cutting oils. It has been suggested that
8 aromatic compounds may interfere with melanocytic
9 activity in some way and thus interact with sun
10 exposure in the causation of malignant melanoma?

11 MR. BARNES: Objection.

12 Q. (BY MR. MEYERS) Are you familiar with that,
13 do you recall that?

14 MR. BARNES: Objection, foundation, ER
15 803, relevance.

16 A. I recall that.

17 Q. (BY MR. MEYERS) Do you agree with the premise
18 that chemical compounds can interfere with melanocytic
19 activity and thus cause a more harsh reaction by solar
20 exposure that leads to malignant melanoma?

21 MR. BARNES: Objection, form. Calls for
22 speculation.

23 A. There's very little good data to support that.

24 Q. (BY MR. MEYERS) But that's the --

25 A. That's what they want you to believe, yeah.



1 Q. And this is a -- out of a textbook used in
2 clinical occupation and environmental medicine courses,
3 correct, Doctor?

4 MR. BARNES: Objection, calls for
5 speculation.

6 A. That's correct.

7 Q. (BY MR. MEYERS) Did you look at any of the
8 additional material with respect to firefighter cancer
9 in the New Fire Environments, do you recall seeing that
10 article?

11 A. Not -- not specifically, but I'm sure I did.

12 Q. Let me see if I can find a couple of questions
13 and we'll dial in on that.

14 Do you recall seeing anything that talked
15 about the chemicals that were found on firefighter
16 gloves?

17 A. No.

18 Q. Do you recall reading anything that talked
19 about the chemicals found on firefighter hoods; that
20 is, the cover to their bunker gear below their helmet?

21 A. No.

22 Q. Do you recall seeing anything about chemical
23 types contaminating firefighter gear at all?

24 A. I question the relevance of that frankly.

25 Q. Well, if firefighter gear is covered with



1 polycyclic aromatic hydrocarbons, does that have
2 anything to do with influencing your opinion with
3 respect to firefighter exposures to cancer-causing
4 agents, in particular those linked to malignant
5 melanoma?

6 MR. BARNES: Objection, foundation,
7 calls for speculation.

8 A. I would think it would only apply if they wore
9 their clothes inside out.

10 Q. (BY MR. MEYERS) And so you don't think that
11 any of this can get past their personal protective
12 equipment; is that what you're saying?

13 MR. BARNES: Objection, mischaracterizes
14 prior testimony, form, foundation.

15 A. That's why it's called protective equipment.

16 Q. (BY MR. MEYERS) Do you believe that the
17 personal protective equipment worn by City of Bellevue
18 firefighters is 100 percent effective?

19 MR. BARNES: Objection, form,
20 foundation, calls for speculation.

21 A. I don't know.

22 Q. (BY MR. MEYERS) And so if it wasn't 100
23 percent effective, you wouldn't have to wear the
24 clothes inside out to come into contact with these
25 chemicals, would you, Dr. Hackett?



1 MR. BARNES: Objection, form,
2 foundation, relevance, calls for speculation.

3 A. That still begs the question as to whether
4 it's causative.

5 Q. (BY MR. MEYERS) I understand your position
6 with respect to your opinion. Did you see anything
7 about the analysis of those chemicals that were found
8 on the gloves and the hoods and actually on the coats
9 at the wristlet of the firefighters' personal
10 protective equipment?

11 A. I'm sure I did if I read the article.

12 Q. Do you know the effective rate of
13 self-contained breathing apparatus masks, whether
14 they're 100 percent or not, Dr. Hackett?

15 MR. BARNES: Objection, calls for
16 speculation.

17 A. Depends on which kind of -- Draggers are
18 probably very good.

19 Q. (BY MR. BARNES) And do you know -- go ahead.

20 A. The rebreathers are probably quite good. I
21 can't give you a number, though.

22 Q. Do you know what type of self-contained
23 breathing apparatus, and in particular the face masks,
24 that have been used by the City of Bellevue fire
25 department since Del Spivey became a firefighter?



1 A. No, I don't.

2 Q. Do you know whether they have improved in
3 terms of their effectiveness and protection levels?

4 MR. BARNES: Objection, form, relevance.

5 A. I have no idea.

6 Q. (BY MR. MEYERS) Do you as a dermatologist
7 deal with the concept of fine and ultra fine particles
8 for ingestion or exposure to skin?

9 A. Refresh my memory, please.

10 Q. Exposures associated with toxins that hit the
11 skin may be absorbed -- the premise is may be absorbed
12 depending on their size and their structure; do you
13 agree with that?

14 MR. BARNES: Objection, foundation,
15 relevance, speculation.

16 A. It depends more on their solubility. If
17 they're water soluble, the answer is no. If they're
18 fat soluble, the answer is maybe.

19 Q. (BY MR. MEYERS) Are you familiar with the
20 skin absorption rates on the scalp, the forehead or the
21 jaw?

22 MR. BARNES: Objection, form,
23 foundation, relevance.

24 A. I've seen the data.

25 Q. (BY MR. MEYERS) And would you agree that with



1 respect to different parts of the body, the areas that
2 have higher absorption rates are the scalp, the
3 forehead, the jaw and actually the scrotum?

4 A. Yeah.

5 Q. Do you agree that absorption through skin
6 increases as temperature increases?

7 MR. BARNES: Objection, form, incomplete
8 hypothetical, relevance.

9 A. Again, the most critical issue in absorption
10 is solubility.

11 Q. (BY MR. MEYERS) And I'm not arguing that.
12 I'm saying, as a further component to this, would you
13 agree or do you know whether percutaneous absorption
14 increases with temperature increases?

15 MR. BARNES: Objection, foundation,
16 relevance, calls for speculation.

17 A. As a marginal component, yes.

18 Q. (BY MR. MEYERS) And so would you agree that
19 firefighters in actual fire suppression activities are
20 exposed at higher than normal temperatures?

21 A. I would assume yes.

22 Q. Now, we talked earlier and you said that
23 malignant melanoma rates have soared in the last 100
24 years; is that accurate?

25 A. I'd say they've increased, "soared" would be a



1 bit dramatic.

2 Q. Would you agree that there's actually a debate
3 among experts that -- whether this is actually a true
4 increase in the malignant melanoma rate or whether it's
5 due to better detection and improved surveillance?

6 MR. BARNES: Objection, calls for
7 speculation.

8 A. I would refer you to the Yale Connecticut
9 Cancer Database and the American Cancer Society.
10 That's probably the best data you're going to find.

11 Q. (BY MR. MEYERS) And do you know whether they
12 have questioned whether the debate is valid that these
13 may not be true increases in malignant melanoma, they
14 may be a result of better detection and improved
15 surveillance?

16 A. To a marginal extent, but if you look at
17 excised melanomas, and the Connecticut database goes
18 back to 1802 or 1803, there clearly is an increase in
19 the number of excised melanomas. Now, is that because
20 of higher examination? Not if you're getting to
21 excised tumors, I think not.

22 Q. Are you familiar with the article Melanoma
23 Epidemiology Risk Factors and Clinical Phenotypes?

24 A. Yes.

25 Q. And that talks about, Recent advancements in



1 the biology and molecular genetics of melanoma are
2 accompanied by an improved appreciation of the role of
3 both intrinsic and extrinsic risk factors and their
4 contribution to disease.

5 Would you agree that that's at least the
6 thrust of that article?

7 MR. BARNES: Objection, form,
8 foundation, relevance, ER 803.

9 A. That's the thrust of the article, yes.

10 Q. (BY MR. MEYERS) And that among the melanoma
11 risk factors called out in this article, occupation is
12 one of them in addition to fair skin and age, correct?

13 A. Yes.

14 MR. BARNES: Same objections.

15 Q. (BY MR. MEYERS) And family history?

16 A. Yes.

17 Q. Dr. Hackett, are you familiar with the phases
18 of fire response activities conducted by firefighters?

19 A. Not generally, no.

20 Q. Let me ask you in specific terms, maybe these
21 will be more familiar.

22 Are you familiar with the term "fire
23 suppression activity"?

24 A. I've heard it used.

25 Q. Do you have an understanding of what it means?



1 A. Not specifically, no.

2 Q. Do you have an understanding of the term
3 "overhaul" in relation to activities conducted after
4 fire suppression?

5 A. No.

6 Q. Do you know what types of personal protective
7 equipment are worn during fire suppression activities?

8 A. I would assume a helmet, hood, some kind of
9 breathing protection, some kind of protective clothing,
10 gloves and boots.

11 Q. Do you know what kind of personal protective
12 equipment is worn by City of Bellevue firefighters with
13 respect to the overhaul phase after the fire has been
14 controlled?

15 A. No.

16 MR. BARNES: Objection, foundation,
17 calls for speculation.

18 A. No, I don't.

19 Q. (BY MR. MEYERS) Do you have an opinion as to
20 whether or not diesel exhaust exposures can cause
21 malignant melanoma?

22 MR. BARNES: Objection, foundation,
23 relevance.

24 A. I'm not aware of data that supports that nor a
25 linkage to firefighters.



1 Q. (BY MR. MEYERS) Do you know whether the
2 apparatus, the equipments, the engine, the medic units
3 are powered by gas engines or diesel engines?

4 A. I don't know.

5 Q. Do you know what the particulate matter is
6 that is created by the City of Bellevue fire apparatus
7 including their engines, their ladders, their other
8 large equipment?

9 A. No.

10 MR. BARNES: Objection, relevance,
11 ER 403 as well.

12 A. Not specifically.

13 Q. (BY MR. MEYERS) Do you know whether the City
14 of Bellevue shuts off the engines to its fire apparatus
15 when they're responding to a call or whether those
16 engines continue to run from the time that the
17 firefighters arrive on scene until the time they get in
18 the vehicles and leave?

19 MR. BARNES: Objection, relevance,
20 ER 403 as well.

21 A. I would assume if they're trying to run pumps
22 the engines would remain on.

23 Q. (BY MR. MEYERS) In any specific way are you
24 familiar with the carcinogens that are found in rubber
25 tires?



1 MR. BARNES: Objection, relevance,
2 foundation, calls for speculation.

3 A. No.

4 Q. (BY MR. BARNES) Are you familiar with
5 carcinogens that are found in asphalt shingles on
6 houses or residential structures?

7 MR. BARNES: Same objections.

8 A. No.

9 Q. (BY MR. MEYERS) Are you familiar with the
10 carcinogens found in building insulation?

11 MR. BARNES: Same objections.

12 A. No.

13 Q. (BY MR. MEYERS) Are you familiar with the
14 carcinogens found in electrical wiring insulation?

15 MR. BARNES: Same objections.

16 A. No.

17 Q. (BY MR. MEYERS) Are you familiar with the
18 carcinogens found in paints, varnishes and cleaning
19 supplies?

20 MR. BARNES: Same objections.

21 A. No.

22 Q. (BY MR. MEYERS) Are you familiar with the
23 carcinogens found in pressure treated wood?

24 MR. BARNES: Same objections.

25 A. No.



1 Q. (BY MR. MEYERS) Are you familiar with the
2 carcinogens found in plywood, particle board or
3 structural panels?

4 MR. BARNES: Same objections.

5 A. No.

6 Q. (BY MR. MEYERS) Are you familiar with the
7 carcinogens found in upholstery in household furniture?

8 MR. BARNES: Same objections.

9 A. I don't know if there are any carcinogens in
10 upholstery.

11 Q. (BY MR. MEYERS) Would you agree that
12 formaldehyde is a carcinogen?

13 MR. BARNES: Objection, relevance.

14 A. It's a sensitizer, I don't know if it's a
15 carcinogen.

16 Q. (BY MR. MEYERS) Do you know if polybrominated
17 diphenyl ethers are carcinogens?

18 MR. BARNES: Objection, relevance.

19 A. I don't know.

20 Q. (BY MR. MEYERS) Do you know whether those are
21 contents of upholstery?

22 A. I don't know.

23 Q. Do you know whether dioxins are carcinogens?

24 MR. BARNES: Objection, relevance.

25 A. Allegedly, yes.



1 Q. (BY MR. MEYERS) And do you know whether
2 dioxins are used in the manufacture of upholstery and
3 in the contents?

4 MR. BARNES: Objection, relevance,
5 foundation.

6 A. I don't know.

7 Q. (BY MR. MEYERS) Are you familiar with the --
8 whether or not there are any carcinogens in plastic
9 furniture or plastic toys?

10 MR. BARNES: Objection, relevance, ER
11 403 to the entire line of questioning.

12 A. I don't know.

13 Q. (BY MR. MEYERS) Are you familiar with whether
14 the plastic items found in households contain
15 carcinogens?

16 MR. BARNES: Same objections.

17 A. I don't know, I would assume if there were
18 flagrant carcinogens, they wouldn't be on the market.

19 Q. (BY MR. MEYERS) Are you familiar with whether
20 there are carcinogens in either the flooring or the
21 siding in residential housing?

22 A. I don't know.

23 Q. Dr. Hackett, are you familiar with any link
24 between disruptions of the circadian rhythm and
25 malignant melanoma?



1 MR. BARNES: Objection, relevance.

2 A. No.

3 Q. (BY MR. MEYERS) Have you read articles that
4 suggest there's a correlation between disruption of the
5 circadian rhythm and malignant melanoma, whether you
6 accept the principle or not?

7 MR. BARNES: Objection, foundation,
8 relevance.

9 A. Yes.

10 Q. (BY MR. MEYERS) And you are aware that
11 firefighters for the City of Bellevue work 24-hour
12 shifts?

13 A. Yes.

14 Q. And that there are times when they get little
15 or no sleep during the course of their 24-hour shift?

16 MR. BARNES: Objection, calls for
17 speculation.

18 A. That was my experience as an intern.

19 Q. (BY MR. MEYERS) You might see them at any
20 time, 24/7; is that fair?

21 A. Yes.

22 Q. They don't get to not respond to a call,
23 correct?

24 A. No.

25 Q. Now, other than the material that we've talked



1 about today that you responded to me or you responded
2 to opposing counsel, did you review any other documents
3 or policies or procedures or materials that we haven't
4 talked about, Dr. Hackett?

5 A. Not that I can recall.

6 Q. And would you agree that good doctors can
7 frequently disagree with one another about the
8 causation of cancers or occupational diseases or even
9 injury?

10 A. Good doctors don't disagree that much.

11 Q. So in every case where there's been a doctor
12 on the other side of you, they were bad doctors and you
13 were the good doctor?

14 MR. BARNES: Objection, argumentative.

15 A. They might have been misinformed doctors.

16 Q. (BY MR. MEYERS) So there is no room in your
17 thinking that reasonable minds can differ with respect
18 to causation of injury or occupational disease?

19 MR. BARNES: Objection, relevance,
20 foundation, argumentative.

21 A. That's not a matter of opinion, that's a
22 matter of data, and in the absence of data, you can't
23 draw a conclusion.

24 Q. (BY MR. MEYERS) Fair to say that in every one
25 of the cases where you have testified against the



1 causation of cancer in firefighters, and in particular
2 the malignant melanoma in the three cases that I've
3 seen you on, there was an expert on the other side who
4 disagreed with your opinion?

5 MR. BARNES: Objection, foundation,
6 relevance, ER 403.

7 A. There was a physician on the other side who
8 disagreed with me.

9 Q. (BY MR. MEYERS) And the opinions expressed by
10 both of you in those cases, in fact there's more than
11 just "a" physician in many of these cases on both
12 sides, correct, Doctor?

13 A. Yes.

14 Q. And those doctors had disagreements with
15 respect to causation, not just with you, but between
16 themselves, and in fairness, with my doctor?

17 MR. BARNES: Objection, foundation,
18 calls for speculation.

19 A. Yes.

20 Q. (BY MR. MEYERS) So it's not unusual for --
21 and is there anything that you know about these doctors
22 that are involved in this case that would suggest that
23 they're not good doctors?

24 A. No.

25 Q. And so if they disagree with you with respect



1 to your opinions, is it because they're misinformed?

2 MR. BARNES: Objection, relevance,
3 foundation.

4 A. It could be a matter of their background,
5 their experience, their perceptions and their
6 information. It's not a simple thing, sir.

7 MR. MEYERS: No further questions.

8

9 REDIRECT EXAMINATION

10 BY MR. BARNES:

11 Q. Just a couple of housekeeping matters, Doctor.

12 I want you to take a look at the copy of your
13 report that you were referring to today that's been
14 marked as Exhibit Number 1, Doctor.

15 A. Uh-huh.

16 Q. Go through that for a second. On the very
17 last page, Doctor, is that report signed?

18 A. No.

19 Q. Do you believe that that was a draft report or
20 not the final product that was put out, Doctor?

21 A. I believe it -- it's what became the final
22 product.

23 Q. Okay. I'm going to hand you what I'll have
24 marked as Exhibit Number 2, Doctor. Could I get you to
25 turn to the last page of that? Is that your signature



1 on the last page of Exhibit Number 2, Doctor?

2 A. Yes, it is.

3 Q. Could I have you go through Exhibit Number 1
4 and Exhibit Number 2 for a second and determine if
5 there's any differences between Exhibit Number 1 and
6 Exhibit Number 2 other than the difference in font size
7 that you testified to earlier, Doctor.

8 MR. MEYERS: And a difference in one's
9 signed and one isn't.

10 MR. BARNES: Correct.

11 MR. MEYERS: I took your question to
12 mean that you wanted the doctor to review this down to
13 each and every comma or phrase or clause to make sure
14 that it was exactly the same as the one that I was
15 given, Counsel?

16 MR. BARNES: I asked him if -- well, the
17 question stands for itself.

18 A. (Witness reviewing document.)

19 I've reviewed both of these and the -- say for
20 the lack of signature on the one, these two reports are
21 identical.

22 Q. (BY MR. BARNES) So just let me make sure I
23 understand, Doctor. Exhibit Number 1 and Exhibit
24 Number 2 are identical in content; is that correct,
25 Doctor?



1 A. Word for word, punctation for punctuation,
2 save for the signature.

3 Q. So the only differences are in the font size
4 or formatting that appears between Exhibit Number 1 and
5 Exhibit Number 2?

6 A. Yes.

7 Q. As well as your signature appears on Exhibit
8 Number 2?

9 A. Yes.

10 Q. Okay. So Exhibit Number 2 would be your final
11 report because it bears your signature, Doctor?

12 A. Yes.

13 MR. BARNES: That's all the question I
14 have at this point, thank you.

15

16 REXCROSS EXAMINATION

17 BY MR. MEYERS:

18 Q. Did you provide a copy of this report or
19 preliminary form to opposing counsel to review before
20 you finalized that report and put your signature on it?

21 A. No.

22 Q. Do you have any understanding of why these
23 reports exist in different format even though your
24 testimony is that they're exactly the same in terms of
25 their content, Dr. Hackett?



1 A. They are exactly the same, you'll have to take
2 that up with the people who printed it.

3 Q. Well, why would one be different than the
4 other is my question, and I take it you don't know the
5 answer to that?

6 A. That's correct.

7 Q. But when you do a report, it's your intention
8 that everybody gets the same material regardless of who
9 is representing whom?

10 A. It would appear they have.

11 Q. Well, we'll review that.

12 MR. MEYERS: Exhibits 1 and 2 are part
13 of this deposition. I'll order a copy of this
14 deposition, e-trans, and I'll ask you to pdf those two
15 exhibits. Thank you very much.

16 MR. BARNES: I'll take a copy as well.

17 MR. MEYERS: Actually he's ordering, I'm
18 taking a copy.

19 (Deposition Exhibit 2 was
20 marked for identification.)

21 (Deposition concluded at 2:10 p.m.)

22 (Signature was reserved.)

23

24

25



**Appendix J:
Order Granting In Part
Respondent City of Bellevue's
Motion for Determination of Legal
Standard on Review and to Strike
Portions of Dr. Coleman's
Testimony**

The Honorable Samuel Chung
Hearing Date: Friday, March 27, 2015 at 9:00 a.m.
(With Oral Argument)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE and
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

Cause No. 14-2-29233-3

~~PROPOSED~~ ORDER GRANTING
RESPONDENT CITY OF BELLEVUE'S
MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW AND
TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

In part

THIS MATTER having come on regularly before the undersigned judge of
the above-entitled court; all parties having appeared through their attorneys of
record; the court having heard arguments of counsel and reviewed the following:

1. Respondent City of Bellevue's Motion for Determination of Legal
Standard on Review and to Strike Portions of Dr. Coleman's Testimony;

2. Declaration of Chad R. Barnes with attached exhibits;

3. Plaintiff's response in Opposition to *City's Motion*; and

4. Declaration of Ron Meyer's; and

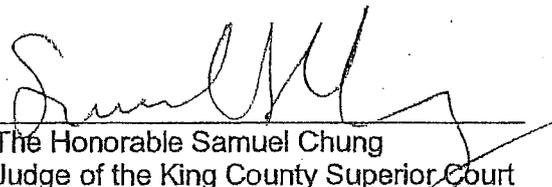
5. City of Bellevue's Reply in support of Motion

and the Court being fully advised in the premises, now, therefore, it is hereby

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ORDERED, ADJUDGED, AND DECREED that Respondent City of
Bellevue's Motion for Determination of Legal Standard on Review ~~and to Strike~~
~~Portions of Dr. Coleman's Testimony~~ is GRANTED and that: ~~(1) Determination of~~
whether the City ^{has} met its burden of ~~production~~ to rebut the presumption of
occupational disease within the meaning of RCW 51.32.185 ~~is a question of law to~~
~~be decided by the judge~~ and ^{and the Court denies the City's motion to strike} (2) Portions of Dr. Coleman's Testimony for which a
~~proper foundation was not established or that were based on hearsay and~~
~~improper leading questions be stricken as follows.~~

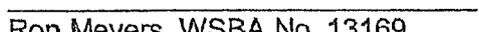
DONE IN OPEN COURT this 27th day of March, 2015.


The Honorable Samuel Chung
Judge of the King County Superior Court

Presented by:
CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

Approved as to Form, Notice of
Presentation Waived:
Ron Meyers & Associates, PLLC

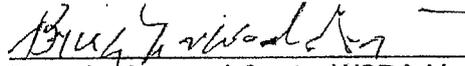

Chad R. Barnes, WSBA No. 30480
Assistant City Attorney


Ron Meyers, WSBA No. 13169
Attorney for Appellant Spivey

1 Attorney for Respondent City of
2 Bellevue

3 Approved as to Form, Notice of
4 Presentation Waived:

5 Department of Labor & Industries

6 

7 Beverly Norwood Goetz, WSBA No. 8434
8 Attorney for Respondent Department of
9 Labor and Industries
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**Appendix K:
Respondent City of Bellevue's
Motion for Determination of Legal
Standard of Review and to Strike
Portions of Dr. Coleman's
Testimony**

RECEIVED

MAR 02 2015

AGO L & I DIVISION
SEATTLE VIA E-MAIL

The Honorable Samuel Chung
Hearing Date: March 27, 2015 at 9:00 a.m.
(With Oral Argument)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DELMIS SPIVEY,

Appellant,

v.

CITY OF BELLEVUE and
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

Cause No. 14-2-29233-3

RESPONDENT CITY OF BELLEVUE'S
MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW AND
TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

INTRODUCTION

This is a workers' compensation appeal under RCW Title 51, the Industrial Insurance Act. Appellant, Delmis Spivey, ("Spivey") has appealed the decision by the Board of Industrial Insurance Appeals ("Board"), dated October 9, 2014. The Board's order affirmed the Department of Labor and Industries decision finding that Appellant Spivey's malignant melanoma on his upper back is not an occupational disease.

1 The Board's entire record is contained in the Certified Appeal Board Record
2 on file with this Court. The trial in King County Superior Court will be limited to a
3 reading of the testimony presented at the Board hearing to a jury.

4 I. RELIEF REQUESTED

5 Respondent City of Bellevue requests an order determining that whether the
6 City met its burden of production to rebut the presumption of occupational disease
7 within the meaning of RCW 51.32.185 is a question of law to be decided by the
8 judge.

9 The City further requests an order striking portions Dr. Coleman's testimony
10 for which a proper foundation was not established or that were based on hearsay
11 and improper leading questions.

12 II. STATEMENT OF FACTS

13 Procedural History

14 Appellant, Delmis Spivey filed a claim for an occupational injury with the
15 Department of Labor and Industries ("Department"). Spivey's claim for benefits
16 was rejected by the Department as not being an occupational disease as
17 contemplated by RCW 51.32.185 and RCW 51.08.140. Spivey appealed the
18 Department's denial of his claim to the Board of Industrial Insurance Appeals. A
19 hearing was conducted and upon completion of the hearing an Industrial Appeals
20 Judge issued a Proposed Decision and Order on July 2, 2014 in favor of Spivey.
21

22 The City filed a Petition for Review of the hearing examiner's proposed
23 decision which was accepted by the Board on September 3, 2014. The full Board
24 of Industrial Insurance Appeals considered the City's arguments and reversed the
25

1 hearing examiner's decision. The Board's final Decision and Order affirmed the
2 order of the Department and concluded that the City had rebutted, by a
3 preponderance of the evidence, the statutory presumption embodied in
4 RCW 51.32.185 that Spivey's melanoma was an occupational disease. The Board
5 found that Spivey's melanoma was not an occupational disease within the
6 meaning of RCW 51.08.140.

7 Spivey has appealed the final Decision and Order of the Board to this Court.
8 Spivey argues that the melanoma on his back was the result of his work as a
9 firefighter. He further contends he is entitled to an evidentiary presumption of
10 occupational disease pursuant to RCW 51.32.185. The City does not dispute
11 RCW 51.32.185 is applicable in this matter. However, it is the City's position that it
12 has met its burden of production under RCW 51.32.185 by introducing evidence,
13 through both Spivey's own doctors and the City's experts that Spivey's melanoma
14 was the result of ultraviolet exposure from the sun and genetic factors. Thus, any
15 presumption in RCW 51.32.185 is negated, and the burden of proof to establish
16 that his melanoma is an occupation disease rests with Spivey.
17

18 Summary of Testimony Presented by the City

19 Delmis Spivey is a career firefighter who began working full-time with the
20 City of Bellevue in approximately 1995. When not working he enjoys a variety of
21 out-door recreational activities including coaching Junior and High School football
22 (over ten years as a coach), hunting, fishing, and bike riding for exercise and for a
23 while as a commuter. Spivey testimony 4/2/14 Tr. p. 159-162.
24
25

1 While working for the Bellevue Fire Department, Mr. Spivey admitted he
2 could not think of any incident where he was not wearing his SCBA (Self
3 Contained Breathing Apparatus) and personal protective equipment in the course
4 of fighting a fire. See Spivey testimony at 4/22/14 Tr. p. 164-165. Mr. Spivey also
5 testified that he has a number of recognized risk factors for melanoma including, a
6 predominately English background, freckles over his body, and a history of
7 sunburns as a kid that were severe enough to use Solarcane. Id. at p. 153-157.

8 During a routine dermatological exam on December 22, 2011, his
9 dermatologist Dr. Janie Leonhardt noted many lentigines (areas of pigmentation)
10 over his head, neck, trunk and extremities. Leonhardt Dep. p. 27, lines 4-23.
11 Lentigines, or lentigos, also known as "sun freckles" are the result of cumulative
12 sun exposure over a person's lifetime. Id at p. 28-29 lines 22-1; p. 33-34, lines 19-
13 1. Due to its size and coloration, Dr. Leonhardt performed a shave biopsy of an
14 atypical lentigo on Mr. Spivey's upper back below his collar line. The pathologist at
15 Virginia Mason confirmed the biopsy was of "sun-damaged skin" and represented
16 an evolving melanoma. Id. at p. 41-42 lines 7-5.

17
18 Dr. Leonhardt testified in this matter that the medical literature supports the
19 relationship between ultraviolet radiation exposure (sun) and the development of
20 melanoma. Id at p. 52 lines 2-4. Dr. Leonhardt further testified that she was not
21 aware of any scientific literature or medical evidence that would support a causal
22 link between development of melanoma and the inhalation of a substance or the
23 presence of a substance on a person's skin. Leonhardt Dep. p. 46 line 5 – p. 47
24 line 20.
25

1 Dr. John Hackett performed a medical exam of Mr. Spivey and reviewed his
2 medical records, and deposition. Dr. Hackett noted that UV light is the medically
3 recognized risk factor that is most strongly associated with the development of
4 melanoma. Hackett Dep. p. 9 lines 13-16. He further testified sun exposure is the
5 most common form of UV exposure. In Mr. Spivey's case he testified on a more
6 probable than not basis the melanoma on Mr. Spivey's upper back was the result
7 of ultraviolet light exposure and not work related. Id. at p. 27 lines 14-23. His
8 opinion was supported in part by the fact that the skin where the lesion developed
9 had evidence of sun damage on biopsy. Hackett Dep. p. 27 line 14 – p. 28 line 19.

10 Dr. Noel Weiss an epidemiologist from the University of Washington also
11 testified regarding the associations between UV exposure and melanoma and the
12 lack of scientific evidence to support chemical exposure as a potential cause for
13 melanoma. Dr. Weiss testified that on a more probable than not basis, based on
14 his review of scientific studies addressing firefighters and the development of
15 certain cancers it would be incorrect to infer firefighters are at an increased risk for
16 the development of melanoma. Weiss testimony 4/3/14 Tr. p. 24 line 9 – p. 25 line
17 14. Similarly, he testified that he is not aware of any studies that would indicate
18 that the inhalation of a substance including, diesel fumes, can lead to the
19 development of melanoma. Weiss testimony 4/3/2014 Tr. p. 28 line 7 – p. 30
20 line 3. Ultimately, Dr. Weiss testified that there is no causal association between
21 the exposure sustained as a firefighter and the development of melanoma. He
22 believes more likely than not that Mr. Spivey's illness was not related to his
23 firefighting. Id. at p. 86 lines 1-16.
24
25

1 Dr. Andy Chien is a dermatologist and melanoma researcher for the
2 University of Washington. He is a peer reviewer for 10-12 scientific journals and
3 has published articles on the risk factors for melanoma. Chien testimony 4/3/14
4 Tr. p. 92 lines 19 – p. 93 lines 7.

5 Dr. Chien testified that the two most strongly accepted causes of malignant
6 melanoma are genetics and ultraviolet light. Id. at p. 108 lines 4-12. He explained
7 that 85% of the gene mutations associated with the development of melanoma are
8 attributable to an ultraviolet light signature. Chien testimony 4/3/14 Tr. p. 97 line
9 16 – p. 99 line 11. Even a one-time use of a tanning bed increases the risk of
10 developing melanoma. Id. at p. 113 lines 6-16. Addressing, Mr. Spivey's theory
11 that exposure to toxic substances in the course of firefighting caused his
12 melanoma, Dr. Chien explained, there is no medical research to indicate that the
13 inhalation of a substance including smoke, soot, diesel fumes, or "polycyclic
14 aromatic hydrocarbon" can lead to the development of malignant melanoma.
15 Chien 4/3/14 Tr. p. 113 lines 24 – p. 115 lines 8. Dr. Chien also addressed
16 whether it was possible to develop melanoma due to absorption through the skin.
17 Dr. Chien testified, there is no evidence the exposure to soot, ash, or diesel fumes
18 on a person's skin can lead to the development of melanoma. Chien 4/3/14 Tr.
19 p. 115 lines 9-18
20

21 III. STATEMENT OF THE ISSUES

- 22 1. Is a decision whether the City met its burden of product to rebut the
23 presumption of occupation disease within RCW 51.32.185 a question
24 of law to be decided by the judge?
25

1 2. Should portions of Dr. Coleman's testimony be stricken due to a lack
2 of foundation and/or improper use of the learned treatises exception to
3 the hearsay rule under ER 803(a)(18).

4 IV. EVIDENCE RELIED UPON

5 1. Declaration of Chad Barnes, with attached portions of the Board of
6 Industrial Insurance Appeals record.

7 V. LEGAL ANALYSIS

8 A. Whether the City met its burden of proof to rebut the presumption
9 of occupation disease within RCW 51.32.185 is a question of law to
10 be decided by the judge.

11 Appellant Review of Board's Order

12 RCW 51.52.115 provides the Superior Court authority to review decisions of
13 the Board. Although the Superior Court's review of the Board's decision is de
14 novo, the Superior Court acts in an appellate capacity. RCW 51.52.115.
15 However, the findings and decision of the Board of Industrial Insurance Appeals
16 are presumed to be correct. WPI 155.03. The Board's decision shall be reversed
17 only if the Board misconstrued the law or found facts inconsistent with the
18 preponderance of the evidence. RCW 51.52.115; *McClelland v. ITT Rayonier*,
19 65 Wn.App. 386, 828 P.2d 1138 (1992).

20 Burden of Proof

21 In any worker's compensation appeal where the issue is a worker's
22 entitlement to benefits, the ultimate burden of proof is at all times with the worker.
23 *Olympic Brewing Co. v. Dept. of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d
24 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52
25

1 Wn.2d 33, 323 P.2d 241 (1958). In this case, Appellate Spivey bears the burden
2 of proof to establish the Board's decision should be overturned. WPI 155.03;
3 RCW 51.52.115.

4 Definition of Occupational Disease

5 RCW 51.08.140 defines "occupational disease" as "such disease or
6 infection as arises naturally and proximately out of employment." The leading case
7 interpreting this statute is Dennis v. Department of Labor and Industries, 109
8 Wn.2d 467, 745 P.2d 1295 (1987). In Dennis the Washington Supreme Court held
9 that:

10 ...a worker must establish that his or her occupational disease
11 came about as a matter of course as a natural consequence or
12 incident of distinctive conditions of his or her particular employment.
13 The conditions need not be peculiar to, nor unique to, the workers'
14 particular employment. Moreover, the focus is upon conditions
15 giving rise to the occupational disease, or the disease-based
16 disability resulting from work-related aggravation of a non work-
17 related disease, and not upon whether the disease itself is common
18 to that particular employment. The worker, in attempting to satisfy
19 the "naturally" requirement, must show that his or her particular
20 work conditions more probably caused his or her disease or
21 disease-based disability than conditions in everyday life or all
22 employments in general; the disease or disease-based disability
23 must be a natural incident of conditions of that worker's particular
24 employment. Finally, the conditions causing the disease or
25 disease-based disability must be conditions of employment, that is,
conditions of the workers' particular occupation as opposed to
conditions coincidentally occurring in his or her workplace.
(Emphasis in original)

Dennis, 109 Wn.2d at 481.

22 Occupational Disease and RCW 51.32.185's Rebuttal Evidentiary
23 Presumption

24 RCW 51.32.185(1) provides a rebuttable evidentiary presumption for
25 firefighters with certain medical conditions:

1 In the case of firefighters . . . there shall exist a *prima facie*
2 *presumption* that: (a) respiratory diseases; (b) any heart problems,
3 experienced within seventy-two hours of exposure to smoke,
4 fumes, or toxic substances, or experienced within twenty-four hours
of strenuous physical exertion due to firefighting activities; (c)
cancer; and (d) infectious diseases are occupational diseases
under RCW 51.08.140.

5 The statute also contains a rebuttal provision:

6 This presumption of occupational disease may be rebutted by a
7 preponderance of the evidence. Such evidence may include, but is
8 not limited to, use of tobacco products, physical fitness and weight,
9 lifestyle, heredity factors, and exposure from other employment or
nonemployment activities.

10 RCW 51.32.185(1).

11 In *Raum v City of Bellevue*, 171 Wn.App. 124, 286 P.3d 695 (2012), review
12 denied. 176 Wn.2d 1040 (2013), Division I of the Court of Appeals addressed the
13 operation of the rebuttable evidentiary presumption of RCW 51.32.185. The court
14 held that "if RCW 51.32.185's rebuttable presumption applies, that burden shifts to
15 the employer unless *or until* the employer rebuts the presumption." *Id.* at 142
16 (*emphasis added*).

17 Notably, "[t]he sole purpose of a presumption is to establish which party has
18 the burden of going forward with evidence on an issue." *Taufen v. Estate of Kirpes*,
19 155 Wn.App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk*
20 *Sewer Sys.*, 35 Wn.App. 840, 843, 670 P.2d (1983)). As the *Indian Trail* Court
21 pointed out, "its efficacy is lost when the other party adduces credible evidence to
22 the contrary. Presumptions are the "bats of the law, flitting in the twilight but
23 disappearing in the sunshine of actual facts." *Indian Trail*, 35 Wn.App. at 843
24 (*quoting Mackowik v. Kansas City, St. J. & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256,
25

1 262(1906)) To continue to apply the presumption is "but to play with shadows and
2 reject substance." *Mackowik*, 94 S.W. at 263.

3 RCW 51.32.185 creates a burden of production verses an ultimate burden
4 of persuasion. The use of the term "prima facie presumption" within the statute
5 contemplates that once contrary evidence is introduced (i.e. production) the
6 burden of proof returns to the claimant. This was recognized by the court in *Raum*,
7 where the court stated:

8 RCW 51.32.185's presumption is not conclusive and may be
9 rebutted by a "preponderance of the evidence." RCW 51.32.185(1).
10 If the employer rebuts the presumption, the burden of proof returns
11 to the worker to show he is entitled to benefits, i.e., that he suffers
12 from an "occupational disease" as defined in RCW 51.08.140. *If*
13 *both parties present competent medical testimony, the jury must*
14 *weigh the evidence to determine whether the worker's condition*
15 *"arises naturally and proximately out of employment."*
16 RCW 51.08.140

17 *Raum*, 171 Wn.App. at 152.

18 Expressed differently, once the City produces "competent medical
19 testimony" calling into question whether the claimant's condition qualifies as an
20 occupational disease, it has met its burden of production to rebut the presumption.
21 At that point, the presumption disappears and it is the jury's duty to weigh the
22 evidence and determine if the claimant has met its burden to prove their condition
23 arose naturally and proximately out of employment.

24 Whether a burden of production is met is decided by a judge, while the
25 issue of whether the burden of persuasion is met is decided by the trier of fact. See
Carle v. McChord Credit Union, 63 Wn.App. 93, 827 P.2d 1070 (1995); 14
A Washington Practice: Civil Procedure § 24:5 (2d ed. 2013) ("Sufficiency of the

1 evidence to take a case to the jury is a question of law.") *Grimwood v. Univ. of*
2 *Puget Sound, Inc.*, 110 Wn.2d 355, 362, 364, 753 P.2d 517 (1988) (Discussing the
3 burden of production in age discrimination cases).

4 As Spivey appealed the Board's decision to superior court, he bears the
5 burden of proving by a preponderance of the evidence that the Board erred when it
6 rejected his claim. See *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d
7 570 (1999). This is because, as the appealing party at superior court, Spivey
8 carries the burden of persuasion. See RCW 51.52.115("the burden of proof shall
9 be upon the party attacking [the Board's decision]"); *Harrison Mem'l Hosp. v.*
10 *Gagnon*, 110 Wn.App. 475, 484, 40 p.3d 1221 (2002) ("RCW 51.52.115 and the
11 applicable cases plainly allocate the burden of persuasion in superior court to
12 whoever is attacking the findings and decision of the board."). Therefore,
13 submitting whether the City met its burden of production to the jury as a factual
14 question, runs contrary to RCW 51.52.115 because it places an evidentiary burden
15 on the City on appeal. As the prevailing party before the Board the City does not
16 have a burden of proof on appeal. Similarly, interjecting whether the City met its
17 burden of production at the Board level to rebut a presumption of occupational
18 disease is immaterial on appeal because Spivey bears the ultimate burden of
19 persuasion. As the court in *La Vera v. Dep't of Labor and Indus.*, 45 Wn.2d 413,
20 275 P.2d 426 (1954) recognized because the appeal procedure is statutory and
21 defines that the party attacking the Board's decision has the ultimate burden "the
22 question of burden of proof at the board level is immaterial . . . [s]uperimposing of
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1 this procedural ramification would serve only to add complexity and confusion to a
2 fact-finding task which is already most difficult." *Id.* at 414-415.

3 In this case, whether the City met its burden of production to rebut the
4 presumption of occupation disease within RCW 51.32.185 a question of law that
5 should be decided by the judge. Although, the superior court reviewing a decision
6 under the Industrial Insurance Act considers the issues de novo, relying on the
7 certified board record, the findings and decision of the Board are presumed to be
8 correct. RCW 51.52.115; *Malang v. Dep't of Labor and Indus.*, 139 Wash.App. 677,
9 683, 162 P.3d 450 (2007); WPI 155.03. The Board's decision shall be reversed
10 only if the Board misconstrued the law or found facts inconsistent with the
11 preponderance of the evidence. RCW 51.52.115; *McClelland v. ITT Rayonier*,
12 65 Wn.App. 386, 828 P.2d 1138 (1992). Here, the Board found that "The statutory
13 presumption that Delmis P. Spivey has an occupational disease has been rebutted
14 within the meaning of RCW 51.32.185." *Decision and Order* pg. 7. This legal
15 conclusion, that the City has met its burden of production as defined by
16 RCW 51.32.185, should be decided by the judge in this case as a matter of law
17 before the case is submitted to the jury.

18
19 B. Portions of Dr. Coleman's testimony should be stricken.

20 Kenneth Coleman, M.D. J.D.'s (Dr. Coleman) perpetuation deposition was
21 taken on March 10, 2014. In large part, his testimony concerned a number of
22 publications that he was supplied by Appellant's counsel generally related to
23 firefighters, cancers, and toxic exposures. From a number of these articles
24 Appellant's counsel read select portions and only then sought Dr. Coleman's
25

1 opinion regarding whether the articles supported a causal link between Appellant
2 Spivey's development of melanoma and his occupation as a firefighter. However,
3 on cross-examination, Dr. Coleman testified that he does not have a subscription
4 to any of the journals or publications that were referenced, with the exception of
5 one textbook. Coleman Dep. at Pg. 30. The articles were provided to him by
6 Appellant's attorney. Coleman Dep. at Pg. 36. Most telling, Dr. Coleman conceded
7 that he did not do any independent investigation himself to determine if the
8 journals or publications were peer-reviewed. Coleman Dep. at Pg. 39.

9 Foundation

10 Under ER 803(a)(18) statements contained in published treatises and
11 pamphlets on the subject of medicine, *if established as authority*, are made
12 exceptions to the hearsay rule when used in cross or direct examination of an
13 expert witness. The published works may be established as authoritative by the
14 testimony or admission of the witness, by other expert testimony, or by judicial
15 notice. ER 803(a)(18). *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986).
16 However, it is not sufficient to show that particular witness regards the publication
17 as reliable. To establish a proper foundation, the proponent of the publication
18 must offer testimony to the effect that the publication is generally regarded as
19 authoritative among the audience to who it is directed. See 5C Wash. Prac.,
20 Evidenc Law and Practice §803.67 (5th ed.); *Schnedier v. Revici*, 817 F.2d 987 (2d
21 Cir. 1987) (Excluding medical article where proper foundation was not laid and
22 noting "*Fed.R.Evid. 803(18) advisory committee note*". Failure, therefore, to lay a
23 foundation as to the authoritative nature of a treatise requires its exclusion from
24
25

1 evidence because the court has no basis on which to view it as trustworthy.") In
2 this case, Appellant's counsel did not lay a proper foundation for the admission of
3 any of the articles that he read into the record and for which he then sought
4 Dr. Coleman's acquiescence. Dr. Coleman admitted that he did not do any
5 independent investigation himself to determine if the journals or publications were
6 peer-reviewed.

7 Dr. Coleman also does not have the necessary qualifications to
8 independently opine whether the publications and articles are regarding as
9 authoritative within their specialized fields. Simply put, Dr. Coleman is a part-time
10 family practice doctor; he is not a dermatologist, oncologist, or epidemiologist.
11 Dr. Coleman does not have any specialized training in biostatistics, industrial
12 hygiene, environmental medicine, occupational medicine, the diagnosis of
13 melanoma, the treatment of melanoma, or the study of melanoma. Consequently,
14 he lacks the necessary professional qualifications and expertise to testify that the
15 articles he reviewed, and responded to questions about, are generally regarded as
16 authoritative among their particular medical fields or technical specialties.
17 Therefore, there is no foundation for the reference to, or quoting from, the journals
18 and articles on which Dr. Coleman testified. Dr. Coleman's testimony regarding
19 the articles he reviewed and specific quotations read into the record by Appellant's
20 counsel should be stricken.

21
22 Improper use of ER 803(a)18.

23 During Dr. Coleman's direct examination, counsel for Appellant Spivey read
24 verbatim lengthy sections from several articles and then simply sought
25

1 Dr. Coleman's acknowledgement that Dr. Coleman relied on the information read
2 to him in forming his opinions. See Coleman Dep. pp. 19-25. This form of
3 questioning constitutes attorney testimony since it is Appellant's counsel that is
4 offering the contents of the article and is improper.

5 ER 803(a)18 provides:

6 To the extent called to the attention of an expert witness upon cross
7 examination or relied upon by the expert witness in direct
8 examination, statements contained in published treatises,
9 periodicals, or pamphlets on a subject of history, medicine, or other
10 science or art, established as a reliable authority by the testimony
or admission of the witness or by other expert testimony or by
judicial notice. If admitted, the statements may be read into
evidence but may not be received as exhibits.

11 The rule provides that portions of an article may be read to a jury. However, the
12 procedure differs between direct examination and cross-examination. The rule
13 contemplates that if "called to the attention of an expert witness upon cross
14 examination" portions of learned treatises could be read into evidence. In contrast,
15 on direct exam the expert witness may rely upon portions of a learned treatise.
16 Notably, for direct examination the rule does not contain the same proviso that
17 portions of the treatise can be "called to the attention" of the expert. The difference
18 being that, during a direct examination, reading a section of a learned treatise is
19 the equivalent of asking a leading question and substituting attorney testimony for
20 the testimony of the expert. In contrast, on cross-examination counsel may ask
21 leading questions to develop testimony. Here, during direct examination
22 Appellant's counsel read verbatim portions of articles to Dr. Coleman and then
23 sought his agreement with the propositions read. This is an improper use of
24

25

1 ER 803(a)18, and thus constitutes hearsay. The leading questions should be
2 stricken from the record.

3 Testimony to Be Stricken

4 Respondent requests the Court strike Dr. Coleman's testimony on the basis
5 found and/or an improper use of ER 803(a)18 as follows:

6 Coleman Perpetuation Deposition:

7 Page 5 line 23 to Page 11 line 21.	Recitation of articles reviewed 8 without foundation.
9 Page 12 line 24 to Page 14 line 22	Article read by Counsel to Dr. 10 Coleman and questions related to the article.
11 Page 15 line 8 to Page 16 line 23	Article read by Counsel to Dr. 12 Coleman and questions related to the article.
13 Page 16 line 24 to Page 18 line 1	Article read by Counsel to Dr. 14 Coleman and questions related to the article.
15 Page 18 line 2 to Page 19 line 10	Article read by Counsel to Dr. 16 Coleman and questions related to the article.
17 Page 19 line 11 to Page 20 line 8	Article read by Counsel to Dr. 18 Coleman and questions related to the article.
19 Page 20 line 9 to Page 21 line 7	Article read by Counsel to Dr. 20 Colman and questions related to 21 the article

22 Highlighted portions of the testimony Respondent requests be stricken are
23 attached as Exhibit No. 2 to the Declaration of Chad Barnes.

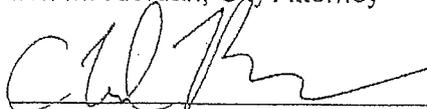
VI. CONCLUSION

1
2 Whether the City rebutted the evidentiary presumption with RCW 51.32.185
3 is a question of law that should be decided by the judge. Allowing the jury to
4 decide whether the City has met its burden of production as a factual question for
5 the jury places a burden of proof on the Respondent in this matter contrary to
6 RCW 51.52.115. Where as here the City prevailed before the Board, the City does
7 not have any burden of proof at trial. It is Appellant Spivey's burden of persuasion
8 to overturn the Board's decision. Respondent requests that following the
9 introduction of evidence¹ the Court determine as a question of law whether the City
10 met its burden of production to rebut the evidentiary presumption in
11 RCW 51.32.185.

12
13 The City further requests those portions of Dr. Coleman's testimony based
14 on the publication and articles read into the record by Appellant's counsel be
15 stricken.

16 DATED this 27th day of February, 2015.

17
18 CITY OF BELLEVUE
19 OFFICE OF THE CITY ATTORNEY
20 Lori M. Riordan, City Attorney



21 Chad R. Barnes
22 Washington State Bar No. 30480
23 Assistant City Attorney
24 Attorney for Respondent City of Bellevue

25 ¹ City reserves the right to request evidence be taken in such an order that the Judge can evaluate the City's evidence independent of Spivey's evidence to determine if the presumption has been rebutted.

**Appendix L:
Plaintiff's Response in Opposition
to City's Motion for Determination
of Legal Standard on Review and
Motion to Strike Portions of Dr.
Coleman's Testimony**

The Honorable Samuel Chung, Dept. 15
Hearing Date: Friday, March 27, 2013, at 9:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DELMIS SPIVEY,

Plaintiff,

v.

CITY OF BELLEVUE and DEPARTMENT
OF LABOR AND INDUSTRIES,

Defendants.

Cause No.: 14-2-29233-3 SEA

PLAINTIFF'S RESPONSE IN OPPOSITION TO
CITY'S MOTION FOR DETERMINATION OF
LEGAL STANDARD ON REVIEW **AND**
MOTION TO STRIKE PORTIONS OF DR.
COLEMAN'S TESTIMONY

I. Preamble

"Certain occupations are associated with an increased risk of melanoma. Firefighters,
... are consistently found to be at the highest risk for melanoma in studies."

*"Risk Factors for the Development of Primary Cutaneous Melanoma",
Dermatology Clinic pg 363-368 (2012), Russak and Rigel.*

RCW 51.04.010 Declaration of police power — Jurisdiction of courts abolished.
... The state of Washington, therefore, exercising herein its police and sovereign power,
declares that ... **sure and certain relief for workers, injured in their work, and their
families and dependents is hereby provided regardless of questions of fault** ...

RCW 51.12.010 Employments included — Declaration of policy.
There is a hazard in all employment and it is the purpose of this title to embrace all
employments which are within the legislative jurisdiction of the state.
**This title shall be liberally construed for the purpose of reducing to a minimum
the suffering and economic loss arising from injuries and/or death occurring in
the course of employment.**

[bold emphasis added]

Plaintiff Delmis Spivey respectfully requests that the Court deny the Defendant City of
Bellevue's (City) Motions for Determination of Legal Standard on Review and to Strike Portions of Dr.
Coleman's Testimony. BIIA Judge Wayne B. Lucia correctly allowed Delmis Spivey's presumptive
malignant melanoma claim and found that the City did not rebut the presumption.

PLAINTIFF'S RESPONSE IN OPPOSITION TO CITY'S
MOTION FOR DETERMINATION OF LEGAL
STANDARD ON REVIEW AND TO STRIKE PORTIONS
OF DR. COLEMAN'S TESTIMONY** Page 1 of 19

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24 developed a treatable malignant melanoma on his back. RCW 51.32.185 creates a legal
25 presumption the claimant's melanoma arose naturally and proximately because of the distinctive
26 conditions of his employment as a firefighter for the SIE. The evidence introduced by the SIE was
27 not sufficient to overcome the statutory presumption by preponderance. Mr. Spivey's malignant
28 melanoma condition arose naturally and proximately from his employment conditions. The
29 Department order is REVERSED AND REMANDED.
30
31
32

The medical literature establishing causation between firefighting and malignant melanoma, the lay witness testimony, the attending physicians' testimony, and the testimony of the medical experts provide substantial evidence that a cause of Del Spivey's malignant melanoma is his career work as a City of Bellevue firefighter. There is no preponderance of rebutting evidence to the contrary.

II. Statement of Facts

This claim arises out of an injury, occupational disease and/or presumptive occupational disease for the diagnosed condition of malignant melanoma.

Malignant melanoma is a presumptive occupational disease pursuant to RCW 51.32.185.

ER 401 - DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [emphasis added]

Malignant melanoma is a form of skin cancer presumed to be occupational for firefighters. Skin cancer among firefighters is a firefighter occupational disease – but not presumptively so. Such cancers include, but are not limited to, basal cell cancer, squamous cell cancer, and lymphoma of the skin. Each case of firefighter skin cancer is relevant to all other firefighter occupational claims of skin cancer because such occurrences make the occupation of firefighting a more likely cause of the skin cancer.

A skin cancer cluster has been identified in the City of Bellevue Fire Department, including at least four other firefighters. The City of Bellevue continues to discriminate against occupational disease claims involving firefighters and continues to reject and litigate firefighter skin cancer claims.

An occupational cluster of firefighter skin cancer is evidenced by the identification of firefighter

1 skin cancer cases in Yakima, Seattle, Bellevue, Tacoma, Everett and other fire departments throughout
2 the state of Washington. Some of the firefighter skin cancer cases involve areas of the body not typically
3 exposed to sunlight.

4 The commonality in these skin cancer cases is the occupation of firefighting with exposure to
5 smoke, fumes, and toxic substances, including known and suspected carcinogens, sun exposures during
6 work, disruptions of the circadian rhythm and other factors such as increased body heat and respiration
7 that increase the exposure risks. Additionally, the cause of skin cancer is not known in a high percentage
8 of all skin cancer cases, so firefighter occupational exposures, and the number of firefighters diagnosed
9 with skin cancer, is relevant to causation in all such cases.

10 Skin, lung and bladder cancers are among the types of cancer most often linked with high-level
11 exposure to workplace carcinogens. Other cancers such as leukemia, lymphoma, testicular, and brain
12 cancer can also occur in clusters. Most well-documented cancer clusters have been found in the
13 workplace, where exposures to certain compounds or other factors tend to be higher and last longer.
14 Also, the group of exposed people is better defined and easier to trace in workplace groups. In fact, the
15 links between cancer and many cancer-causing agents (called carcinogens) were first found in studies
16 of workers. *Source: The American Cancer Society.*

17 III. Relief Requested

- 18 1. Should the City of Bellevue be allowed to avoid a jury trial in a case where there are
19 genuine issues of material fact? No.
- 20 2. Did the Board of Industrial Insurance Appeals commit reversible error when it overruled
21 the Industrial Appeals Judge who found that the malignant melanoma was work related
22 and that the City of Bellevue had not rebutted the presumption? Yes.
- 23 3. Did the City of Bellevue rebut the statutory presumption in RCW 51.32.185? No.
- 24 4. Should portions of Dr. Coleman's testimony should be stricken? No.

25 III. Evidence Relied Upon

26 This response is based on the Declaration of Ron Meyers and exhibits thereto, if any, the BIIA
record, legal authority and argument set forth below, and the prior decisions, pleadings, and other papers

1 filed in this matter, and the exhibits thereto, if any.

2 **IV. Legal Authority and Argument**

3 **1. Legal Standard on Review**

4 The legal standard is not in question – review by the superior court is de novo. The presumption
5 must apply until the presumption is rebutted by a preponderance of evidence. The City in its case before
6 the Board did not rebut the presumption.

7 The City of Bellevue’s experts could not identify all causes of malignant melanoma and
8 therefore could not rule out firefighting as a proximate cause. The City ‘s experts could not segregate
9 sunlight exposures at work or away from work and could not rule out sunlight during work as a
10 proximate cause of malignant melanoma.

11 Upon the filing by the City of Bellevue of a Petition for Review, the Board of Industrial
12 Insurance Appeals reviewed the evidentiary rulings and found that no prejudicial error was committed
13 and affirmed those rulings. CABR 1. The Board simply granted review because it somehow disagreed
14 with the LAJ’s findings that the City of Bellevue did not rebut the presumption. CABR 1.

15 **2. Whether a disease arises out of and is caused by conditions of employment are**
16 **questions of fact.**

17 This case involved the strong statutory presumption set forth in RCW 51.32.185, that Delmis
18 Spivey’s malignant melanoma is presumed to be “occupational.” The term “occupational” means that
19 Delmis Spivey’s malignant melanoma arose naturally out of employment and that his employment was
20 a one of the proximate causes thereof. RCW 51.08.140. These are questions of fact. By virtue of RCW
21 51.32.185(1), and the definition of “occupational” in RCW 51.08.140, Del Spivey’s malignant
22 melanoma (a) was presumed to arise naturally out of his job and (b) was presumed to be proximately
23 cause by his job (i.e. “Occupational”). These questions of fact were established by the presumption
24 unless overcome by a preponderance of evidence.

25 It is not the role of the jury, not the judge, to weigh the City’s evidence and decide whether the
26 City proved by a preponderance of admissible evidence that Del Spivey’s cancer did not arise naturally

1 and proximately out of his employment. Whether Del Spivey's cancer arose naturally out of and was
2 caused by conditions of his employment are questions of fact. "Proximate cause is generally a question
3 of fact." *White v. Twp. of Winthrop*, 128 Wash.App. 588, 595, 116 P.3d 1034 (2005). Whether a disease
4 "arises naturally from conditions of employment" is factual as well.

5 RCW 51.32.185 (the statutory presumption) expressly states that the presumption can be
6 rebutted by a preponderance of the evidence. *RCW 51.32.185(1)*. Triers of fact consider and weigh
7 evidence and make decisions based on a preponderance of that evidence.

8 The Board issued a finding of fact that Del Spivey's malignant melanoma did not arise naturally
9 and proximately out of his employment. CABR 6. It was presumed at the Board-level that Del Spivey's
10 cancer arose naturally and proximately out of conditions of his employment (i.e. was "occupational").
11 The Board found in its "findings of fact" section of the Decision and Order that his cancer did not arise
12 naturally and proximately out of his employment (which necessarily means that the Board found that
13 the City rebutted the presumption). CABR 6.

14 On appeal in the Superior Court, Del Spivey should have the benefit of the presumption and the
15 City of Bellevue should have the ultimate burden to prove that the Board was right in deciding that the
16 City rebutted the presumption. The Board committed reversible error when it took the presumption
17 away from him. The Board also committed error in *Larson v City of Bellevue*, another recent malignant
18 melanoma claim. The jury corrected the Board's error. The City has appealed to Division I of the
19 Washington State Court of Appeals (Cause No. 71101-6-1).

20 It is undisputed that Del Spivey was an eligible firefighter with one of the diseases enumerated
21 in RCW 51.32.185, was entitled to the presumption, and that the City had to rebut that presumption.
22 On appeal to the Superior Court, the presumption does not vanish.

23 The City wants to re-structure an injured worker's constitutional rights to a trial-by-jury, in that
24 the judge – not the jury – would determine if the evidence presented by one party (the City) established
25 on a more likely than not basis that the plaintiff's disease arose naturally out of his employment. It is
26 the jury's job to decide whether the Board was correct in finding that the City rebutted the presumption

1 of occupational disease.

2 It is clear that the City did not rebut firefighting as a proximate cause of malignant melanoma.
3 The Court could make that ruling.

4 3. The operation of RCW 51.32.185 places the burden on the City to rebut the
5 presumption of causation. Whether the City has overcome the presumption by a
6 preponderance of admissible evidence is for the jury to decide.

7 The operation of the statutory presumption of RCW 51.32.185 requires the City of Bellevue to
8 rebut the causation that is presumed. What is presumed is the fact that the firefighter's disease arose
9 naturally out of his job and the fact that the disease was proximately caused by his job (i.e. the disease
10 was "occupational").

11 The operation of the statutory presumption requires that the City of Bellevue rebut these facts
12 by a preponderance of the evidence.

13 The idea advanced by the City that all the City has is a "burden of production" is incorrect.
14 "RCW 51.32.185, however, shifts the burden of disproving such occupational disease to the employer
15 once the firefighter shows that he has a respiratory, infectious, or other qualifying disease under this
16 statute." *Gorre v. City of Tacoma*, 108 Wash.App. 729, 324 P.3d 716, 730, footnote 33, (2014):

17 "Under the plain language of the RCW 51.32.185(1), once the firefighter shows that he
18 has one of these types of diseases, triggering the statutory presumption that the disease
19 is an "occupational disease," the burden shifts to the employer to rebut the presumption
20 by a preponderance of the evidence by showing that the origin or aggravator of the
firefighter's disease did not arise naturally and proximately out of his employment."
Gorre v. City of Tacoma, 108 Wash.App. 729, 324 P.3d 716, 730, footnote 33 (2014)
[emphasis added].

21 "If the employer cannot meet this burden, for example, if the cause of the disease cannot
22 be identified by a preponderance of the evidence or even if there is no known association
23 between the disease and firefighting, the firefighter employee maintains the benefit of
the occupational disease presumption." *Id. at 730-731* [emphasis added].

24 "... the province of the jury is to determine the facts of the case from the evidence adduced, in
25 accordance with the instructions given by the court." *Hastings v. Dep't of Labor & Indus.*, 24 Wash.2d
26 1, 13, 163 P.2d 142 (1945).

1 In a case involving a claim for life insurance policy proceeds where the insurer was disputing
2 coverage by claiming death-by-suicide the Supreme Court stated:

3 “When the plaintiff proved the contract of insurance and the death of the insured her
4 case was made. The defendant then perforce assumed the burden of proving suicide by
5 a preponderance of the evidence. Was there evidence or lack of evidence from which
6 the jury could in good reason find that the defendant has failed to carry this burden.”
7 *Burrier v. Mut. Life Ins. Co. of New York*, 63 Wn.2d 266, 270, 387 P.2d 58 (1963)
8 [emphasis added].

9 The Court stated, “The jury are the final arbiters as to the weight of the evidence necessary to
10 overcome the presumption.” *id at 281* [emphasis added].

11 In a case involving a claim for wrongful death, where the body was never found, the
12 presumption of death was at issue in a dispute over whether the three year statute of limitations had run.

13 “In Washington, the presumption of death attaches where a party has been absent for seven years
14 without tidings of his or her existence. The law presumes life during the first seven years of absence.”

15 *Nelson v. Schubert*, 98 Wash.App. 754, 759, 994 P.2d 225 (2000). As to rebutting the presumption, the
16 Court held

17 “The presumption of death arising from seven years’ unexplained absence is always
18 rebuttable. Jurors are the final arbiters as to the weights of the evidence necessary to
19 overcome the presumption.” *Nelson v. Schubert*, 98 Wash.App. 754, 759, 994 P.2d 225
20 (2000) [emphasis added].

21 The issue of whether the City rebutted by a preponderance of evidence the facts presumed by
22 RCW 51.32.185(1) is properly a jury issue – unless the Court rules that the City did not rebut the
23 presumption by establishing that firefighter exposures to smoke, fumes and toxic substances – including
24 work place sunshine – is not a proximate cause of malignant melanoma.

25 **4. The Purpose Of The Industrial Insurance Act Is Remedial In Nature And Shall Be**
26 **Liberally Construed In Favor Of The Injured Worker.**

27 The Industrial Insurance Act is the product of a compromise between employers and workers.
28 Under the Industrial Insurance Act, employers accept limited liability for claims that might not
29 otherwise be compensable under the common law. In exchange, workers forfeit common law remedies.

1 *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). RCW 51.04.010 provides that
2 “sure and certain relief for workers, injured in their work, and their families and dependents is hereby
3 provided regardless of questions of fault and to the exclusion of every other remedy.”

4 The Washington Supreme Court has stated that the “guiding principle in construing the
5 Industrial Insurance Act is remedial in nature and shall be liberally construed in order to achieve its
6 purpose of “reducing to a minimum the suffering and economic loss arising from injuries and/or death
7 occurring in the course of employment.” RCW 51.12.010. “All doubts about the meaning of the [IIA]
8 must be resolved in favor of workers.” *Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467, 470
9 (1987); *Boeing Co. v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

10 **5. Judicial Notice.**

11 The Claimant requested at the beginning of his case in chief that judicial notice be taken of the
12 legislature’s intent in drafting and passing RCW 51.32.185. The legislative intent has accompanied the
13 statute since 1987 – almost a quarter of a century ago – without challenge.

14 **Rule ER 201 Judicial Notice of Adjudicative Facts**

- 15 (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
16 (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in
17 that it is either (1) generally known within the territorial jurisdiction of the trial court or (2)
18 capable of accurate and ready determination by resort to sources whose accuracy cannot
19 reasonably be questioned.
20 (c) When Discretionary. A court may take judicial notice, whether requested or not.
21 (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with
22 the necessary information.
23 (e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be
24 heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the
25 absence of prior notification, the request may be made after judicial notice has been taken.
26 (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

22 **6. Legislative Intent For The Presumptive Occupational Disease Statute.**

23 “The legislature finds that the employment of firefighters exposes them to smoke, fumes, and
24 toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher
25 rate of respiratory disease than the general public. The legislature therefore finds that respiratory
26 disease should be presumed to be occupationally related for industrial insurance purposes for
firefighters.”

Legislative Intent, Session Laws 1987 Chapter 515 § 1.

1 In analyzing the presumptive occupational disease statute, it is clear the legislature made a
2 finding in 1987 that career exposures to smoke, fumes and toxic substances cause firefighters to have
3 a higher rate of certain diseases than the general public. The legislature has mandated that due to those
4 exposures that damage health – certain diseases and cancers including “malignant melanoma” – are
5 presumed to be occupational diseases for firefighters. The public policy has not changed.

6 The fact that several City of Bellevue firefighters – firefighters who have worked together for
7 years responding to the same incidents and experiencing the same exposures – have recently been
8 diagnosed with skin cancer is relevant. That several City of Bellevue firefighters have skin cancer is
9 evidence of occupational causation. The City of Bellevue has an ongoing – growing – skin cancer
10 cluster that endangers all firefighters – not just these firefighters who have been working together for
11 years.

12 **7. The Presumptive Occupational Disease Statute, RCW 51.32.185.**

13 In order for a firefighter to gain the protections of the presumption of occupational disease and
14 the shifting of the burden of proof onto the City, the statute must be applied at the beginning of the
15 claim. Under the presumptive disease statute, when a firefighter applies for Title 51 benefits for
16 occupational disease, certain diagnosed disease conditions: (1) are presumed to be occupational, and,
17 (2) shift the burden of disproving the condition is an occupational condition onto the City.

18 **RCW 51.32.185 Occupational diseases— Presumption of occupational disease for
19 firefighters — Limitations — Exception — Rules.**

20 (1) In the case of firefighters as defined in RCW 41.26.030(4) (a), (b), and © who are covered
21 under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully
22 compensated basis as a firefighter of a private sector employer's fire department that includes
23 over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory
24 disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke,
25 fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical
26 exertion due to firefighting activities; (c) **cancer**; and (d) infectious diseases **are occupational
diseases under RCW 51.08.140.** This presumption of occupational disease may be rebutted by
a preponderance of the evidence. Such evidence may include, but is not limited to, use of
tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from
other employment or nonemployment activities.

(3) The presumption established in subsection (1)(c) of this section shall only apply to any
active or former firefighter who has cancer that develops or manifests itself after the firefighter

1 has served at least ten years and who was given a qualifying medical examination upon
2 becoming a firefighter that showed no evidence of cancer. The presumption within subsection
3 (1)(c) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty,
primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder
cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

4 There is no preponderance of relevant, admissible evidence with which to rebut the presumption
5 in Del Spivey's favor. He is a non-smoker. His physical fitness is not an issue. His weight is not an
6 issue. Heredity is not an issue. Exposure from non-firefighter employment or non-employment activities
7 is not an issue. He has been a firefighter since 1986. The City's appeal should be dismissed.

8 The City's experts were unfamiliar with the exposures of a firefighter. The City's evidence did
9 not rebut Del Spivey's presumptive occupational disease arising from his hundreds of individual and
10 cumulative exposures to smoke, fumes and toxic and chemical substances. From (1) his diesel fume
11 exposures in fire stations, (2) diesel fume exposures at fire response calls and emergency medical calls,
12 (3) every fire that he has worked – not just those that left him coughing up black phlegm and blowing
13 black mucous from his nose for days afterward, (4) the second hand smoke he was exposed to in fire
14 stations from 1987 through 1994, (5) exposures to chlorine and solvents used in cleaning the station and
15 equipment – the cumulative effect is undeniable. The Legislature has identified an occupational
16 causation between malignant melanoma skin cancer consistent with a lengthy career of injurious
17 exposures to smoke, fumes and toxic and chemical substances.

18 The legislature mandated into law a causal connection between the dangerous public service
19 profession of firefighting, and various diseases including respiratory disease, certain cancers such as
20 malignant melanoma, infectious diseases, and any heart problems experienced within certain time
21 periods after exposures. This law means the firefighter does not have to prove causation; the causal
22 connection has been made and is mandated by RCW 51.32.185. The firefighter only needs to present
23 with a covered diagnosis that falls within the statute.

24 **8. The City failed to provide a preponderance of credible, admissible evidence**
25 **rebutting the presumption of firefighter malignant melanoma.**

26 The City, by simply presenting other potential speculative causes of disease or injuries, or

1 denying the existence of disease or injury, has not presented a preponderance of credible and admissible
2 evidence that firefighting is not a proximate cause of his malignant melanoma. In fact, it is unclear how
3 the City could prove, by a preponderance of admissible evidence, that none of Del Spivey's exposures
4 were a proximate cause of his malignant melanoma – especially given that several of the firefighters
5 within his shift or crew have also recently been diagnosed with skin cancer – including malignant
6 melanoma.

7 Dr. Kenneth Coleman, plaintiff's expert witness, testified "one can never determine the precise
8 cause of a malignant melanoma." Deposition of Dr. Kenneth Coleman, 3/10/14, pg 11, lines 22-24. Dr.
9 Coleman also testified that the fact that at least three other City of Bellevue firefighters, who worked
10 together and fought many of the same fires together, have developed skin cancer, two of which are
11 malignant melanoma, supports more likely than not the occupation of firefighter as a cause. Deposition
12 of Dr. Kenneth Coleman, 3/10/14, pg 23, lines 10-14, lines 23-25. Dr. Coleman also opined on a more
13 likely than not basis that Del Spivey's occupation as a firefighter was a cause of his malignant
14 melanoma. Deposition of Dr. Coleman, 3-10/14, pg 40, line 2, lines 16-19, pg 41, lines 4-12. Dr
15 Coleman was familiar with relevant peer reviewed articles that found a causal connection between
16 firefighting and malignant melanoma.

17 The City's experts do not know all of the causes of cancer. The City's experts know that not all
18 causes of cancer have been identified. Therefore, firefighting cannot be ruled out as a cause of Del
19 Spivey's, and the other City of Bellevue firefighter's, malignant melanoma. The presumption has not
20 been rebutted.

21 Dr. Noel Weiss, expert epidemiologist witness for the City of Bellevue, testified that in most
22 cases of cancer the causes are unknown. April 3, 2014 Hearing Transcript, pg 46, lines 25-26, pg 56,
23 lines 2-8, pg 63, lines 8-10. Dr. Weiss did not offer an opinion that Del Spivey's malignant melanoma
24 was not caused by his workplace exposures. April 3, 2014 Hearing Transcript, pg 83, lines 3-4. Dr.
25 Weiss testified that he does not know if firefighting increases the risk of developing melanoma. April
26 3, 2014 Hearing Transcript, pg 85, lines 13-16. He did not rebut the presumption.

1 Dr. Andy Chien, expert witness for the City of Bellevue, testified that he does not know all of
2 the factors that cause malignant melanoma, April 3, 2014 Hearing Transcript, pg. 148, lines 7-11, and
3 that cause is unknown for 15% of melanoma cancer cases. April 3, 2014 Hearing Transcript, pg 99,
4 lines 8-11, pg 131, lines 8-11. He also testified to at least two causes of melanoma – genetics and
5 ultraviolet exposure, April 3, 2014 Hearing Transcript, pg 108, lines 4-7, and that higher education and
6 higher socioeconomic status are also risk factors for melanoma. April 3, 2014 Hearing Transcript, pg.
7 150, lines 16-19, pg 151, lines6-8. Dr. Chien admitted that he does not know enough about firefighters
8 duties or exposures to draw conclusions regarding the exposures of firefighters. April 3, 2014 Hearing
9 Transcript, pg 145, lines 2-11. He did know that sunshine was a cause but could not parse out any
10 difference between workplace sunshine and non-work sunshine. He did not rebut the presumption.

11 Dr. John Hackett, City of Bellevue witness, testified that there are some chemical exposures that
12 can cause malignant melanoma. Deposition of Dr. John Hackett, March 12, 2014, pg. 67, lines 14-20. He
13 also knew that sunshine was a cause of malignant melanoma but could not parse out any difference
14 between workplace sunshine and non-work sunshine. He did not rebut the presumption.

15 The City's Fire Chief, Michael Eisner testified that firefighters would never be 100% protected
16 from exposures to smoke, fumes or toxic substances. Deposition of Michael Eisner, March 13, 2014,
17 pg 37, lines 1-6. Chief Eisner also testified that firefighter exposures are widely known to result in
18 illnesses or injuries and that some of those exposures are carcinogens. Declaration of Michael Eisner,
19 March 13, 2014, pg. 39, lines 8-14, pg 56, lines14-16. His testimony appears to support the
20 presumption. That testimony certainly does nothing to rebut the presumption.

21 Dr. Janie Leonhardt, plaintiff's treating physician, testified that she did not know enough about
22 Mr. Spivey's occupation to form an opinion as to whether or not Mr. Spivey's malignant melanoma was
23 caused by his workplace conditions. Deposition of Dr. Janie Leonhardt, March 28, 2014, pg. 46, lines
24 5-9, pg 47, lines 15-20, pg. 48, lines1-7, pg 52, lines 10-16, pg. 76, lines10-14. She did not rebut the
25 presumption.

26 Additionally, the cluster of City of Bellevue firefighters with skin cancer – who worked with

1 Del Spivey – is also relevant evidence supporting the causal connection between firefighting and
2 malignant melanoma. A cancer cluster is defined as a greater-than-expected number of cancer cases that
3 occurs within a group of people in a geographic area over a period of time.

4 <http://www.cdc.gov/NCEH/clusters/default.htm>

5 These City of Bellevue firefighters worked on the same calls, spent 24 hour shifts in the same
6 stations and used the same diesel apparatus for years and years and years. Most cancer clusters caused
7 by a shared exposure have not been found in the communities where people live. Rather, they have been
8 seen in the workplace, where exposures to certain compounds or other factors tend to be higher and last
9 longer. Also, the group of exposed people is better defined and easier to trace in workplace groups. In
10 fact, the links between cancer and many cancer-causing agents (called carcinogens) were first found in
11 studies of workers. Lung, skin, and bladder cancers are the types of cancer most often linked with
12 high-level exposure to workplace.

13 <http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/c>
14 [ancer-clusters](http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/c).

15 The City's witnesses have presented speculative potential causes for his malignant melanoma.
16 The City has failed to rebut the presumption of malignant melanoma by a preponderance of credible,
17 relevant and admissible evidence.

18 Rank speculation, conjecture or conclusory statements do not overcome the presumption of
19 occupational disease. The City must overcome the presumption with something much, much more than
20 wishful thinking or deceptive arguments. Speculation by the City's medical experts, or disagreeing with
21 the attending physician's diagnosis is not a preponderance of competent, admissible testimony as a
22 matter of law. ER 702; ER 703; *Miller v. Likins*, 109 Wash. App. 140 (2001).

23 The City of Bellevue has not: (1) established a non-occupational cause – of Del Spivey's
24 malignant melanoma skin cancer, (2) excluded his firefighting exposures as the cause of his malignant
25 melanoma, nor did it, (2) eliminate firefighting as a proximate cause of his malignant melanoma. The
26 City did not meet the conditions required to overcome the presumptive occupational disease statute.

1 9. A “Preponderance Of The Evidence” Is A Judicial Standard.

2 A “preponderance of the evidence” is a judicial standard requiring that all of the evidence
3 establish the proposition at issue is more probably true than not true. See, *Presnell v. Safeway Stores,*
4 *Inc.*, 60 Wn.2d 671 (1962); *Dependency of H.W.*, 92 Wash. App. 420 (1998); *In re Sego*, 82 Wn.2d 736,
5 739 n. 2 (1973).

6 In *Harrison Memorial Hospital v. Gagnon*, 147 Wn.2d 1011 (2002), the Court ruled that the
7 claimant’s Hepatitis C was an occupational disease and that the evidence was sufficient to support an
8 inference on a more probable than not basis that the claimant acquired hepatitis while working at the
9 hospital. This was true even though the claimant had a history of drug use, had numerous body
10 piercings, numerous tattoos, and had worked as an emergency medical technician in the Navy prior to
11 employment at the hospital.

12 Here, as in *Harrison*, the emphasis is not on what else could have caused Del Spivey’s skin
13 cancer, but on whether employment was a proximate cause and whether the City can prove otherwise.
14 The City cannot and the City did not eliminate firefighting as a proximate cause of his skin cancer. In
15 fact, the one piece of literature advanced by the City, *Risk Factors for the Development of Primary*
16 *“Cutaneous” Melanoma*, establishes that firefighters are at the highest risk for occupational malignant
17 melanoma.

18 10. The Occupational Disease Statute, RCW 51.08.140, Injury Statute RCW 51.08.100,
19 and Aggravation.

20 A. Arising Naturally and Proximately Out of Employment.

21 The occupational disease statute, RCW 51.08.140 is another avenue for establishing an
22 occupational disease claim. It requires somewhat more from the firefighter than a diagnosis of certain
23 conditions falling within the presumptive occupational disease statute. It does not shift the burden on
24 to the City as does the presumptive disease statute. It does not create a presumption in favor of the
25 firefighter as does the presumptive disease statute. Even so – the hundreds of exposures to smoke,
26 fumes, toxic and chemical substances that Del Spivey has experienced during his career meet the

1 requirements for a finding of coverage under this statute, too.

2 **RCW 51.08.140 "Occupational disease."**

3 "Occupational disease" means such disease or infection as arises naturally and proximately out
4 of employment under the mandatory or elective adoption provisions of this title.

5 **11. Persuasive Authority.**

6 Failures of employers or state agencies to apply mandatory legislative presumptive disease
7 statutes like RCW 51.32.185 have not been tolerated by the Appellate Courts and Supreme Courts of
8 other jurisdictions. In such jurisdictions, as in our jurisdiction, the burden of proof never starts with the
9 claimant, but rather falls squarely on the shoulders of the employer or the government agency.

10 In *Jackson v. Workers' Compensation Appeals Bd.*, 133 Cal. App. 45h 965, 969, 35 Cal. Rptr.
11 3d 256 (3d Dist. 2005), the Court reviewed a similar presumption statute in a worker's compensation
12 case, including a physician's testimony that there was nothing specific to the deceased correctional
13 officer's occupation that caused the officer's heart attack or put him at greater risk for heart attack. The
14 Court found such testimony insufficient to rebut the statutory presumption that the correctional officer's
15 heart problems arose out of and in the course of his employment.

16 Many other cases agree that a presumptive statute cannot be overcome by expert testimony that
17 simply challenges the premise of the presumption. Instead, to overcome the presumption, an employer
18 must produce clear medical evidence of a cause for the disease, outside of claimant's employment.
19 Idiopathic or unknown causes are not sufficient. *City of Frederick et al. v. Shankle*, 136 Md. App. 339,
20 765 A.2d 1008 (2001). See: *Worden v. County of Houston*, 356 N.W.2d 693, 695-96 (Minn. 1984);
21 *Cook v. City of Waynesboro*, 300 S.E.2d 746, 748 (Va. 1983); *Superior v. Dep't of Indus. Labor &*
22 *Human Relations*, 267 N.W.2d 637, 641 (Wis. 1978); *Cunningham v. City of Manchester Fire Dep't.*,
23 525 A.2d 714, 718 (N.H. 1987).

24 Specifically in *Cunningham*, the court addressed a situation where a doctor attacked the premise
25 of the presumptive disease statute. The doctor stated that the claimant's heart disease was not related
26 to employment, and pointed to the uncertainty in the medical community regarding the causation of
heart disease. The doctor also referenced studies that show an absence of a correlation between

1 firefighting and heart problems. The doctor opined there was no medical evidence that the claimant's
2 employment as a firefighter played any role in the development of his heart disease. The Court in
3 *Cunningham* determined that although the medical community may disagree as to the role of
4 firefighting in the development of heart problems, the legislature had made a decision to presume a
5 causal connection.

6 The City's hired experts may disagree with the legislature – but that does not rebut the
7 presumption. The City's experts may testify against the great weight of persuasive authority – but that
8 does not rebut the presumption, either. The City's experts may even disagree with the testimony of the
9 attending physician where those attending health care providers are entitled to special consideration –
10 but that is not nearly enough to rebut the presumption. Simply stated, the City wants to ignore the law
11 – but that does not rebut the strong public policy that has favored firefighters for over a quarter of a
12 century.

13 **12. Testimony of Dr. Kenneth Coleman, MD**

14 **RCW 51.52.104**

15 Such petition for review shall set forth in detail the grounds therefore and the party or
16 parties filing the same shall be deemed to have waived all objections or irregularities not
specifically set forth therein.

17 Kenneth Coleman, MD, JD, testified in this case. He also testified in the prior malignant
18 melanoma case of Captain William Larson (another City of Bellevue firefighter who worked closely
19 with Del Spivey). Although Larson's malignant melanoma claim was rejected by the City of Bellevue
20 and by the Board – the claim was recently allowed by a King County Superior Court jury following his
21 appeal of the rejection. Dr. Coleman has also testified in at least one other firefighter malignant
22 melanoma case in western Washington.

23 Unlike the other expert witnesses in these skin cancers cases, Dr. Coleman has conducted an
24 extensive review of the many peer reviewed published articles supporting the established causative link
25 between occupational exposures and malignant melanoma – especially in firefighters. Articles and
26 documents reviewed include:

1 *Cancer Incidence Among Firefighters in Seattle and Tacoma, Washington.* Cancer Causes
Control, Volume 5, 1994.

2 *Registry-Based Case-Control Study of Cancer in California Firefighters.* American Journal of
3 Industrial Medicine, 2007.

4 *Cancer Incidence in Florida Professional Firefighters, 1981-1999.* Journal of Occupational and
Environmental Medicine, Volume 48, 2006.

5 *Cancer Incidence Among Massachusetts Firefighters, 1982-1986.* American Journal of
6 Industrial Medicine at 19, pp 17-54, 1990.

7 *Cancer Incidence Among Male Massachusetts Firefighters, 1987-2003.* American Journal of
Industrial Medicine, Volume 51, pp 329-335, 2008.

8 *Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies.* Journal of
9 Occupational and Environmental Medicine, Volume 48, Number 11, 2006.

10 *Organic Chemicals and Malignant Melanoma.* American Journal of Industrial Medicine.
American Journal of Industrial Medicine, 1983.

11 *Nonsunlight Risk Factors for Malignant Melanoma, Part 1: Chemical Agents, Physical
12 Conditions, and Occupation.* International Journal of Dermatology, Volume 33, Number 6,
1994.

13 *Environmental Factors and the Etiology of Melanoma.* Cancer Causes and Control, Volume 4,
14 pp 59-62, 1993.

15 *Nonsolar Factors in Melanoma Risk.* Clinics in Dermatology, 1992, Volume 10, pp 51-63.

16 *Melanoma and Occupation: Results of a Case-Control Study in The Netherlands.* British
Journal of Industrial Medicine, 1993.

17 *Textbook of Clinical Occupational and Environmental Medicine.* Medical Text, 1994.

18 *Firefighter Cancer in the New Fire Environment.* NFPA Conference & Expo Handout, 2012.

19 *Melanoma Epidemiology, Risk Factors, and Clinical Phenotypes.* Advances in Malignant
20 Melanoma- Clinical Research and Perspectives, 2011.

21 *Characterization of Firefighter Exposure During Fire Overhaul.* AIHAJ 61:636-641, 2000.

22 *Melanoma in Fire Firefighters Science Document.* IAFF Division of Occupational Health Safety
and Medicine.

23 *Chemicals Released During Burning.* Zender Environmental Health and Research Group
24 Handout, 2005.

25 *Fire Fighter Exposure to Carcinogens.* IAFF Division of Occupational Health Safety and
Medicine.
26

1 Plaintiff's expert, Kenneth Coleman, MD, testified on the basis of reasonable medical
2 probability that a proximate cause of Plaintiff's malignant melanoma was his work as a firefighter.

3 He also based his opinion on peer-reviewed literature supporting causation that contains facts
4 or data generally accepted by medical professionals dealing with the issue of causation in cancer cases
5 [ER 703].

6 ER 803(a)(18):

7 **Learned Treatises.** To the extent called to the attention of an expert witness upon cross
8 examination or relied upon by the expert witness in direct examination, statements contained
9 in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other
10 science or art, established as a reliable authority by the testimony or admission of the witness
11 or by other expert testimony or by judicial notice. If admitted, the statements may be read into
12 evidence but may not be received as exhibits.

13 The City did not make objection to Dr. Coleman's testimony in its Petition for Review and under
14 RCW 51.52.104 has waived its objections to Dr. Coleman's testimony. Nor was the admissibility of
15 Dr. Coleman's testimony addressed in the Decision and Order of the Board, in fact, all evidentiary
16 rulings were reviewed and no error found. The City's argument is specious. It is without merit.

17 The only issue addressed by the City in its Petition for Review was:

18 **I. ISSUE**

- 19 1. Whether the Industrial Appeals Judge erred in finding and concluding that
20 Mr. Spivey developed a malignant melanoma on his upper back as an
21 occupational disease within the meaning of RCW 51.32.185 and RCW
22 51.08.140.

23 The testimony of Dr. Coleman that the City has moved to exclude was offered at the board level,
24 in a board proceeding, and then subsequently included in the record filed by the board in the Superior
25 Court. He is well qualified to testify as an expert and was the most knowledgeable witness regarding
26 the peer reviewed articles that have shown a relationship between malignant melanoma and occupations
such as firefighting for many years.

As stated above, the testimony and evidence that is properly before the Superior Court on an
industrial insurance appeal is that offered before the board or included in the record filed by the board

1 in the superior court . RCW 51.52.115.

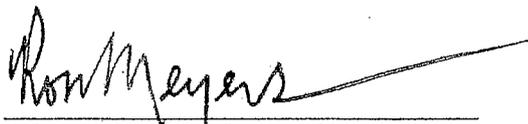
2 **II. CONCLUSION**

3 The Employer's Motion for Determination of Legal Standard on Review and Motion to Strike
4 Portions of Dr. Coleman's Testimony should BOTH be denied.

5 The Court is permitted by RCW 51.52.115 to consider testimony and evidence that was offered
6 before the Board or included in the record filed by the Board in the Superior Court. Even so, the jury
7 is the fact finder, unless the Court determines as a legal finding that the City of Bellevue failed to rebut
8 the presumption. The evidence supports that conclusion.

9 DATED: March ~~6th~~, 2015.

10 **RON MEYERS & ASSOCIATES PLLC**

11 

12 By: _____
13 Ron Meyers, WSBA No. 13169
14 Matthew Johnson, WSBA No. 27976
15 Tim Friedman, WSBA No. 37983
16 Attorneys for Plaintiff Firefighter Spivey

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**Appendix M:
Department's Reply to City of
Bellevue's Motion re RCW
51.32.185 and to Motion to Strike
Portions of Spivey's Brief and Its
Reply to Spivey's Response to the
City of Bellevue's Motion**

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

DELMIS SPIVEY,

NO. 14-2-29233-3 SEA

Appellant,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

DEPARTMENT'S REPLY TO CITY
OF BELLEVUE'S MOTION RE RCW
51.32.185 AND TO MOTION TO
STRIKE PORTIONS OF SPIVEY'S
BRIEF AND ITS REPLY TO
SPIVEY'S RESPONSE TO THE CITY
OF BELLEVUE'S MOTION

1. Relief requested

The Department joins in the City of Bellevue's (the City) request for judicial review of the Board of Industrial Insurance Appeals' conclusion that, as a matter of law, it had met its burden of production with respect to the RCW 51.32.185 rebuttable evidentiary presumption and that the sole issue for the trier of fact was whether Spivey's malignant melanoma arose naturally and proximately out of distinctive conditions of his employment as a firefighter and emergency medical technician, as opposed to conditions found in all employment or in non-employment.

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1 **2. Statement of facts**

2 The statement of facts are adequately set out in the October 9, 2013 Board decision,
3 proposed decision and order as referenced in the Board decision, and in the City's motion.¹
4 Board Record (BR) at 1-2, 61-63; City of Bellevue motion at 2-4. The Department will not
5 re-recite those facts.

6 **3. Statement of the issues**

7 Is whether the City met its burden of production in rebutting the RCW 51.32.185
8 evidentiary presumption a question of law to be decided by the judge?
9

10 Should Spivey's references to the proposed decision and order be stricken because an
11 industrial appeals judge's decision has no standing until adopted by the full Board?

12 **4. Evidence relied on**

13 The evidence relied on is contained the certified appeal board record pertinent excerpts
14 of which are attached to the declaration of Chad Barnes and the City of Bellevue's motion.
15

16 **5. Authority**

17 The Department joins in the City's legal analysis at pages 8-12 of the City's motion.

18 **a. A prima facie presumption places a burden of production on a defendant**
19 **and the court, not the jury, determines whether the defendant's has met**
20 **its burden of production, shifting the burden of persuasion back to the**
plaintiff

21 "In the case of firefighters . . . , there shall exist a *prima facie* presumption that:
22 [certain conditions]. . . (c) cancer . . . are occupational diseases under RCW 51.08.140." This
23 legislatively-created presumption, RCW 51.32.185, relieves a firefighters from having to
24 prove that his or her condition arose "naturally and proximately" out of distinctive
25

26 ¹ The certified appeal board record will be cited "BR" and the large Bates stamped number.

1 employment conditions, i.e. that but for a workplace exposure the disease would not have
2 been contracted. *Raum v. City of Bellevue*, 171 Wn. App. 124, 152, 286 P.3d 695 (2012); *City*
3 *of Bremerton v. Shreeve*, 55 Wn. App. 334, 339-340, 777 P.2d 568 (1989). A rebuttable
4 presumption thus aids a worker in establishing eligibility for benefits, but it cannot circumvent
5 the facts of a given case. See, e.g., *City of Bellevue v. Kinsman*, 34 Wn. App. 786, 789, 664
6 P.2d 1253 (1983).
7

8 RCW 51.32.185 thus relieves a firefighter from producing evidence to support a claim
9 ~~of occupational disease with respect to certain disease conditions, including cancer, contracted~~
10 by firefighters, instead providing that, for firefighters, the existence of certain conditions are
11 prima facie occupational diseases and requiring the Department, or self-insured employer, to
12 produce evidence to rebut the prima facie presumption by a preponderance of evidence. This
13 presumption involves the burden of production because the statute specifies that it is a "prima
14 facie" presumption. RCW 51.32.185. It is thus the trial judge that determines whether a
15 burden of production is met, not the jury. See *Carle v. McChord Credit Union*, 65 Wn. App.
16 93, 102, 827 P.2d 1070 (1992).
17

18 This type of analysis is also called a "McDonnell Douglas" analysis because it involves
19 a three-step, burden-shifting protocol articulated by the United States Supreme Court in
20 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668
21 (1973) and followed by our Supreme Court in *Hegwine v. Longview Fibre Co., Inc.*, 162
22 Wn.2d 340, 354, 172 P.2d 688 (2007). The application of this analysis is appropriate because
23 discrimination claims are statutory, and can arise out of an initial administrative decision, like
24
25
26

1 workers' compensation claims. See Chapter 49.60 RCW. See also *Hill v. BCTI Income*
2 *Fund-I*, 144 Wn.2d 175, 181, 23 P.3d 440 (2001).

3 Under this three-step process the worker's burden of making a prima occupational
4 disease claim is met courtesy of RCW 51.32.185. The rebuttable presumption takes hold and
5 the burden shifts to the employer to produce evidence of a non-work cause of the worker's
6 condition. If this "intermediate production burden" is met the *presumption* established by
7 having the prima facie evidence is rebutted and 'having fulfilled its role of forcing the
8 defendant to come forward with some response, [the presumption] simply drops out of the
9 picture.' " Cites omitted. *Id.*

10
11 The Board of Industrial Insurance Appeals likewise concluded, as a matter of law, that
12 the City had rebutted the RCW 51.32.185 presumption that Spivey's melanoma was an
13 occupational disease, i.e., met its burden production. BR 7. The superior court is an appellate
14 court with respect to appeals from the Board. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51
15 P.3d 793 (2002). As an appellate court, the superior court reviews issues of law de novo. See,
16 e.g., *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 352, 646 P.2d 113 (1982)
17 (issues of law responsibility of judicial branch to resolve). The Court, like the Board, must
18 determine whether the City met its burden of production. If the Court concludes, based solely
19 on the City's evidence, that the Board erred in its conclusion that the City met its burden of
20 production and rebutted the presumption, then the presumption applies and this case must be
21 remanded to the Department to allow the claim because RCW 51.32.185(3) specifically
22 enumerates cancer as an occupational disease. There would be no need to ask the jury
23 whether Spivey met his burden of persuasion. *Raum*, 171 Wn. App. at 152; *Hill v. BCTI*

1 *Income Fund-I*, 144 Wn.2d at 181 (if defendant fails to meet burden of producing admissible
2 evidence plaintiff is entitled to an order establishing right to relief as a matter of law, because
3 no issue of fact remains in the case). If the Court concludes that the occupational disease
4 presumption was rebutted Spivey may still ask a jury to overturn the Board's *findings of fact*
5 and determine that his malignant melanoma arose naturally and proximately out of distinctive
6 conditions of his City of Bellevue employment, and not as the result of sun exposure in non-
7 work activities. As the *Raum* Court held:

8
9 ~~RCW 51.32.185's presumption is not conclusive and may be rebutted by a~~
10 "preponderance of the evidence." RCW 51.32.185(1). If the employer rebuts
11 the presumption, the burden of proof returns to the worker to show he is entitled
12 to benefits, i.e., that he suffers from an "occupational disease" as defined in
RCW 51.08.140. *If both parties present competent medical testimony, the jury*
must weigh the evidence to determine whether the worker's condition "arises
naturally and proximately out of employment." RCW 51.08.140.

13 *Raum*, 171 Wn. App. at 152 (emphasis added); *see also Hill v. BCTI Income Fund-I*, 144
14 Wn.2d at 182.

15 **b. Spivey, not the City, bears the burden of proving that the Board's finding**
16 **of fact that his cancer was not an occupational disease, by a preponderance**
17 **of evidence**

18 Under the Industrial Insurance Act workers always bear the burden of establishing
19 eligibility for benefits. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505,
20 208 P.2d 1181(1949) rev'd on other grounds. If the jury were asked to determine whether the
21 City rebutted the presumption it would impermissibly place the burden of proof on the City. In
22 an appeal to superior court the burden of proving that the Board's decision is incorrect is on the
23 appealing party, Spivey. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5,
24 977 P.2d 570 (1999).

1 Spivey impermissibly conflates the rebuttable presumption of RCW 51.32.185 with the
2 definition of occupational disease in RCW 51.08.140. Plaintiff's Response at 4. He correctly
3 states that whether Spivey's cancer arose naturally and proximately out of his employment is a
4 question of fact. Plaintiff's Response at 4-5. See Board finding of fact 12.² BR at 6. But
5 Spivey misstates the burden of proof. It is Spivey's burden to prove, by a preponderance of
6 evidence that Board finding of fact 12 is incorrect. Spivey confuses the preponderance of
7 evidence standard he has to meet as part of his burden of persuasion, with the burden of
8 evidence standard he has to meet as part of his burden of persuasion, with the burden of
9 production regarding the rebuttable presumption the City had to meet at the Board, which
10 decision the judge reviews here. The fact that RCW 51.32.185 allows the applicable burden
11 of production to be satisfied by a preponderance of the evidence does not transform the
12 question of whether the burden of production was met into a jury question. It merely provides
13 guidance to the trial judge as to what standard to use in determining whether the employer has
14 met the burden of production. Here the jury may consider only the Board's *findings*, not the
15 Board's conclusions of law. See also *Laschied v. City of Kennewick*, 137 Wn. App. 633, 642,
16 644, 154 P.3d 307 (2007).

18 Spivey asserts, Plaintiff's Response at 5, that on appeal to superior court he "should
19 have the benefit of the presumption." But he does have the benefit of the presumption because
20 the Court reviews de novo the Board's legal conclusion that the City properly rebutted the
21 presumption. If the Court concludes, as a matter of law, that the City *did not* rebut the
22 presumption, then Spivey's claim must be allowed. There will be no need for a jury to
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24
25 ² Board finding of fact 12 reads: "Mr. Spivey's malignant melanoma is not a condition that arose
26 naturally and proximately out of the distinctive conditions of his employment as a firefighter with the City of
Bellevue. BR 6.

1 determine whether Spivey's cancer arose naturally and proximately out of distinctive
2 conditions of his employment as opposed to exposures coincidentally occurring in all
3 employment or in non-employment.

4 c. A majority of Washington courts and commentators agree that a prima
5 facie presumption overcome by proper evidence ceases to exist

6 *Bradley v. S.L. Savidge, Inc.*, 13 Wn. 2d 28, 123 P.2d 780, 787 (1942) provided and
7 early, and exhaustive analysis. It held that when a presumption "is overcome by proper
8 evidence it ceases to exist and cannot be further considered by the court or jury, or used by

9 counsel in argument." *Id.* at 42. In *Bradley* the trial court found as a matter of law that the
10 presumed fact (that the driver of the car was the agent of the car's owner) did not exist and
11 properly withdrew the issue from the jury when the defendant introduced competent evidence
12 that clearly rebutted the presumption—the presumption disappeared entirely from the case. *Id.*
13 at 63-64. The plaintiff, in whose favor the presumption operated, then bore the burden of
14 establishing, by a preponderance of the evidence, the presumed fact, that the driver did indeed
15 have the owner's permission to drive the car, i.e., was the owner's agent. *Id.* Although the
16 *Bradley* Court required the rebutting evidence to be "inimpeached, clear and convincing,"
17 under RCW 51.32.185 the evidence must only preponderate. Here, the trial court must
18 determine whether a preponderance of the evidence rebuts the presumed fact, i.e., that Spivey's
19 cancer is an occupational disease. If a preponderance of the evidence does so, the occupational
20 disease presumed fact ceases to exist and is properly withdrawn from the jury. The burden
21 becomes Spivey's to prove, by a preponderance of evidence, that Board finding of fact 12, is
22 incorrect. Spivey must prove that his cancer arose naturally and proximately from distinctive
23 conditions of his employment and not as the result non-employment conditions or exposures.
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1 Of course, here, the jury is required to give a presumption of correctness to the Board's
2 findings in this regard. The jury must weigh the evidence, but, if Spivey is to prevail, the
3 evidence must preponderate in his favor. It cannot be evenly balanced. RCW 51.52.115; *Ruse*,
4 138 Wn.2d at 5. By appealing the Board's decision Spivey assumed the burden of producing
5 "sufficient, substantial, facts, as distinguished from a mere scintilla of evidence" which
6 overcome the presumption of correctness enjoyed by the Board's decision and warrant
7 reversing that decision. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038
8 (1955). ~~Spivey must prove, by a preponderance of evidence, that Board finding of fact 12 is~~
9 ~~incotrect~~, i.e. that his malignant melanoma *did* arise naturally and proximately out of the
10 distinctive conditions of his employment as a firefighter for the City of Bellevue. BR at 6.

11
12 Most Washington cases operate on the "Thayer rule" that once contrary evidence is
13 introduced the presumption disappears. 5 Karl B. Tegland, *Washington Practice: Evidence*
14 *Law and Practice* §301.14 (5th ed. data base updated 2014). The Court in *Burrier v. Mut. Life*
15 *Ins. Co. of New York*, 63 Wn.2d 266, 387 p.2d 58 (1963), cited by Spivey, readily
16 acknowledged that where, as here, the defendant had to rebut the presumption of accidental
17 death, to instruct the jury with respect to a rebuttable presumption "saddled the defendant with
18 a double burden." *Id.* At 274. The *Burrier* Court also made it clear that instructing the jury on
19 the presumption was disfavored by courts and commentators by a wide margin. *Id.* at n.1. Per
20 6 *Washington Practice* WPI 24.05 at 274 (6th ed. 2012) the *Burrier* opinion could be read to
21 say that it only applies to the presumption against suicide. *Nelson v. Schubert*, 98 Wn. App.
22 754, 994 P.2d 225 (2000), the only other case cited by Spivey, only cites to *Burrier* in a
23 footnote, and it is not known whether there was a challenge to the instruction that was given
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1 there, regarding the presumption of death after seven years. *Id.* at 763. Neither *Burrier*, nor
2 *Nelson*, overcome the weight of authority favoring the rule that when a presumption is
3 overcome by proper evidence it ceases to exist.

4 d. **Spivey does not demonstrate a failure on the part of the City to overcome**
5 **the presumption**

6 Spivey asserts that the City was required to show that sun exposure away from work,
7 rather than sun exposure at work, proximately caused his cancer in order to rebut the
8 presumption. Plaintiff's Response at 4. Presumably, this is to show the trial court that the City
9

10 has not rebutted the RCW 51.32.185 presumption. Spivey's assertion, however, is incorrect.
11 Spivey's sun exposure, whether at work, or in recreation, cannot be a cause of an *occupational*
12 disease because it is not a distinctive condition of his firefighter employment but rather a sun
13 exposure which can occur in all employment and in nonemployment. RCW 51.08.140; *Potter*
14 *v. Dep't of Labor and Indus.*, 172 Wn. App. 301, 315-16, 289 P.3d 727 (2012) (no evidence
15 that exposure encountered in employment exposed worker to greater risk of contracting disease
16 than non-work environment).

17 The out-of-state cases Spivey cites are of little relevance since most states use private
18 insurance carriers to cover workers compensation and state statutes vary widely. Nor do any of
19 the cases address the issue to be decided here, whether the trial court must determine whether
20 the City rebutted the RCW 51.32.185 prima facie occupational disease presumption so that the
21 presumption "disappears" leaving the burden of Spivey, as the appealing party to prove that his
22 cancer is an occupational disease as defined by RCW 51.08.140.
23

24 To the extent that the cases are meant as authority for the proposition that the City has
25 not rebutted the RCW 51.32.185 presumption, they do not do so. *Jackson v. Workers'*
26

1 *Compensation Appeals Bd.*, 35 Cal. Rptr.3d 256, 259 (2005) construes a statute providing that
2 “injury” includes a “disputable presumption” that “heart trouble which develops or manifests
3 itself” during specific employment is work-related. It was passed to do away with the dispute
4 among medical experts regarding what causes “heart trouble” by requiring proof of an actual
5 contemporaneous nonwork-related event. In *City of Frederick v Shankle*, 136 Md. App. 339,
6 366, 765 A.2d 1008 (2001) an expert’s testimony that he disagreed with the premise behind a
7 presumption that heart disease was caused by stress, i.e., employment as a police officer, was
8 ruled inadmissible but only because he did not also testify that the officer had any of the four to
9
10 six risk factors for cardio-vascular disease. Spivey misstates the actual holding in *Cunningham*
11 *v. City of Manchester Fire Department*, 129 N.H. 232, 238, 525 A.2d 714 (1987) the court also
12 noted that the presumption could be rebutted by “producing evidence that one or more non-
13 occupationally-related factors were more probably the cause of the plaintiff’s heart disease than
14 his firefighter occupation.” The employers did meet the burden of rebutting the presumption
15 in *Worden v. Houston County*, 356 N.W.2 693 (Minn. 1984) and *Cook v. City of Waynesboro*
16 *Police Dept.*, 225 Va. 23, 300 S.E.2d 746 (1983). Lastly, *Superior v. Dep’t of Industry, Labor*
17 *and Human Relations*, 84 Wis.2d 663, 267 N.W.2d 637 (1978) involved only the admissibility
18 of a pre-employment physical to demonstrate that a deceased fireman had no preexisting heart
19 disease and thus qualified for the presumption of occupational disease.
20
21

22 Without citation to the record Spivey asserts that the City’s expert testimony “simply
23 challenges the premise of the presumption.” Plaintiff’s Response at 15. This may be an
24 attempt to make these out-of-state cases applicable, but there is no support for it in the record
25 as the expert witnesses testified that Spivey’s sun exposure is the cause of his malignant
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1 melanoma. Alternatively it might be an argument that the RCW 51.32.185 presumption is a
2 conclusive one, which is clearly not the case. It is a rebuttable one.

3 e. RCW 51.32.185 is clear on its face and need not be “liberally construed”

4 Spivey’s “liberal construction” argument is not clear. There is no issue of statutory
5 interpretation here. It is “fundamental” that the doctrine of liberal construction does not apply
6 when the intent of the legislature is clear from the plain reading of the statute. *Elliot v. Dep’t*
7 *of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009), citing *Johnson v. Dep’t of*
8 *Labor and Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949). ~~See also *Harris v. Dep’t of Labor*~~
9 ~~& Indus.~~, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (rejecting a request for liberal
10 construction of RCW 51.32.225 because the statute is unambiguous) and *Lowry v. Dep’t of*
11 *Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (declining to apply the liberal
12 construction doctrine in a workers’ compensation case where the statute is unambiguous, “the
13 so-called construction would in fact be legislation”). It would be error for the Court to
14 consider legislative intent. Spivey seems to argue that the RCW 51.32.185 presumption is a
15 conclusive one. On its face, however, RCW 51.32.185 is not conclusive, but rebuttable.
16

17
18 Contrary to Spivey’s argument, Plaintiff’s Response at 10, once rebutted the “mandated
19 causal connection” disappears and Spivey *does have to prove causation* – that per RCW
20 51.08.140 his cancer arose naturally and proximately out of distinctive conditions of
21 employment. Here, the Board determined that the City’s medical testimony was more
22 persuasive than Spivey’s medical testimony. It will be up to a jury to determine if Spivey’s
23 proof preponderates over that of the City’s, unless the Court determines that the City failed to
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1 rebut the presumption that Spivey's cancer was an occupational disease — in which
2 circumstance the jury will not hear either party's testimony.

3 Spivey cites to *Dennis v. Dep't of Labor and Indus.*, 109 Wn.2d 467, 470-71, 745 P.2d
4 1295 (1987) in support of his liberal construction argument. But *Dennis* merely concluded that
5 the occupational disease proximate cause requirement was no different than the industrial
6 injury proximate cause requirement — proximate cause could be satisfied if a pre-existing
7 condition was made worse by a work exposure just as it could a work injury. Spivey's citation
8 to *Boeing Co. v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002) is also in apropos. The

9
10 Supreme Court in *Heidy* rejected Boeing's expert testimony explanation for rating hearing loss
11 resolving "doubts" about its "uncertain science" in favor of the worker. There are no doubts
12 about "uncertain science" unless one accepts Spivey's contention that any firefighter with
13 cancer automatically has an occupational disease. But that flies in the face of the clear
14 language of the statute which makes such a conclusion rebuttable, and not subject to "liberal
15 interpretation."

16
17 **f. It is error to refer to a proposed decision and order**

18 Finally, Spivey's reference to the proposed decision and order is error and should be
19 stricken and an order in limine entered that no party may refer to the proposed decision and
20 order. An industrial appeals judge's rejected decision is not the Board's decision. Only the
21 Board's decision is at issue. *Stratton v. Dep't of Labor and Indus.*, 1 Wn. App. 77, 79, 459
22 P.2d 651(1969). The industrial appeals judge's rejected proposal has no standing. *Id.* An
23 industrial appeals judge is merely an employee of the Board. Pursuant to RCW 51.52.104, his
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25
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1 or her proposed decisions and orders are not the decisions and orders of the Board. They do
2 not acquire that dignity until the Board formally adopts them. *Id.*

3 **6. Conclusion**

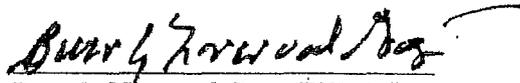
4 The trial court must determine whether the Board's conclusion of law, that the City
5 properly rebutted the RCW 51.32.185 prima facie presumption, is correct. If the Board's
6 conclusion of law is correct, then Spivey bears of burden of persuading the jury that his cancer
7 meets the RCW 51.08.140 definition of occupational disease. If the Board's conclusion of law
8 is not correct then the court must remand Spivey's claim to the Department and order the
9

10 Department to allow it. The Department will present a separate proposed order.

11 The court should also enter an order in limine striking all references to the proposed
12 decision and order, and directing the parties not to refer to it. A proposed order in limine
13 accompanies the Department's response.

14
15 DATED this 16th day of March, 2015.

16 Robert W. Ferguson
17 Attorney General

18 
19 Beverly Norwood Goetz WSBA #8434
20 Senior Counsel