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No. 54981-6-II

COURT OF APPEALS DIVISON II
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA,
Appellant/Petitioner,

vs.

STEPHEN T. BRADLEY and THE WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,
Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Out-of-State Cases

Federal Court Cases

Washington Statutes

Washington Constitution

U.S. Constitution

Washington Legislative History

Washington Appellate Rules

Washington Uniform Jury Instructions

Other Authorities

I. INTRODUCTION

This is an industrial insurance case. It concerns the so-called firefighter's statute, RCW 51.32.185. At relevant times, Respondent Bradley was a firefighter for the City of Olympia. CP 333-335. At relevant times, he was diagnosed with bladder cancer. CP 40/8-21.

Armed with RCW 51.32.185, Mr. Bradley filed an industrial insurance claim, alleging his firefighting activities presumptively caused his bladder cancer. CP 19/7-11. The Department of Labor and Industries denied his claim. He then appealed to the Board of Industrial Insurance Appeals (BIIA) and, after a evidentiary hearing, the BIIA affirmed the Department's order. CP 5-20. Mr. Bradley then filed an appeal in Superior Court, requesting a jury trial. In superior court, he eventually filed a motion for summary judgment. CP 1205-1266. The superior court granted that motion, essentially ruling that the City could not rebut the presumption (1) through epidemiologic evidence that firefighting is not a risk factor for

bladder cancer and/or (2) through clinical evidence that firefighting did not cause Mr. Bradley's bladder cancer. CP 1301-02; RP 23/13-25; 24-26/1-13. The City then appealed that ruling to the Court of Appeals, which affirmed the ruling of the trial court.

II. IDENTITY OF PETITIONER

The petitioner is the City of Olympia. It seeks review of the opinion published by Division II of the Court of Appeals.

III. COURT OF APPEALS' DECISION

The Court of Appeals Division II filed its published opinion on November 9, 2021. A copy of the opinion is attached as Appendix A-1 to A-19.

IV. ISSUES PRESENTED FOR REVIEW

A. Assignment of Error

Did the Court of Appeals err when it ruled as matter of law that the City of Olympia could not rebut the presumption of RCW 52.32.185 by proffering epidemiologic and clinical

evidence that firefighting activities are not risk factors for or do not cause bladder cancer?

B. Issues Pertaining to the Assignment of Error

1. Can the presumption of RCW 51.32.185 be rebutted through epidemiologic and/or clinical evidence that firefighting activities are not risk factors for and do not cause bladder cancer?

2. If so, does the City also need to identify a specific or nonspecific nonoccupational cause of Mr. Bradley's bladder cancer?

3. If the answer to 2 is in the affirmative in that the City needs to identify a *nonspecific* nonoccupational cause of Mr. Bradley's bladder cancer, what is the definition of a *nonspecific* nonoccupational cause of a disease *viz.*, Mr. Bradley's bladder cancer?

4. If the answer to 2 is in the affirmative, did the City present sufficient evidence to create an issue of fact that Mr.

Bradley's bladder cancer was caused by nonoccupational risk factors?

V. STATEMENT OF THE CASE

The Court of Appeals Division II's recitation of the facts and procedure is generally accurate. Op. at 2-6. Even so, certain points bear emphasis.

As witnesses, Mr. Bradley presented himself; a co-worker, Ken Carson; and a medical expert, a Dr. Kenneth Coleman, a former part-time emergency room and family medicine physician and presently an attorney. CP 469/16; 470/12-18 & 21-25. He has no expertise in diagnosing or treating bladder cancer. CP 473/4-7. Dr. Coleman opined that Mr. Bradley's firefighting activities caused his bladder cancer. CP 458/10-25. Dr. Coleman also testified that exposure to second hand smoke can cause bladder cancer. CP 501/14-17. Mr. Bradley testified that until he was nineteen, he lived with his parents, both of whom were heavy smokers. CP 397/9-20; 398/1.

The City presented three medical experts: Dr. Bill Vanasupa, a Board certified urologist and Mr. Bradley's treating physician; Dr. Erik Torgerson, a Board certified urologist and medical director for urologic services for Swedish Health System; and Dr. Noel Weiss, a highly regarded professor of epidemiology at the University of Washington. CP 37/4; 38/5-8; 39/16-21; 40/11-12 & 21; 216/25; 217/1 & 15-18; 218/16; 220/2-25; 221/1-21; 119/2-3 & 8-9; 140/10-14. Each testified that firefighting activities were not a risk factor for bladder cancer and that Mr. Bradley's firefighting activities more probably than not did not cause his bladder cancer. CP 46/11-25; 47/1-13; 229/9-16; 253/3-4; 140/17-25. Drs. Vanasupa and Torgerson based their opinions on clinical experience and epidemiologic studies. CP 253/3-4; 47/5-7.

Dr. Weiss based his opinion on the universe of relevant epidemiologic studies. CP 140/17-25. He surveyed the scientific literature on the risk of bladder cancer from firefighting activities. CP 121-123. He himself had authored

epidemiological studies on the relationship between firefighting activities and bladder cancer. CP 120-121. From that survey, he identified five critical studies:

(1) LeMasters, *et. al.* Cancer Risk Among Firefighters: A Review and Meta-Analysis of 32 Studies (2006). CP 122/9-13;

(2) The IARC Working Group's Review and Update of LeMasters' Meta-Analysis in the IARC Monograph No. 98 entitled the Evaluation of Carcinogenic Risks to Humans with specific reference to firefighters (2010). CP 122/18-23;

(3) R. D. Daniels, *et. al.* Mortality and Cancer Incidence in a Pooled Cohort of U.S. Firefighters from San Francisco, Chicago & Philadelphia (1950-2009) (NIH 2014). CP 122/24-25; 123/1-3;

(4) R. D. Daniels, *et. al.* Exposure-Response Relationships for Select Cancer and Non-Cancer Health Outcomes in a Cohort of U.S. Firefighters from San Francisco, Chicago & Philadelphia (1950-2009) (NIH 2015). CP 123/13-18; and

(5) Silverman & Koutros, *et. al.* Bladder Cancer in Thun (ed.) CANCER EPIDEMIOLOGY AND PREVENTION (OUP 2017). CP 123/19-23; 150/14-25.

These studies presented a massive amount of data for thousands of firefighters over decades of firefighting exposures. From these data, the conclusion was drawn by the researchers and by Dr. Weiss that firefighting activities are unlikely to cause bladder cancer. CP 140/17-25.

VI. WHY THIS COURT SHOULD ACCEPT REVIEW

A. Qualification for Review Under RAP 13

The City of Olympia requests that this Court grant discretionary review under RAP 13.4 First, under RAP 13.4(b)(1), the decision of the Court of Appeals in *Bradley v. City of Olympia*, 2021 Wash. App. LEXIS 2632 (2021) conflicts with this Court's decision in *Spivey v. City of Bellevue*, 187 Wn.2d 716, 389 P.3d 504 (2017) and with RCW 51.32.185 itself. It also conflicts with the decision in Division I

of the Court of Appeals in *City of Bellevue v. Raum*, 171 Wn. App. 124, 286 P.3d 695 (2012). Unlike *Spivey*, *Raum* and RCW 51.32.185, *Bradley* limits the kind of evidence that the employer can proffer to rebut the presumption. It prohibits the introduction of evidence rebutting "general causation."

Second, under RAP 13.4(b)(4), the Court of Appeals' decision involves an issue of substantial public interest that this Court should determine.

Third, under RAP 13.4(b)(3), the Court of Appeals' decision raises significant question of law under the U.S. Constitution.

B. Rebutting the RCW 51.32.185 Presumption

1. Introduction

Under RCW 51.32.185, the presumption is substantive in that it remains in the case as a substitute for evidence. *Spivey*, 187 Wn.2d at 732-35; M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 906-27 (1931). That much is granted. But Division II of the Court of

Appeals has taken this presumption one step further—one step too far: It has ruled that the presumption is conclusive, that firefighting activities cause bladder cancer.

The Court of Appeals' decision will legally prevent employers from rebutting the presumption. That is, because of *Bradley*, the presumption is now effectively irrebuttable. In the Court of Appeals' words, "RCW 51.32.185(1)(a) is designed to foreclose the argument that firefighting activities cannot cause bladder cancer." *Bradley*, 2021 Wash. App. LEXIS at 12 & 16.

> RCW 51.32.185[1] provides in relevant part:
>
> (1)(a) In the case of firefighters ***, there shall exist a prima facie presumption that: *** (c) cancer; *** [is an] occupational disease[s] under RCW 51.08.140.
> ***
> *** This presumption of occupational disease may be rebutted by a preponderance

[1] Mr. Bradley filed his claim with the Department in 2017. So the version of RCW 51.32.185 that applies here is that enacted in 2007. ENGROSSED SUBSTITUTE HOUSE BILL 1833 Chapter 490, Laws of 2007 (partial veto) effective date: 07/22/07.

> 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 within subsection (1)(c) of this section shall only apply to *** bladder cancer ***.

2. Definition of Key Terms

That the presumption is now held to be irrebuttable follows logically and legally from an analysis of how causation is proved in presumption cases. Analysis of causation in toxic exposure cases proceeds by partitioning the concept of causation into its two constituents: "general causation" and "specific causation." *E.g., Raynor v. Merrell Pharmaceuticals, Inc.,* 104 F.3d 1371, 1376 (D.C. Cir. 1997) (discussing the distinction between general and specific causation); *Casey v. Ohio Medical Products*, 877 F. Supp. 1380 (N.D. Cal. 1995) ("the term causation has two meanings..., the first is general causation..., the second is specific causation...."); *City of*

Littleton v. Indus. Claim Appeals Office, 2016 CO 25, 370 P.3d 157, 160 (2016).

"General causation" is that the purported exposure (*viz.*, firefighting activities) causes (or is a statistically significant risk factor) for the disease (*viz.*, bladder cancer) in the relevant or exposed population. Assessing "general causation" is through well-designed population (or epidemiologic) studies. For instance, if in the relevant exposed population, the risk of developing the disease is no greater than it is in the general population, the exposure is not a risk factor for the disease. That would be a scientific fact.

"Specific causation" is that, if general causation is proven, the particular exposure (*viz.*, Bradley's firefighting activities) caused this particular worker's disease (*viz.*, Bradley's bladder cancer).

3. General Causation

3.1 *Limits on Rebuttal Evidence.* Division II of the Court of Appeals has held that *as a matter of law* general causation is

conclusively presumed under RCW 51.32.185. *Bradley*, 2021 Wash. App. LEXIS at 2-3 & 14. That is, it held that RCW 51.32.185 mandates that firefighting activities cause bladder cancer in firefighters. In the Court of Appeals words, "...an employer cannot rebut the presumption with evidence that there is no association between firefighting and the disease at issue." *Bradley*, 2021 Wash. App. LEXIS at 14. That means that in proceedings at the Board of Industrial Insurance Appeals, where the record is created, the employer cannot introduce into evidence scientific studies that contradict the presumption of general causation. Under the holding of *Bradley*, such rebuttal evidence would be irrelevant.

For better guidance on this issue, see *City of Littleton v. Indus. Claim Appeals Office,* 2016 CO. 25, 370 P.3d 157, 160 (2016). There the appellate court held that, in a statute similar to Washington's RCW 51.32.185, general causation is rebuttable. Indeed, under the *City of Littleton,* the employer can

rebut the presumption by disproving general or specific causation.[2]

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[2] This Court has referred to *Cunningham v. City of Manchester Fire Dep't*, 129 N.H. 232, 525 A.2d 714 (1987) regarding the Morgan theory of presumptions. *Cunningham* is not a good analogy for interpreting Washington law. In *Cunningham*, the appellate court held that the employer could not rebut the Morgan presumption by disproving general causation. In essence, general causation is irrebuttable. The court further held that the employer need not have to prove the *specific* cause of the worker's disease, but it does have to provide evidence of non-occupational co-risk factors for the disease from which a reasonable trier of fact could conclude that the worker's disease was more probably than not caused by one or more of those non-occupational risk factors. *Cunningham*, 129 N.H. at 238.

The court identifies a test for legal (*viz.*, proximate) causation in heart disease cases. *New Hampshire Supply Co. v. Steinberg*, 119 N.H. 223, 230-31, 433 A.2d 1247 (1979). This test does not appear to track Washington's conception of proximate cause. New Hampshire has a "substantial factor" test for proximate cause. *Id.* Washington does not recognize such a test of proximate cause. *Hurwitz v. Dep't of Labor & Indus.*, 38 Wn.2d 332, 334-35, 229 P.2d 505 (1951); *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 207, 667 P.2d 78 (1983); *Bremerton v. Shreeve*, 55 Wn. App. at 339-40. Washington appellate courts should discern the intent of the statute from its language, not from decisions interpreting dissimilar statutes or common law. *Simpson Logging Co.*, 32 Wn.2d at 479.

Moreover, the New Hampshire court's line of reasoning is illogical. As a fact of general causation, firefighting activities

3.2 *RCW 51.32.185.* Nowhere in RCW 51.32.185 does it provide that the kinds of evidence the employer can proffer to rebut the presumption are limited to disproving specific causation. RCW 51.32.185 provides:

> This presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is

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are presumed to cause heart disease. This presumption does not disappear; it is continuing; it is read to the jury. Yet the employer cannot disprove that causative factor. But it can introduce into evidence, as a matter of general causation, co-risk factors for heart disease and establish that these co-risk factors apply to the claimant without specifying whether any one of them in fact caused his heart disease. If it did so, the fire fighter's heart disease would have at least two causes—the presumed work-related cause and the proffered non-work related cause. If the jury decides to find for the employer, it must disregard the work-related Morgan presumed cause, which has not been disproved. But unless it speculated, why would it disregard the presumed cause? Because the employer cannot proffer evidence challenging the scientific basis of the presumed cause, the jury has no idea of the *nature* or *dimension* of the presumed cause. Is that presumed cause ill-founded, weakly founded, strongly founded? The jury has no clue. That is, it does not know whether the association between firefighting and heart disease is statistically significant or merely due to random chance or, if statistically significant, whether it satisfies any of the Bradford-Hill criteria for assessing causation. See CP 138/18-25; 139-140/1-3.

> not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. [Emphasis supplied.]

On its face, the statute does not limit the kind of evidence that can rebut the presumption. Division II of the Court of Appeals in *Bradley* has rewritten the statute.

4. Specific Causation

Division II of the Court of Appeals apparently believes that a defense expert can conduct a differential diagnosis as to an alternate cause of Bradley's bladder cancer without being able to rule out that firefighting activities cause bladder cancer. No expert can do that. In the context of RCW 51.32.185, an employer cannot disprove specific causation without disproving general causation. Every assessment of specific causation has, as a predicate, a finding on general causation. *See City of Littleton v. Indus. Claim Appeals Office*, 2012 COA 187, 412 P.3d 440, 456 (2012) (Carparelli, J., dissenting); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005)

("[W]ithout general causation, there can be no specific causation.").

4.1 *Firefighting Activities Caused Bradley's Bladder Cancer.* As a matter of "specific causation," the Court of Appeal's decision legally establishes that Bradley's firefighting activities caused his bladder cancer. That is, admittedly, Bradley was a firefighter. Admittedly, he has bladder cancer. By virtue of the Court of Appeal's decision, as a matter of law, it is conclusively presumed under RCW 51.32.185 that firefighting activities cause bladder cancer. Therefore, it follows that Bradley's bladder cancer was caused at least in part by his firefighting activities. No factfinder could logically reach a different conclusion, as discussed below.

4.2 *Alternate Cause of Bradley's Bladder Cancer.* The Court of Appeals said that for the employer to rebut specific causation, the employer must prove that Bradley's bladder

cancer was the result of an alternate nonoccupational[3] cause of bladder cancer. *Bradley*, 2021 Wash. App. LEXIS at 17. That proof entails proof of general causation as to the alternate nonoccupational cause of bladder cancer. It also entails—very importantly—that the alternate cause be either the sole cause or a unique cause of his bladder cancer.

That latter requirement is mandated by Washington's law of proximate cause. WPI 155.06.03; *Bremerton v. Shreeve*, 55 Wn. App. 334, 339-40, 777 P.2d 568 (1989)(Div. II); *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683-84, 571 P.2d 229 (1977)(Div. II). Under that law, there may be more than one proximate cause of the occupational disease. So if the employer merely proved that Bradley's bladder cancer had another or alternate cause, it could not overcome the presumption as to specific causation. This is so because

[3] Technically, the alternate cause could be occupational as long as it does not arise from the firefighter's occupation with the subject employer against whom the firefighter has filed his industrial insurance claim. See RCW 51.32.185(1).

Bradley's bladder cancer could have two or more proximate causes. Moreover, no factfinder could conclude that there is an alternate cause of Bradley's bladder cancer that is an intervening independent and sufficient cause without first disproving the presumption that firefighting activities cause bladder cancer.

So an expert who testifies that Bradley's bladder cancer was caused by secondhand smoke is saying by entailment (1) that, as a matter of general causation, secondhand smoke causes bladder cancer and (2) that, given proof of (1), secondhand smoke is, as a matter of specific causation, a cause (not necessarily the sole cause) of Bradley's bladder cancer.

4.3 *The Alternate Cause is the Sole Cause of Bladder Cancer.* If the expert also says that it is the sole cause or a unique cause[4] of his bladder cancer, the expert is saying by

[4] A "unique" cause of a disease is a cause scientifically established, as a matter of general causation, as the only cause of that disease. Division II of the Court of Appeals has essentially held that as to the diseases identified in RCW

entailment that he has ruled out firefighting activities as a specific cause of his bladder cancer. To rule out firefighting activities as a specific cause of Bradley's bladder cancer, the expert would need to establish that, as a matter of general causation, firefighting activities are not a cause of (or risk factor for) bladder cancer.[5] But under the Court of Appeal's *Bradley* decision, the expert is foreclosed from doing that. This is so because, as a matter of general causation, firefighting activities are conclusively presumed to cause (or be a risk factor for) bladder cancer.

Division II of the Court of Appeals effectively ruled that to overcome the presumption, the employer must establish a

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51.32.185(1) & (3), the Legislature has determined (1) that none has a unique nonoccupational cause and (2) that each is conclusively presumed, as a matter of general causation, to be caused by firefighting activities. *Bradley*, 2021 Wash. App. LEXIS at 14 & 16.

[5] The expert could claim that the claimant is not a firefighter or that he/she does not have the required disease. But those conditions are predicates to application of RCW 51.32.185 and so are defenses designed to skirt the presumption not to overcome the presumption.

unique nonoccupational cause of the disease. Yet, at the same time, it has held that the Legislature has conclusively determined that each of the diseases identified in the statute has no unique cause, that is, that each is caused by firefighting activities—even if, as a matter of scientific fact (general causation), "there is no association between firefighting activities and the disease in question." *Bradley*, 2021 Wash. App. LEXIS at 14. That is absurd.

4.4 *Proving an Alternate Cause is Not a Precondition for Rebutting General Causation.* Disproving general causation is a "necessary" and "sufficient" condition to rebutting the presumption. Proving, by a preponderance of evidence, an alternate co-occurring cause should not be a precondition to being able to proffer evidence rebutting general causation. Simply, proof of a co-occurring cause is insufficient to rebut the presumption. That is, when an expert testifies that the firefighter's disease was caused solely by an alternate cause, the expert is by entailment testifying that firefighting activities,

though conclusively presumed to cause this disease, are not a cause of this firefighter's disease. So disproof of general causation is a "necessary" condition to rebutting the presumption. It is also a "sufficient" condition. It is sufficient because if firefighting activities do not cause bladder cancer, then by the force of logic (*viz.*, the law of the excluded middle), the cause of Bradley's bladder cancer must be nonoccupational as explained in more detail below in section 4.7.

4.5 *City of Bellevue v. Raum*. Division II of the Court of Appeals referred to the Division I Court of Appeals' case of *City of Bellevue v. Raum*, 171 Wn. App. 124, 286 P.3d 695 (2021) as an example of the type of evidence needed to rebut the RCW 51.32.185(1) presumption. *Bradley*, 2021 Wash. App. LEXIS at 17-18. There are significant problems with this suggestion. Essentially, it is an empty promise.

First, *Raum* was decided before *Spivey*. *Raum* was analyzed under a Thayer theory of presumptions, not under Morgan theory as *Spivey* later mandated. That distinction is

significant. In *Raum,* the employer introduced evidence that tended to disprove general causation. *Raum*, 171 Wn. App. at 134-35. In *Bradley*, no such evidence would be legally admissible; it would be irrelevant because as a matter of law the employer could not disprove "general causation." That is, that the employer could not prove that firefighting activities are not a risk factor for bladder cancer. Indeed, it is highly ironic that Division II of the Court of Appeals used *Raum* as an example of how to prove an alternate nonoccupational cause. That is so because in *Raum*, the employer prevailed because it disproved general causation. It proved that Raum's "heart problem"[6]—coronary artery disease—was not due to, as a matter of general

[6] RCW 51.32.185(1)(a)(ii) provides that the presumption is triggered if the worker has "any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities. [Emphasis supplied.]

causation, firefighting activities.[7] *Raum,* 171 Wn. App. at 134-35.

Second, in *Raum*, Division I held that by virtue the legislative history of RCW 51.32.185, the presumption was not intended to create a legal conclusion that fire fighters have a higher incidence of cardiovascular disease. *Raum*, 171 Wn. App. at 152-53. This holding is directly contrary to that in

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[7] There are two issues: the first issue is definitional. Is coronary artery disease in the class of "heart problems" described by the statute? *See Gorre v. City of Tacoma*, 184 Wn.2d 30, 357 P.3d 625 (2015). The second issue regards proof of general causation—do firefighting activities cause coronary artery disease or increase the risk of cardiovascular disease? As to the first issue: symptoms from coronary artery disease may develop within seventy-two hours of exposure to smoke, fumes, or toxic substances and those symptoms are "heart problems," but coronary artery disease itself, although a "heart problem," does not develop within seventy-two hours of said exposures and so would not be in the class of "heart problems" embraced by the statute. That defense is not rebutting the presumption. It is skirting the presumption. As to the second issue: Dr. Yang testified that there is no strong evidence of a direct link or causation between firefighting and the development of coronary artery disease or an increased risk of dying from cardiovascular disease. *Raum*, 171 Wn. App. 134-135. Based on the holding in *Bradley*, the employer here could not address this last issue.

Bradley. In *Raum*, Division I held that by virtue of the legislative history of RCW 51.32.185 (Engrossed Senate Bill 5801), the statute "*does nothing more than shift the burden of proof* for duty related heart disease for LEOFF [Law Enforcement Officers' and Fire Fighters' Retirement System] II law enforcement, and heart/lung diseases for fire fighters to [the Department] or self-insured employers." "[Emphasis added.]" *Raum*, 171 Wn. App. at 143-44. That holding directly contradicts *Bradley*, where Division II of the Court of Appeals held that RCW 51.32.185 not only shifts the burden of proof and burden of persuasion to the employer but also limits the kind of evidence that the Department or self-insured employer may proffer to rebut the presumption. That is, the employer may not introduce evidence that would disprove general causation. *Bradley*, 2021 Wash. App. LEXIS at 14.

4.6 *Proving the Specific Cause of the Firefighter's Disease*. In *Spivey*, this Court held that "this standard [applying the Morgan theory of presumptions] does not impose on the

employer a burden of proving the specific cause of the firefighter's melanoma." *Spivey*, 187 Wn.2d at 735.

In *Bradley*, Division II concluded that despite the self-insured employer's epidemiological and clinical evidence demonstrating that firefighting activities do not cause bladder cancer, as matter of law, the City had not established a specific alternate nonoccupational cause of Bradley's bladder cancer. *Bradley*, 2021 Wash. App. LEXIS at 16.

But if firefighting activities do not cause bladder cancer, then by the force of logic, the cause of Bradley's bladder cancer must be non-occupational as explained in more detail below in section 4.7. The City should not have to prove more than that.

4.7 *Rebutting the Presumption is a Factual Issue for the Jury*. In *Spivey*, this Court held that "whether the City rebutted the firefighter presumption by a 'preponderance of the evidence' is a question of fact that may be submitted to the jury." *Spivey*, 187 Wn.2d at 728. In *Bradley*, Division II ignored the edict of this Court and took that issue from the jury,

concluding that despite the self-insured employer's epidemiological and clinical evidence demonstrating that firefighting activities do not cause bladder cancer, whether the City rebutted the firefighter presumption by a 'preponderance of the evidence' is *a question of law* to be decided by the trial court. *Bradley*, 2021 Wash. App. LEXIS at 16. Worse, it limited the allowable evidence to rebut the presumption such that the presumption cannot realistically be rebutted. In doing so, it ignored the plain language of the statute.

RCW 51.32.185 "explicitly states that the presumption maybe rebutted with a preponderance of the evidence." *Spivey*, 187 Wn.2d at 728. "[I]t requires that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." *Spivey*, 187 Wn.2d at 735. It does not plainly or explicitly limit the kind of evidence that the employer can proffer to rebut the presumption. If the Legislature had intended to limit the kind of evidence that the

employer could proffer to rebut the presumption, that would have been a significant qualification of the statutory scheme and so that qualification would have been expected to have been stated explicitly.

If general causation can be rebutted and if the preponderance of the evidence is that firefighting activities do not cause bladder cancer, then by the force of logic, the cause of Bradley's bladder cancer is non-occupational. This is why. The causes of bladder cancer can be sorted into two mutually exclusive or disjoint sets: (1) the set of occupational causes (*viz.*, *allegedly* firefighting activities) and (2) the set of nonoccupational causes. In propositional logic, this is what is called an "exclusive disjunction." So the causes of bladder cancer are either (1) or (2). And so, logically, Bradley's bladder cancer was caused either by firefighting activities (*viz.*, occupational causes) or by non-firefighting activities or

exposures or conditions (*viz.*, nonoccupational causes). There is no viable third category.[8]

Given those two complete and mutually exclusive or disjoint sets, if the City proves that firefighting activities or exposures do not cause bladder cancer (*viz.*, it disproves "general causation"), then by force of the logical law of the excluded middle, unspecified[9] nonoccupational factors are the cause of bladder cancer as to firefighters generally and as to Mr. Bradley specifically. This is what the Board of Industrial Insurance Appeals concluded: That the City had proved by a preponderance of the evidence through its three experts—Drs. Vanasupa, Weiss and Torgerson—that *unspecified*

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[8] Arguably, Bradley's bladder cancer could have been caused by a combination of both kinds of factors. But this scenario does not change the logic as to the proof needed to rebut the presumption. Such combined causes would fall into the set of occupational causes because the nonoccupational factors would not be the *sole* proximate cause of the Bradley's bladder cancer.

[9] *Spivey* does not require the employer to prove the *specific* cause of the bladder cancer. *Spivey*, 187 Wn.2d at 735.

nonfirefighting activities or conditions caused Mr. Bradley's bladder cancer.

C. Substantive Due Process

If firefighting exposures do not cause bladder cancer, then the presumption as to bladder cancer lacks a rational foundation. It is arbitrary. If the presumption is arbitrary, it violates substantive due process under the 14th Amendment of the U.S. Constitution and under Article I, §3 of the Washington Constitution. Under RAP 2.5(a), a party may raise a manifest error affecting a constitutional right. The City broached this issue indirectly in its Opening Brief at page 21, footnote 13 and did so more directly in its Reply Brief at pages 13-15.

VII. CONCLUSION

This Court should grant the employer's Petition for Review and reverse the decision of the Court of Appeals and trial court.

This document contains 4888 words, excluding the parts of the document exempted from the word count under RAP 18.17.

Dated this 7th day of December 2021.

Respectfully submitted,

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APPENDIX A

Bradley v. City of Olympia, 2021 Wash. App. LEXIS 2632

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Bradley v. City of Olympia

Court of Appeals of Washington, Division Two

September 17, 2021, Oral Argument; November 9, 2021, Filed

No. 54981-6-II

Reporter

2021 Wash. App. LEXIS 2632 *; 2021 WL 5190924

STEPHEN T. BRADLEY, *Respondent*, v. THE CITY OF OLYMPIA ET AL., *Appellants*.

Prior History: [*1] Appeal from Thurston Superior Court. Docket No: 18-2-04848-3. Judge signing: Honorable James J Dixon. Judgment or order under review. Date filed: 06/18/2020.

Core Terms

firefighting, cancer, bladder, disease, rebut a presumption, factors, nonoccupational, exposure, workers' compensation, occupational disease, exposed, smoke, veto, superior court, rebutted, grant summary judgment, claimant's, argues, genuine issue of material fact, statutory presumption, medical evidence, present evidence, summary judgment, attorney's fees, causal

Case Summary

Overview

HOLDINGS: [1]-The city's argument that the statutory presumption under Wash. Rev. Code § 51.32.185(1)(a) could be rebutted solely with medical evidence that firefighting activities in general did not cause bladder cancer was rejected because § 51.32.185(1)(a) was designed to foreclose the argument that firefighting activities could not cause bladder cancer, the city was arguing that the presumption itself should not exist because the evidence did not support it but § 51.32.185(1)(a) was the law, and the court had to liberally construe § 51.32.185(1)(a) in favor of the worker; [2]-The city presented no other evidence that would rebut § 51.32.185(1)(a)'s presumption, and therefore the trial court did not err by granting the firefighter summary judgment, because the city did not even attempt to present any evidence that specifically related to the cause of the firefighter's bladder cancer.

Outcome

Judgment affirmed and case remanded.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

HN1[] **Workers' Compensation, Occupational Diseases**

Wash. Rev. Code § 51.32.180 states that any worker who suffers disability from an occupational disease in the course of employment is entitled to certain workers' compensation benefits. Under *Wash. Rev. Code § 51.08.140*, an occupational disease is a disease that arises naturally and proximately out of employment.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

Governments > Local Governments > Fire Departments

HN2[] **Workers' Compensation, Occupational Diseases**

Wash. Rev. Code § 51.32.185(1)(a)(iii)1 establishes a presumption for firefighters that cancer is an occupational disease. *Section 51.32.185(3)(b)* expressly applies that presumption to bladder cancer. This presumption is rebuttable. *§ 51.32.185(1)(d)*. In Spivey v. City of Bellevue, the Washington Supreme Court stated that to rebut the *§ 51.32.185(1)* presumption, the firefighter's employer must provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN3[] **Workers' Compensation, Occupational Diseases**

An employer cannot rebut the presumption under *Wash. Rev. Code § 51.32.185(1)(a)* with evidence that firefighting activities in general

do not cause bladder cancer. Instead, to avoid summary judgment an employer must present sufficient evidence that the individual claimant's bladder cancer was caused by nonoccupational factors.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Evidence > Burdens of Proof > Allocation

HN4[↓] Workers' Compensation, Occupational Diseases

The Industrial Insurance Act, Wash. Rev. Code Title 51, governs workers' compensation claims. *Wash. Rev. Code § 51.32.180* states that any worker who contracts an occupational disease in the course of employment is entitled to certain workers' compensation benefits. An occupational disease is a disease that arises naturally and proximately out of employment. *Wash. Rev. Code § 51.08.140*. In general, the worker bears the burden of proving an occupational disease when asserting a workers' compensation claim.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

Evidence > Burdens of Proof > Preponderance of Evidence

HN5[↓] Workers' Compensation, Occupational Diseases

Wash. Rev. Code § 51.32.185(1)(a)(iii) and *(3)(b)* establish a presumption that bladder cancer is an occupational disease for firefighters. This presumption can be rebutted by the preponderance of the evidence. *§ 51.32.185(1)(d)*. 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. *§ 51.32.185(1)(d)*. Whether an employer has rebutted the *§ 51.32.185(1)* presumption generally is a question of fact.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Evidence > Burdens of Proof > Allocation

Workers' Compensation &

SSDI > Compensability > Inferences & Presumptions

HN6[] **Workers' Compensation, Occupational Diseases**

In Spivey, the Washington Supreme Court determined that the Morgan theory of presumptions applies to *Wash. Rev. Code § 51.32.185(1)*. Under the Morgan theory, the presumption does not vanish on the production of contrary evidence; it shifts both the burden of production and persuasion to the employer to show that firefighting activities are not the cause of the firefighter's disease. In other words, the employer has the burden both to produce contrary evidence and to persuade the finder of fact that firefighting did not cause the disease.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

HN7[] **Workers' Compensation, Occupational Diseases**

Rebutting the statutory presumption under *Wash. Rev. Code § 51.32.185(1)* does not require the employer to prove the specific cause of the firefighter's disease. Instead, the employer is required to produce evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review

HN8[] **Administrative Proceedings, Judicial Review**

On appeal from the superior court for an industrial insurance claim, an appellate court reviews the superior court's decision, not the Board of Industrial Insurance Appeals' order.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN9[] **Entitlement as Matter of Law, Appropriateness**

An appellate court reviews a superior court's order on summary judgment de novo. All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wash. Super. Ct. Civ. R. 56(c)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN10[] **Standards of Review, De Novo Review**

Statutory interpretation is a question of law that an appellate court reviews de novo. A court's primary goal in interpreting a statute is to determine and give effect to the legislature's intent. Courts discern this intent through the language of the statutory provision, the context of the statute, and related statutes.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Governments > Legislation > Interpretation

HN11[] **Workers' Compensation, Occupational Diseases**

Wash. Rev. Code § 51.12.010 states that the Industrial Insurance Act (IIA) 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. The IIA is remedial in nature, and thus we must construe it liberally in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. The court in Spivey stated that *Wash. Rev. Code § 51.32.185* reflects a strong social policy, and thus it must accord it the strength intended by the legislature.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN12[] **Workers' Compensation,**

Occupational Diseases

Spivey supports the conclusion that an employer cannot rebut the *Wash. Rev. Code § 51.32.185(1)(a)* presumption with evidence that firefighting actually does not cause the disease subject to the presumption.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN13 **Workers' Compensation, Occupational Diseases**

An employer cannot rebut the *Wash. Rev. Code § 51.32.185(1)(a)* presumption with evidence that firefighting actually does not cause the disease at issue. The court stated that a firefighter retains the benefit of the *§ 51.32.185(1)* presumption even if there is no known association between the disease and firefighting. This statement necessarily means that an employer cannot rebut the presumption with evidence that there is no association between firefighting and the disease at issue.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN14 **Workers' Compensation, Occupational Diseases**

Courts must liberally construe *Wash. Rev. Code § 51.32.185(1)(a)* in a manner that is favorable to the worker. *Wash. Rev. Code § 51.12.010*. And courts must give effect to the strong social policy reflected in *§ 51.32.185(1)*.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Governments > Local Governments > Fire Departments

HN15 **Workers' Compensation, Occupational Diseases**

Courts must interpret *Wash. Rev. Code § 51.32.185(1)* in a manner that best advances the statute's legislative purpose. The clear purpose of *§ 51.32.185(1)* is to extend workers' compensation benefits to firefighters who develop certain specified diseases even if

a connection between the disease and firefighting cannot be shown, unless the employer can prove that nonoccupational factors caused the firefighter's disease.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN16[] Workers' Compensation, Occupational Diseases

The examples of rebutting evidence provided in *Wash. Rev. Code § 51.32.185(1)(d)* share the common characteristic that they are all nonoccupational risk factors specific to an individual claimant. Nothing in *§ 51.32.185(1)(d)* suggests that an employer can rebut the presumption by showing that there actually is no connection between firefighting and bladder cancer.

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN17[] Compensability, Inferences & Presumptions

In Spivey, the court stated that to rebut the *Wash. Rev. Code § 51.32.185(1)* presumption, a firefighter's employer must provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors. An employer cannot satisfy this burden by attempting to prove that firefighting in general does not cause bladder cancer. Instead, the employer must focus on evidence showing what caused the individual claimant's cancer. *Wash. Rev. Code § 51.32.185(1)(d)* provides a nonexclusive list of relevant factors: use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. An employer can avoid summary judgment only if it presents evidence that creates a genuine issue of material fact the individual claimant's bladder cancer was caused by these or other nonoccupational factors.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN18[] Workers' Compensation,

Occupational Diseases

Spivey is consistent with the conclusion that an employer can meet the burden of production and therefore avoid summary judgment by presenting evidence that the firefighter's disease was caused by nonoccupational factors.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN19 **Opposing Materials, Accompanying Documentation**

In the summary judgment context, there is no question that a superior court can rule as a matter of law when the nonmoving party does not provide sufficient evidence to create a genuine issue of material fact. *Wash. Super. Ct. Civ. R. 56(c).*

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN20 **Appeals, Appellate Briefs**

Appellate courts generally do not address claims asserted for the first time in the reply brief.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Compensability > Occupational Diseases

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

HN21 **Workers' Compensation, Occupational Diseases**

Wash. Rev. Code § 51.32.185(9)(b) provides that attorney fees are permitted in an appeal to

any court involving the presumption under § 51.32.185(1) and when the final decision allows the claim for benefits.

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Judges: Authored by Bradley Maxa. Concurring: Bernard Veljacic, Linda Lee.

Opinion by: Bradley Maxa

Opinion

¶1 MAXA, J. — The City of Olympia appeals a superior court order granting summary judgment for Stephen Bradley, a former firefighter in the City's fire department, on a workers' compensation claim that he filed with the Department of Labor and Industries (DLI). Bradley claimed that firefighting activities caused his bladder cancer.

¶2 HN1[↑] RCW 51.32.180 states that any worker who suffers disability from an occupational disease in the course of employment is entitled to certain workers' compensation benefits. Under RCW 51.08.140, an "occupational disease" is a disease that "arises naturally and proximately out of employment."

¶3 HN2[↑] In addition, RCW 51.32.185(1)(a)(iii)[1] establishes a presumption for firefighters that cancer is an occupational disease. [*2] RCW 51.32.185(3)(b) expressly applies that presumption to bladder cancer. This presumption is rebuttable. RCW 51.32.185(1)(d). In *Spivey v. City of Bellevue*, the Supreme Court stated that to rebut the RCW 51.32.185(1) presumption, the firefighter's employer must "provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." 187 Wn.2d 716, 735, 389 P.3d 504 (2017).

¶4 DLI denied Bradley's workers' compensation claim, and Bradley filed a petition for review with the Board of Industrial Insurance Appeals (Board). To rebut the RCW 51.32.185(1)(a) presumption, the City presented medical evidence that firefighting activities *in general* do not cause bladder

[1] RCW 51.32.185 has been amended twice since Bradley filed his workers' compensation claim, and the amendments have changed the numbering of the relevant subsections. Because the amendments are not material to this case, we cite to the current version of the statute.

cancer. The Board affirmed DLI's denial, finding that the City had rebutted the statutory presumption. On appeal, the superior court granted summary judgment in favor of Bradley on the grounds that the City's medical evidence could not rebut the *RCW 51.32.185(1)(a)* presumption.

¶5 *HN3*[↑] We hold that an employer cannot rebut the presumption under *RCW 51.32.185(1)(a)* with evidence that firefighting activities *in general* do not cause bladder cancer. Instead, to avoid summary judgment an employer must present sufficient evidence that the individual claimant's bladder cancer was caused by nonoccupational [*3] factors. Here, summary judgment was appropriate because the City failed to present evidence that created a genuine issue of material fact as to whether nonoccupational factors caused Bradley's bladder cancer.

¶6 Accordingly, we affirm the superior court's order granting summary judgment in favor of Bradley and remand to DLI to approve Bradley's workers' compensation claim.

FACTS

Background

¶7 Bradley was born in August 1949. He worked as a firefighter for the City from 1997 until 2014. As a firefighter, Bradley was exposed to diesel exhaust during various firefighting activities. He also was exposed to mild to moderate smoke, fumes, and toxins as well as the exhaust from the fire equipment and emergency vehicles while responding to fire suppression-related calls. After fire-suppression activities, Bradley would have soot on his wrists and around his neck. He also would expel a black substance when coughing or blowing his nose.

¶8 Bradley never had any lung problems while working as a firefighter. None of his annual physicals with the City's fire department showed any signs of cancer. Bradley's father had colon cancer that doctors suspected was caused by exposure to Agent Orange when he served in [*4] the Vietnam War. Other than his father, there was no history of cancer in Bradley's family.

¶9 In September 2016 when he was 67 years old, Bradley was diagnosed with bladder cancer. After his diagnosis, Bradley filed a workers' compensation claim under *RCW 51.32.185(1)* with DLI, alleging that his firefighting activities caused his bladder cancer. DLI denied his claim.

Petition for Review to Board

¶10 Bradley filed a petition for review of DLI's decision with the Board. In April 2018, an

industrial appeals judge (IAJ) held an evidentiary hearing. Bradley generally testified to the facts stated above. He also admitted that he consistently was exposed to secondhand smoke for the first 19 years of his life because both of his parents smoked. In addition, Bradley and his coworker testified about their duties as firefighters.

¶11 Bradley also relied on deposition transcripts from his medical expert witness Dr. Kenneth Coleman, an emergency medicine and family medicine physician and attorney. He generally testified that medical studies showed that there was a causal link between firefighting and bladder cancer and agreed with statements from medical studies that were read to him. But he also agreed that an epidemiological [*5] study that established an association or correlation did not necessarily establish causation.

¶12 Dr. Coleman generally stated that exposure to secondhand smoke can be a cause of bladder cancer. But he was not asked whether Bradley's exposure to secondhand smoke could have been the cause of his bladder cancer.

¶13 The City presented deposition transcripts to the IAJ from three medical expert witnesses: Dr. Bill Vanasupa, a Board certified urologist and Bradley's treating physician; Dr. Noel Weiss, an epidemiologist and epidemiology professor at the University of Washington; and Dr. Erik Torgerson, a Board certified urologist and medical director of urology at the Swedish Urology Group.

¶14 Dr. Vanasupa began treating Bradley's bladder cancer in September 2016. He generally stated that based on the articles he reviewed, he believed that there was an increase in bladder cancer mortality among firefighters, but that the increase was not statistically significant. Dr. Vanasupa stated that it was possible that firefighting caused Bradley's bladder cancer, but there was less than a 50 percent probability of a causal connection. But he admitted that he did not know what carcinogens firefighters in general [*6] or Bradley specifically were exposed to during fire suppression activities.

¶15 Dr. Vanasupa stated that a history of smoking could cause bladder cancer and that certain genetic predispositions could make bladder cancer more likely in a person. But he acknowledged that Bradley was not a smoker and that there was no history of bladder cancer in his family. Dr. Vanasupa also mentioned radiation exposure as a potential causation for bladder cancer, but he did not suggest that Bradley had been exposed to radiation.

¶16 Dr. Weiss testified that based on his review of studies involving firefighters and

bladder cancer, his opinion was that it was unreasonable to make the inference that exposure to firefighting activities caused bladder cancer. He testified that there were inconsistent conclusions among the 30 studies regarding this hypothesis, and that there was a weak association between firefighting activities and bladder cancer. His opinion was that firefighting does not have the capacity to cause bladder cancer, but he could not rule out that possibility.

¶17 Dr. Weiss acknowledged that Bradley's medical records showed that he was a nonsmoker with no family history of bladder cancer. He admitted that [*7] he did not know how many times Bradley was exposed to various carcinogens while on the job.

¶18 Dr. Torgerson testified that he believed that firefighting was not an occupation that had an association with bladder cancer. He admitted that he had no knowledge about the extent to which Bradley was exposed to carcinogens as a firefighter or what Bradley's duties were as a firefighter. Dr. Torgerson testified that Bradley was a nonsmoker who had no family history of kidney or bladder cancer, or any genitourinary cancer.

¶19 The IAJ entered a proposed decision and order affirming DLI's order. The IAJ determined that the statutory presumption under *RCW 51.32.185(1)* applied, but that the City's expert medical evidence had rebutted the presumption by a preponderance of the evidence. However, the IAJ noted that none of the medical experts could state with certainty as to what caused Bradley's bladder cancer. And the IAJ found that the evidence regarding Bradley's history of exposure to secondhand smoke from other employment and non-employment activities was insufficient to rebut the presumption. Nevertheless, the IAJ concluded that the preponderance of the evidence did not establish that Bradley's distinctive employment [*8] conditions caused his cancer rather than conditions of everyday life or employments in general.

¶20 The Board adopted the IAJ's decision and order and denied Bradley's petition for review.

Superior Court

¶21 Bradley appealed the Board's decision to the superior court. He filed a summary judgment motion on the grounds that the City had failed to prove by a preponderance of the evidence that his bladder cancer was, more probably than not, caused by nonoccupational factors. After Bradley filed his summary judgment motion, DLI conceded that Bradley's workers' compensation claim should be allowed.

¶22 The superior court granted Bradley's

summary judgment motion after reviewing the entire certified appeal board record. The court awarded Bradley reasonable attorney fees and remanded to DLI to allow Bradley's claim.

¶23 The City appeals the superior court's summary judgment order.

ANALYSIS

A. OCCUPATIONAL DISEASE PRESUMPTION FOR FIREFIGHTERS

¶24 *HN4*[↑] The Industrial Insurance Act (IIA), Title 51 RCW, governs workers' compensation claims. *RCW 51.32.180* states that any worker who contracts an occupational disease in the course of employment is entitled to certain workers' compensation benefits. An "occupational disease" is a disease that "arises naturally and proximately out of employment." [*9] *RCW 51.08.140*. In general, the worker bears the burden of proving an occupational disease when asserting a workers' compensation claim. *Spivey, 187 Wn.2d at 726*.

¶25 *HN5*[↑] However, *RCW 51.32.185(1)(a)(iii)* and *(3)(b)* establish a presumption that bladder cancer is an occupational disease for firefighters. This presumption can be rebutted by the preponderance of the evidence. *RCW 51.32.185(1)(d)*. "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." *RCW 51.32.185(1)(d)*. Whether an employer has rebutted the *RCW 51.32.185(1)* presumption generally is a question of fact. *Spivey, 187 Wn.2d at 727-28*.

¶26 *HN6*[↑] In *Spivey*, the Supreme Court determined that the Morgan theory of presumptions applies to *RCW 51.32.185(1)*. *Id. at 731-35*. Under the Morgan theory, "[t]he presumption does not vanish on the production of contrary evidence; it shifts both the burden of production and persuasion to the employer" to show that firefighting activities are not the cause of the firefighter's disease. *Id. at 731*. In other words, the employer has the "burden both to *produce* contrary evidence and to *persuade* the finder of fact" that firefighting did not cause the disease. *Id. at 735*.

¶27 *HN7*[↑] The court stated that rebutting the statutory presumption under *RCW 51.32.185(1)* does not require the employer to [*10] prove the specific cause of the firefighter's disease. *Id.* Instead, the employer is required to produce evidence "from which a reasonable trier of fact could conclude that *the firefighter's disease was, more probably than not, caused by nonoccupational factors*." *Id.* (emphasis added).

B. STANDARD OF REVIEW

¶28 HN8[↑] On appeal from the superior court for an industrial insurance claim, we review the superior court's decision, not the Board's order. *Leitner v. City of Tacoma, 15 Wn. App. 2d 1, 11, 476 P.3d 618 (2020), review denied, 196 Wn.2d 1045 (2021); see also RCW 51.52.140.*

¶29 HN9[↑] We review a superior court's order on summary judgment de novo. *Weaver v. City of Everett, 194 Wn.2d 464, 472, 450 P.3d 177 (2019).* All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c); Weaver, 194 Wn.2d at 472.*

¶30 HN10[↑] In addition, this case involves statutory interpretation, which is a question of law that we review de novo. *Spivey, 187 Wn.2d at 726.* Our primary goal in interpreting a statute is to determine and give effect to the legislature's intent. *Wright v. Lyft, Inc., 189 Wn.2d 718, 722, 406 P.3d 1149 (2017).* We discern this intent through the language of the statutory provision, the context of the statute, and related statutes. *Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014).*

¶31 HN11[↑] *RCW 51.12.010* states that the IIA "shall be liberally construed for the purpose of reducing [*11] to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." "The IIA is remedial in nature, and thus we must construe it 'liberally ... in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'" *Spivey, 187 Wn.2d at 726* (alteration in original) (quoting *Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)*). Specific to this case, the court in *Spivey* stated, "*RCW 51.32.185* reflects a strong social policy, and thus we must accord it the strength intended by our legislature." *187 Wn.2d at 731.*

C. REBUTTING THE *RCW 51.32.185(1)(A)* PRESUMPTION

¶32 The City argues that the statutory presumption under *RCW 51.32.185(1)(a)* can be rebutted solely with medical evidence that firefighting activities *in general* do not cause bladder cancer. The City claims that presentation of such evidence necessarily shows that Bradley's bladder cancer must have been caused by nonoccupational factors, thereby satisfying the *Spivey* requirement. We disagree.

1. Evidence Challenging the Validity of the Presumption

¶33 The City presented medical evidence that

firefighting in general does not cause bladder cancer. The City argues that this evidence is sufficient to create a question of fact as to whether Bradley's [*12] bladder cancer was caused by nonoccupational hazards, which *Spivey* stated was required to rebut the *RCW 51.32.185(1)* presumption. The City claims that if firefighting in general does not cause bladder cancer, Bradley's cancer must have been caused by nonoccupational hazards rather than by his firefighting activities.

¶34 We reject this argument. By adopting the presumption that a firefighter's bladder cancer is an occupational disease, the legislature already has determined that there is at least some causal connection between firefighting activities and bladder cancer. In other words, *RCW 51.32.185(1)(a)* is designed to foreclose the argument that firefighting activities cannot cause bladder cancer.

¶35 The City's argument essentially is that the legislature was wrong when it enacted *RCW 51.32.185(1)(a)*. An employer who presents evidence that firefighting activities actually do not cause bladder cancer is not rebutting the presumption; it is attacking the validity of the presumption itself. The City is arguing that the presumption should not exist because the evidence does not support it. But *RCW 51.32.185(1)(a)* is the law. Adopting the presumption was within the legislature's prerogative. It would make no sense to allow an employer to defeat a firefighter's workers' [*13] compensation claim by disagreeing that the presumption is legitimate.

¶36 *HN12[↑] Spivey* supports the conclusion that an employer cannot rebut the *RCW 51.32.185(1)(a)* presumption with evidence that firefighting actually does not cause the disease subject to the presumption. The court in *Spivey* indicated that the *RCW 51.32.185(1)* presumption was adopted because firefighters may have difficulty producing evidence that firefighting actually caused their disease. *187 Wn.2d at 734-35*. In addressing the legislature's addition of melanoma to the list of cancers to which *RCW 51.32.185(1)* applies, the court stated,

> [The legislature] added melanoma despite testimony that there was not enough scientific evidence to support adding additional diseases to the statute. *See* H.B. REP. ON H.B. 2663, at 3, 57th Leg., Reg. Sess. (Wash. 2002) ("[t]he bill is too broad because it covers conditions for which no correlation to fire fighting exposure is known"). Thus, the apparent purpose of adding melanoma to the list of covered diseases was *to compensate firefighters even in circumstances when there may not be strong medical or scientific evidence establishing a definitive causal relationship*

between firefighting and the disease.

Id. (emphasis added).

¶37 The court concluded, "*RCW 51.32.185* reflects the legislature's [*14] intent to relieve a firefighter of unique problems of proving that firefighting caused his or her disease." *Id. at 741-42*.

¶38 This court's decision in *Gorre v. City of Tacoma, 180 Wn. App. 729, 758, 324 P.3d 716 (2014), reversed on other grounds, 184 Wn.2d 30, 357 P.3d 625 (2015)*, also is consistent with the conclusion that *HN13* an employer cannot rebut the *RCW 51.32.185(1)(a)* presumption with evidence that firefighting actually does not cause the disease at issue. The court stated that a firefighter retains the benefit of the *RCW 51.32.185(1)* presumption "even if there is no known association between the disease and firefighting." *Id.* This statement necessarily means that an employer cannot rebut the presumption with evidence that there is no association between firefighting and the disease at issue.[2]

¶39 *HN14* In addition, we must liberally construe *RCW 51.32.185(1)(a)* in a manner that is favorable to the worker. *RCW 51.12.010*; *Spivey, 187 Wn.2d at 726*. And we must give effect to the strong social policy reflected in *RCW 51.32.185(1)*. *Spivey, 187 Wn.2d at 731*. Rejecting the City's argument is consistent with this strong social policy.

¶40 Similarly, even if the City's position was reasonable, *HN15* we must interpret *RCW 51.32.185(1)* in a manner that best advances the statute's legislative purpose. *Wright, 189 Wn.2d at 729*. The clear purpose of *RCW 51.32.185(1)* is to extend workers' compensation benefits to firefighters who develop certain specified diseases even if a connection between the disease and [*15] firefighting cannot be shown, unless the employer can prove that nonoccupational factors caused the firefighter's disease. *See Spivey, 187 Wn.2d at 733-34, 741-42*.

¶41 The City refers to *RCW 51.32.185(1)(d)*, arguing that the second sentence of that provision does not limit the type of evidence that can rebut the *RCW 51.32.185(1)* presumption. *HN16* But the examples of rebutting evidence provided in *RCW 51.32.185(1)(d)* share the common characteristic that they are all nonoccupational risk factors *specific to an individual claimant*. Nothing in *RCW 51.32.185(1)(d)* suggests that an employer can rebut the presumption by showing that there actually is no connection between firefighting and bladder cancer.

[2] The parties debate whether this statement is dicta. But regardless of whether it is dicta, the statement is consistent with *Spivey*.

¶42 The City also argues that the governor's veto of a section providing a statement of intent of a 2002 bill amending *RCW 51.32.185(1)* supports its position. One of the vetoed provisions stated, "Fire fighters are exposed to polycyclic aromatic hydrocarbons as products of combustion and these chemicals have been associated with bladder cancer. The epidemiologic data suggests fire fighters have a three-fold risk of bladder cancer compared to the population as a whole." LAWS OF 2002, ch. 337, § 1(d), at 1717-18. The explanation of the partial veto stated that the governor strongly supported the statutory presumption, but stated that "[t]he assumptions in [*16] section 1 of this bill have not been clearly validated by science and medicine." LAWS OF 2002, ch. 337, veto statement at 1719. The City argues that this veto rejects the ideas that *RCW 51.32.185(1)* creates a legal conclusion that firefighting causes bladder cancer.[3]

¶43 However, this veto does not support the City's position. The significance of the veto is that the presumption for bladder cancer remained the law - strongly supported by the governor - even without a statutory finding that firefighters have a greater risk of bladder cancer. The veto explanation is consistent with the statement in *Spivey* that *RCW 51.32.185(1)* was designed to "compensate firefighters even in circumstances when there may not be strong medical or scientific evidence establishing a definitive causal relationship between firefighting and the disease." *187 Wn.2d at 735*.

¶44 Accordingly, we hold that the City's evidence showing that firefighting in general does not cause bladder cancer is insufficient to create a question of fact as to whether the *RCW 51.32.185(1)* presumption was rebutted in this case.

2. Evidence Needed to Rebut Presumption

¶45 The next question is whether the City presented any other evidence that would rebut the *RCW 51.32.185(1)* presumption. *HN17*[↑] In *Spivey*, the court stated that [*17] to rebut the *RCW 51.32.185(1)* presumption, a firefighter's employer must "provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." *187 Wn.2d at 735*.

¶46 As we discuss above, an employer cannot satisfy this burden by attempting to prove that firefighting in general does not cause bladder

[3] The City also refers to a veto of a section providing a statement of intent of a 2007 bill amending *RCW 51.32.185(1)*. *See* LAWS OF 2007, ch. 490, at 2253. The explanation of veto stated a concern that the statement of intent contained "broad generalizations about the incidence of cardiovascular disease." LAWS OF 2007, ch. 490, veto statement at 2256.

cancer. Instead, the employer must focus on evidence showing what caused the *individual claimant's* cancer. RCW 51.32.185(1)(d) provides a nonexclusive list of relevant factors: "use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities." An employer can avoid summary judgment only if it presents evidence that creates a genuine issue of material fact the individual claimant's bladder cancer was caused by these or other nonoccupational factors.

¶47 An example of the type of evidence needed to rebut the RCW 51.32.185(1) presumption is found in City of Bellevue v. Raum, 171 Wn. App. 124, 286 P.3d 695 (2012). In that case, the employer presented evidence from four doctors that the firefighter claimant's cardiovascular disease was caused by a variety of non-employment-related factors, including high cholesterol, high blood pressure, and family history. [*18] Id. at 154. The court held that this evidence was sufficient for a jury to find that the employer had rebutted the presumption. Id. at 155.

¶48 The parties discuss whether in addition to showing that a firefighter's disease was caused by nonoccupational factors, an employer also must prove that firefighting was not a contributing cause. HN18[↑] But *Spivey* is consistent with the conclusion that an employer can meet the burden of *production* and therefore avoid summary judgment by presenting evidence that the firefighter's disease was caused by nonoccupational factors. 187 Wn.2d at 735. We need not address whether an employer must disprove any connection between firefighting and a claimant's disease in order to meet the burden of persuasion at trial.

¶49 Here, the City did not even attempt to present any evidence that specifically related to the cause of Bradley's bladder cancer. The City's witnesses admitted that Bradley was not a smoker and had no family history of bladder cancer. There was evidence in the record that Bradley was exposed to second hand smoke while he was growing up, but none of the witnesses testified that this exposure was a cause of his cancer. And the City's witnesses did not identify any other potential nonoccupational [*19] exposures that may have caused Bradley's bladder cancer.

¶50 The Supreme Court in *Spivey* declined to address "whether it would *ever* be permissible for a judge to decide the issue [of whether the firefighter presumption has been rebutted] as a matter of law." 187 Wn.2d at 729. HN19[↑] But in the summary judgment context, there is no question that a superior court can rule as a matter of law when the nonmoving party does

not provide sufficient evidence to create a genuine issue of material fact. *CR 56(c)*; *Weaver, 194 Wn.2d at 472*.

¶51 We conclude that the City's evidence was insufficient to create a genuine issue of material fact that nonoccupational factors caused Bradley's bladder cancer. Accordingly, we hold that the superior court did not err in granting summary judgment in favor of Bradley.

D. SUBSTANTIVE DUE PROCESS

¶52 The City argues for the first time in its reply brief that if the evidence shows that firefighting activities do not cause bladder cancer, the *RCW 51.32.185(1)(a)* presumption regarding bladder cancer is arbitrary and violates substantive due process. However, the City did not include a substantive due process challenge to *RCW 51.32.185(1)(a)* in its assignments of error and did not reference this claim in its opening brief. *HN20*[↑] We generally do not address claims asserted for [*20] the first time in the reply brief. *Samra v. Singh, 15 Wn. App. 2d 823, 834 n.30, 479 P.3d 713 (2020)*. Therefore, we decline to consider the City's substantive due process argument.

E. ATTORNEY FEES ON APPEAL

¶53 Bradley argues that he is entitled to attorney fees on appeal under *RCW 51.52.130* and *RCW 51.32.185(9)(b)*. We agree.

¶54 *RCW 51.52.130(2)* provides that "[i]n an appeal to the superior or appellate court involving the presumption established under *RCW 51.32.185*, the attorney's fee shall be payable as set forth under *RCW 51.32.185*." *HN21*[↑] *RCW 51.32.185(9)(b)* provides that attorney fees are permitted in an appeal to any court involving the presumption under *RCW 51.32.185(1)* and when "the final decision allows the claim for benefits."

¶55 Here, we affirm the superior court's order granting summary judgment in favor of Bradley and remand to DLI to approve his workers' compensation claim. Accordingly, we grant Bradley's request for attorney fees under *RCW 51.52.130* and *RCW 51.32.185(9)(b)*.

CONCLUSION

¶56 We affirm the trial court's order granting summary judgment in favor of Bradley and remand to DLI to approve Bradley's workers' compensation claim.

LEE, C.J., and VELJACIC, J., concur.

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No. 54981-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA, Appellant/Petitioner, v. STEPHEN T. BRADLEY, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I filed a PETITION FOR REVIEW with Division II of the Court of Appeals in the State of Washington and by this DECLARATION OF SERVICE served the PETITION FOR REVIEW on the following persons or entities:

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