

2-12-2015

## State v. Rhoades Clerk's Record v. 3 Dckt. 42742

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

The Estate of,  
KURT AIKELE (Deseased),

Claimant/Appellant,

v.

CITY OF BLACKFOOT, Employer, and  
IDAHO STATE INSURANCE FUND, Surety,

Defendants/Respondents.

SUPREME COURT NO. 42742

HEARING TRANSCRIPT  
TAKEN DECEMBER 4, 2013

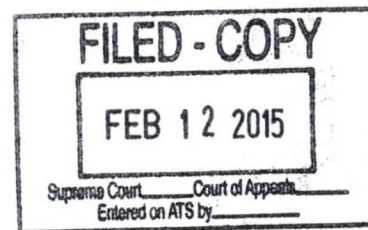
BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

Andrew Adams  
598 N. Capital Ave.  
Idaho Falls, ID 83402

Attorney for Respondent

Steven R. Fuller  
PO Box 191  
Preston, ID 83263



42742

COPY

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KURT AIKELE, ) IC 2008-040432  
)  
Claimant, )  
)  
vs. )  
)  
CITY OF BLACKFOOT, )  
)  
Employer, )  
)  
and )  
)  
IDAHO STATE INSURANCE FUND, )  
)  
Surety, )  
Defendants. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT

Idaho Falls, Idaho  
Wednesday, December 4, 2013  
9:01 A.M.

**REFEREE DOUGLAS A. DONOHUE**

For Claimant: ANDREW A. ADAMS, Esq.  
CURTIS & PORTER  
598 N. Capital Avenue  
Idaho Falls, Idaho 83402

For Defendants: STEVEN R. FULLER, Esq.  
ATTORNEY AT LAW  
Post Office Box 191  
Preston, Idaho 83263

ORIGINAL

FILED  
DEC 11 2013  
INDUSTRIAL COMMISSION

I N D E X

	<u>Page</u>	<u>Line</u>
<u>Wednesday, December 4, 2013</u>		
Hearing.....	1	1
Opening Statement by Mr. Adams.....	8	4
Opening Statement by Mr. Fuller.....	8	20
<u>Claimant's Witnesses</u>		
AIKELE, MARY DENISE		
Direct by Mr. Adams.....	11	18
Cross by Mr. Fuller.....	21	7
Examination by Referee Donohue.....	24	4
GRAY, KEVIN		
Direct by Mr. Adams.....	26	13
Cross by Mr. Fuller.....	32	21
Examination by Referee Donohue.....	33	16
Redirect by Mr. Adams.....	35	1
Claimant rests.....	35	24
Defendants rest.....	36	1
Reporter's Certificate.....	37	1

E X H I B I T S

JOINT EXHIBITS

Page    Line

VOLUME I

A. Teton Oncology	Admitted.....	8	1
B. Dr. George Pfoertner M.D.	Admitted.....	8	1
C. St. Lukes Mountain States Tumor	Admitted.....	8	1

VOLUME II

1. Blackfoot Medical Center, Medical Records	Admitted.....	8	1
2. Pathology Associates, Medical Records	Admitted.....	8	1
3. Blackfoot Medical Clinic, Medical Records	Admitted.....	8	1
4. Bingham Memorial Hospital, Medical Records	Admitted.....	8	1
5. Dr. Henry West, Medical Records	Admitted.....	8	1
6. Dr. Richard Oehlschager, Medical Records	Admitted.....	8	1
7. International Association of Fire Fighters, Records	Rejected.....	6	11
8. Midmark Diagnostics Group, Medical Records	Admitted.....	8	1
9. Portneuf Medical Center, Medical Records	Admitted.....	8	1

B

E X H I B I T S (Continued)

<u>JOINT EXHIBITS (Continued)</u>	<u>Page</u>	<u>Line</u>
10. Dr. Bjorn Sauerwein, Medical Records Admitted.....	8	1
11. Star Valley Pulmonary Medicine, Medical Records Admitted.....	8	1
<u>VOLUME III</u>		
11a. Mountain View Hospital Admitted.....	8	1
12. Southeast Idaho Urology, Medical Records Admitted.....	8	1
13. Cancer Treatment Centers of America, Records Admitted.....	8	1
14. Regional Hearing and Balance Center, Medical Records Admitted.....	8	1
15. Eastern Idaho Regional Medical Center, Medical Records Admitted.....	8	1
16. Pharmacy Solutions, Medical Records Admitted.....	8	1
17. Hawker Funeral Home Admitted.....	8	1
18. The Aspen Group, Records Admitted.....	8	1
19. Misc. Medical Records Admitted.....	8	1
20. Marriage License Admitted.....	8	1
21. Claimant's Fire Incident Participation Admitted.....	8	1

C

E X H I B I T S (Continued)

<u>JOINT EXHIBITS (Continued)</u>	<u>Page</u>	<u>Line</u>
22. Death Certificate Admitted.....	8	1
23. Blackfoot Medical Center Bills Admitted.....	8	1
24. Dr. Dane Dickson, Medical Bills Admitted.....	8	1
25. Mountain View Hospital, Medical Bills Admitted.....	8	1
26. Bingham Memorial Hospital Medical Bills Admitted.....	8	1
27. Portneuf Medical Center, Medical Bills Admitted.....	8	1
28. Urology Center of Idaho, Medical Bills Admitted.....	8	1
29. Joint Exhibits from August 13, 2012, Hearing Admitted.....	8	1

D

1 IDAHO FALLS, IDAHO, WEDNESDAY, DECEMBER 4, 2013

2 9:01 A.M.

3  
4  
5 REFEREE DONOHUE: Good morning.

6 This is the time and place according to the  
7 notice for the hearing in the matter of Kurt Aikele,  
8 deceased, versus the City of Blackfoot and Idaho  
9 State Insurance Fund, Industrial Commission Docket  
10 No. 08-040432.

11 The wife of the Claimant is present represented  
12 by Mr. Adams. The Defendants are represented by  
13 Mr. Fuller.

14 The issues, according to the notice, are as  
15 follows -- this is Part 2. The first hearing was  
16 bifurcated and dealt with, and now we're hearing the  
17 remaining issues, which are:

18 Whether Claimant has complied with the notice  
19 and limitations requirements set forth in Idaho Code  
20 Section 72-701 through Idaho Code 72-706, and whether  
21 these limitations are tolled under Idaho Code 72-604.

22 Second, whether the condition for which  
23 Claimant seeks benefits was caused by the alleged  
24 industrial accident.

25 And third, the extent of death benefits



1 payable.

2 Mr. Adams, does that fairly set forth the  
3 things we need to talk about?

4 MR. ADAMS: I, I believe it does. The original  
5 bifurcated hearing, we were discussing any TTD  
6 benefits or past income benefits. Will that also be  
7 covered with this from the time of, from the time of  
8 diagnosis till the time that he passed away?

9 REFEREE DONOHUE: Do you have any objection to  
10 that, Mr. Fuller?

11 MR. FULLER: Well, that poses an interesting  
12 issue.

13 REFEREE DONOHUE: Go ahead.

14 MR. FULLER: Because we have, we have the  
15 original statute of limitations issue, which had to  
16 do with -- and we went to hearing on that. Now the  
17 hearing never culminated in a decision because  
18 Mr. Aikele passed away.

19 REFEREE DONOHUE: Yes.

20 MR. FULLER: The issues of TTD and death  
21 benefits seem to be somewhat --

22 REFEREE DONOHUE: Oh, I see your point.

23 MR. FULLER: -- different as far as how those  
24 statute of limitations arguments run. In other  
25 words, we may have a statute of limitations argument

1 on -- that was previously heard that may affect TTD  
2 as opposed to just simply a death benefit argument,  
3 which is what is being made now.

4 And I haven't really explored that; but, but if  
5 that's going to be an issue, that needs to be  
6 clarified here for today.

7 REFEREE DONOHUE: And I hadn't given that a  
8 thought myself. So, yes, we will consider everything  
9 and let the parties brief out how they think it  
10 should go.

11 MR. FULLER: And that's fine.

12 REFEREE DONOHUE: Okay. Now, of course, we  
13 already have the transcript; the joint exhibits from  
14 the prior hearing, which we are calling for this  
15 purpose Exhibit A; and we have the deposition of  
16 Dr. Zuckerman as part of that hearing, which is  
17 incorporated into this by reference and will be  
18 considered in full.

19 I have received a set of joint exhibits today  
20 numbered 1 through 29. Mr. Adams, does the Claimant  
21 have any objection to the admission of any of these  
22 documents?

23 MR. ADAMS: We do not.

24 REFEREE DONOHUE: Okay. Does the Defense have  
25 an objection to any of these documents?

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MR. FULLER: Now which?

REFEREE DONOHUE: 1 through 29, the big set.

MR. FULLER: The big -- the two large sets?

REFEREE DONOHUE: Yes, Volume 1 and 2.

MR. FULLER: Yes, I have an objection to -- it is Volume 2, No. 7. Is that correct?

REFEREE DONOHUE: International Association of Firefighters --

MR. FULLER: That's correct, yes. I have to stand when I make an objection.

REFEREE DONOHUE: If you wish.

MR. FULLER: I'm so used to it. I can't help it.

REFEREE DONOHUE: Feel free to be comfort; and if that makes you comfortable, you go right ahead.

MR. FULLER: The objection we would make to this is this is a submission of what appears to be a letter to Mr. Kurt Aikele dated February 26, 2010. It is a letter from or -- excuse me -- on the letterhead of International Association of Firefighters. It's signed by an Alyce Girardi.

And attached to that letter is what appears to be a treatise, Evaluating Causality For Occupational Cancers: The Example of Firefighters, by a T. L. Guidotti, G-u-i-d-o-t-t-i.

1           We don't believe that particular document and  
2 the treatise that is attached to it meets the  
3 requirements for an exception to the hearsay rule;  
4 and as a learned treatise as well, it should be part  
5 of an expert witness's testimony who would also  
6 testify as to that and that it's been used in  
7 preparation of their testimony and their opinion.

8           We do not understand that Ms. Girardi will be  
9 appearing, and we would make an objection to the  
10 admissibility of that evidence on that basis.  
11 There's lack of foundation and so forth as well.

12           REFEREE DONOHUE: I take it this Guidotti is  
13 not going to be testifying either.

14           MR. FULLER: That is my understanding as well.

15           REFEREE DONOHUE: Mr. Adams.

16           MR. ADAMS: Mr. Referee, the, the -- what this  
17 was was the, the firefighters' union contacted the  
18 International Association of Firefighters, and they  
19 forwarded -- the International Association of  
20 Firefighters forwarded this, this treatise.

21           What it is, as far as my reading, is it's, it's  
22 just a study. Dr. Dickson, I believe, Dr. Dickson,  
23 the treating oncologist -- we believe Kurt forwarded  
24 this to him, and Ms. Aikele was prepared to testify  
25 to that today.

1           And so -- but as far as what this was, they're  
2 not going to be here to -- it seems to be  
3 well-founded in research as you can see by their, by  
4 their footnotes. But this is -- it's not a study on  
5 Kurt's diagnosis per se, but it's more of a study on  
6 just firefighters and cancer that they received as a  
7 result of their employment.

8           REFEREE DONOHUE: Well, it is hearsay then; and  
9 until it is linked to an expert opinion of somebody  
10 who's testifying, it won't be allowed in. So your  
11 objection is sustained.

12          MR. FULLER: Okay.

13          REFEREE DONOHUE: Like I say, to the extent  
14 that it is now. If foundation is laid in a  
15 post-hearing deposition, then we can look at it then,  
16 but not right now.

17          MR. ADAMS: Okay.

18          REFEREE DONOHUE: Any other objections?

19          MR. FULLER: Well, we have this volume that I  
20 prepared that I need to address for just one second.

21          REFEREE DONOHUE: If you will, please.

22          MR. FULLER: The Volume 1 of the hearing  
23 exhibits -- and these are joint hearing exhibits --  
24 does contain reference to a treatise that was, that  
25 was given in Dr. Zuckerman's report. He relied on

1 that. He'll also be testifying to that as we take  
2 his second deposition.

3 All of that is actually admitted in the first  
4 joint exhibits that we've agreed to. But I did look  
5 at the rule again; and what's interesting in that  
6 rule is that if you want to admit the treatise,  
7 apparently 803, Rule 803, requires us to either read  
8 it in the record or make a motion that it be simply  
9 admitted for good cause.

10 We would ask that it be admitted for good cause  
11 so we don't have to have Dr. Zuckerman read it into  
12 the record, and it's already been admitted as part of  
13 the joint exhibits previously given to the  
14 Commission. So we would ask that it be admitted and  
15 that it not -- that we not have to read it into the  
16 record.

17 REFEREE DONOHUE: It seems like a formality  
18 without cause in this situation, unless you have an  
19 objection.

20 MR. ADAMS: I don't have an objection to that.

21 REFEREE DONOHUE: Very well.

22 MR. FULLER: I think it would be very boring to  
23 have him reading tables and things into the record.

24 REFEREE DONOHUE: I don't know. Maybe Sandi  
25 needs extra money.

1 All right. So 1 through 6 and 8 through 29 are  
2 admitted.

3 Mr. Adams, an opening statement, if you please.

4 MR. ADAMS: Your Honor or Mr. Referee, this  
5 is -- it's pretty simple. He was a firefighter who  
6 develops -- who developed a lung cancer, and so the  
7 whole issue becomes causation.

8 We do have some statute of limitations problems  
9 to work out; but the way that we see it, if -- it  
10 comes down to a battle of the experts to be  
11 straightforward.

12 So we should -- it should be pretty  
13 straightforward today; and I don't, I don't think  
14 it'll take us too much time to get through what we  
15 need to to get to that point. But that -- it's going  
16 to come down to just between Dane Dickson and  
17 Dr. Zuckerman, so.

18 REFEREE DONOHUE: All right. Thank you.

19 Mr. Fuller.

20 MR. FULLER: This is a fairly straightforward  
21 matter in terms of whether or not there was medical  
22 causation; and that, in essence, is whether or not  
23 Mr. Aikele's cancer was caused by some type of  
24 exposure due to his employment.

25 There are -- we do intend to take some

1 post-hearing depositions we probably should mention.  
2 There is a Dr. Pfoertner and a Dr. Zuckerman that I  
3 intend to take their depositions at this point in  
4 time, and I believe counsel for the Claimant will be  
5 taking -- Dr. Dickson?

6 MR. ADAMS: Correct.

7 MR. FULLER: -- Dr. Dickson's deposition. I  
8 believe those are the three depositions that are  
9 anticipated will be taken post-hearing.

10 Now, those depositions have not yet been set,  
11 but we're trying to get them. Okay?

12 REFEREE DONOHUE: And we'll waive any time  
13 deadlines required.

14 MR. FULLER: I was going to ask the Referee if  
15 we could do that because we're -- it's very difficult  
16 to get some of these doctors' depositions, especially  
17 if they're in Switzerland or places like that where  
18 we don't get to go.

19 We believe that the evidence will show as this  
20 -- as it is developed through the medical causation  
21 that there really is no ability scientifically to  
22 show that, that firefighters in general have any  
23 greater propensity for cancer or to obtain cancer or  
24 this particular type of lung cancer than any other  
25 person in the general population and that that



1 basically will become the arguments presented to the  
2 Commission for purposes of causation.

3 As to the, as to the, the statute of  
4 limitations arguments, those have become quite  
5 interesting. Previously it was our position that the  
6 statute had run. Mr. Aikele was then living and that  
7 the statute had simply run and that the -- the  
8 Claimant's position was that, that the IME doctor had  
9 somehow morphed into becoming a treating doctor,  
10 thereby extending the statute of limitations.

11 And when we took the deposition of  
12 Dr. Zuckerman, that was the only issue that was  
13 addressed. We did not address medical causation.

14 So that issue was then being placed before the  
15 Commission, but had not yet ripened into a decision.  
16 It had not yet been briefed, and then unfortunately  
17 Mr. Aikele died.

18 At that point counsel is -- switched to a --  
19 the statute of limitations claim for death benefits,  
20 which is a four-year statute; and I'm sure they will  
21 address that today is what their -- in some testimony  
22 today as to the timing and so forth. But that's  
23 where it sits right now.

24 And this issue of TTD benefits and other things  
25 may become a very interesting issue as far as what

1 may have run statutorily and what may not have run  
2 given this is a death benefit claim, and now it may  
3 be combined with another part of a claim. So that's  
4 where we're at.

5 REFEREE DONOHUE: Thank you.

6 Call your first witness.

7 MR. ADAMS: All right. The Claimant calls  
8 Denise Aikele.

9 REFEREE DONOHUE: Ms. Aikele.

10 MS. AIKELE: I get the hot seat?

11 REFEREE DONOHUE: You do.

12  
13 MARY DENISE AIKELE,  
14 called as a witness by and on behalf of the Claimant,  
15 being first duly sworn, was examined and testified as  
16 follows:

17  
18 DIRECT EXAMINATION

19 BY MR. ADAMS:

20 Q. Thank you, Denise. We'll be -- we've  
21 already stipulated that, that you and Mr. Aikele were  
22 married. Can you tell me how long you guys had been  
23 married?

24 MR. FULLER: Should we put that on the record  
25 now?

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MR. ADAMS: Oh. Sorry.

THE WITNESS: A long time.

MR. ADAMS: Yeah. We'll put that on the record that before the hearing we stipulated that they were married.

MR. FULLER: And I so stipulate.

REFEREE DONOHUE: Very well.

Q. BY MR. ADAMS: Were you married to Mr. Aikele while he was employed at the City of Blackfoot Fire Department?

A. Yes.

Q. And how long was he employed at the City of Blackfoot Fire Department?

A. I believe it was 21 years full time. He'd been a volunteer for five years prior to that. So been there about, total about 26 years.

Q. And were you married to Mr. Aikele at the time of his death?

A. Yes.

Q. Okay. What did Mr. Aikele pass away from?

A. Lung cancer.

Q. Lung cancer. Before being diagnosed with lung cancer, had Mr. Aikele had any other experiences with, with cancer?

1           A.       He'd had -- I believe it was a basal cell  
2 removed from his -- I have to look at him. That  
3 cheek. (Indicating.) Probably -- I don't remember  
4 how many years prior.

5           Q.       So the left cheek?

6           A.       I'm looking at you. It's that left  
7 cheek, yes. Yeah, he had a basal cell removed. It  
8 was about five years or so prior to that.

9           Q.       Okay. And what happened with that?

10          A.       They just went in and, and removed it.

11          Q.       Any further complications?

12          A.       Unh-uh. (Negative.) No.

13          Q.       Chemotherapy?

14          A.       No.

15          MR. ADAMS: Okay. With the Referee's  
16 permission and with counsel's permission, I'd just  
17 like her to tell -- just give her permission to tell  
18 a narrative of how they found out about the cancer  
19 in -- his lung cancer.

20          REFEREE DONOHUE: Without objection?

21          MR. FULLER: I don't have an objection other  
22 than I would like to hear about dates if we can.

23          THE WITNESS: Okay.

24          MR. FULLER: That would be --

25          MR. ADAMS: Right.

1 MR. FULLER: -- appropriate with what we're  
2 talking about.

3 REFEREE DONOHUE: Very well. Go ahead.

4 Q. BY MR. ADAMS: If -- so if you want to  
5 start with the knee surgery and then go forward, that  
6 narrative there.

7 A. Okay. He had a torn cartilage; and, and  
8 I don't even remember which knee. But he went in in  
9 November to have that repaired, did well, was back to  
10 work within about a week, worked. Began --

11 MR. FULLER: What year?

12 THE WITNESS: Same year, 2008.

13 MR. FULLER: Okay.

14 THE WITNESS: Yeah. Went back to work, was  
15 doing great, but started to have some pain in his  
16 feet, had gone to a podiatrist. They'd given him  
17 some special braces, orthotics. The pain had kind of  
18 come off and on.

19 But he went in on December 16th of 2008 -- I  
20 believe is the date -- to Dr. McKinlay. They could  
21 not find any cause for the pain; decided to possibly  
22 run a d-dimer, which is a test that checks for blood  
23 clots, wondering if maybe he had blood clots.

24 So they did the d-dimer, and it was high. So  
25 they took him to the hospital that day for a CT scan

1 because they wanted to see if they had moved to the  
2 lungs; and when they checked the CT, there was blood  
3 clots in the lungs. But they also found large --  
4 enlarged lymph nodes.

5 So he was scheduled for, goll, CT the next day;  
6 and we got the diagnosis a day after that.

7 MR. ADAMS: Okay.

8 THE WITNESS: So December 18th. That's what  
9 our family remembers 'cause it was my son's birthday;  
10 and that was the news we got -- the day we got the  
11 news that it was lung cancer, so. So he went on the  
12 16th, for the test, of December.

13 Q. BY MR. ADAMS: Okay. The -- and then do  
14 you know if he informed his employer of the, of the  
15 results of the test?

16 A. Yes, he did.

17 Q. Okay. And do you know who he informed?

18 A. Chief Gray.

19 Q. Chief Gray.

20 A. Uh-huh. (Affirmative.)

21 Q. And he informed him that he had had lung  
22 cancer of some sort?

23 A. He -- when he got the diagnosis, yes.

24 Q. Was he taken off of work? Did they keep  
25 him on work or --

1           A.       He did take off from that point on. They  
2 started chemo. It was right through the Christmas  
3 holiday. So they started chemo right after that.  
4 But he did not return to work from that point on.  
5 They were concerned about the blood clots moving more  
6 at that point, and so they had -- he chose to take  
7 off.

8           But he went back to work -- he started chemo,  
9 but he was back to work right after that. So he was  
10 off for about two, two and a half, three weeks; and  
11 then he went right back to work again. He was back  
12 in full time.

13           Q.       And how long did he remain full time?

14           A.       He remained full time until 2012; and I  
15 believe in February, January, February, of 2012  
16 Chief Gray asked him to please not come back to work.

17           Q.       Okay.

18           A.       Because they were concerned that -- his  
19 safety, safety of others. He still was doing fairly  
20 well, but they just felt like it was probably in the  
21 best interest of the department that he not return.  
22 So he was --

23           Q.       So for that three, three and a half  
24 years --

25           A.       He was full time.

1 Q. -- the City of Blackfoot Fire Department  
2 created a job for him?

3 A. Oh, no. No. He was working full time.  
4 Just -- he was a captain; and he still went out and  
5 fought fires, functioned as a paramedic. He, he kept  
6 his job. He remained until they asked him not to  
7 come back in February of 2012. So he stayed -- his  
8 job remained.

9 Q. So he stopped working in February, 2012?

10 A. I --

11 Q. Ish.

12 A. I'm not sure the exact date; but it was  
13 January, February, right -- it was just within those  
14 months. I don't remember the exact date, but --  
15 'cause we were concerned about having -- 'cause he  
16 was really close to full retirement, and he had  
17 enough sick time and stuff to get to a point. But we  
18 were like pushing the line for full retirement  
19 because that meant a lot to me.

20 And so he was kind of like -- you know, it was  
21 really tough for him to, to not go back because he  
22 needed another couple months to make sure we were  
23 going to be okay with that full retirement, but. So  
24 I know there was an issue of time there, but that's  
25 when -- it was early. It was January, February,



1 right around there. I don't remember the exact date.

2 Q. Okay. I have what is marked as Joint  
3 Exhibit 21. Now -- and marked as Joint Exhibit 21,  
4 Pages 1 through 14. Can you describe briefly what  
5 you see on that page?

6 A. Those are calls that he was on. Looks  
7 like he's gone back and identified exactly what those  
8 calls were.

9 Q. Okay. Now, you were married to Kurt for  
10 quite a while. Can you recognize his signature?

11 A. Oh, yeah.

12 Q. Okay. Is that Kurt's signature on those  
13 pages?

14 A. His writing?

15 Q. Yes.

16 A. Yes.

17 Q. Okay. That's all I have on that  
18 particular exhibit. I just wanted to make sure.

19 Did you help him prepare that exhibit?

20 A. No, I did not.

21 Q. Okay. But that -- but you're certain  
22 that that's his handwriting?

23 A. Yes.

24 Q. Okay. And I know you mentioned this  
25 earlier. When did Kurt pass away?

..1           A.       December 8th, 2000 -- what is this year?  
2           -- 2012.

3           Q.       Okay. Okay. On Volume A of the joint  
4 exhibits -- oh, excuse me. Scratch that. Scratch  
5 that.

..6           Did you ever -- who was Kurt's treating  
7 oncologist?

8           A.       The treating oncologist was Dane Dickson  
9 in Rexburg.

10          Q.       Did you ever attend any of those meetings  
11 with, with Kurt?

12          A.       Yes, almost all of them.

13          Q.       Did -- were you ever asked to leave the  
14 room when Dr. Dickson was talking to Kurt about  
15 diagnosis or prognosis?

16          A.       No.

17          Q.       Okay. Did Dr. Dickson ever give an  
18 opinion as to the causation of the lung cancer that  
19 you over -- that you were there when he was talking  
20 about it?

21          MR. FULLER: Objection. It's hearsay.

22          REFEREE DONOHUE: It is. And we are certainly  
23 not taking it for any medical testimony or proof of  
24 causation, but we'll take it for her understanding of  
25 the events that transpired.

1 THE WITNESS: He did say that the chances were  
2 that, yes, it could be and maybe not. But he said  
3 that it was very likely that it could aggravated the  
4 situation that would have brought on that cancer,  
5 yes.

6 Q. BY MR. ADAMS: Okay. All right. Did he  
7 ever -- as far as your understanding of what he said,  
8 did he ever tell you or Kurt that it was most likely  
9 something else?

10 A. No.

11 Q. All right. Now, joint exhibit --  
12 Volume A of the joint exhibits has what's called a  
13 First Report of Injury or Illness, and it looks like  
14 this was prepared by Kevin Gray. And it's on  
15 Page 23. Trying to find -- okay.

16 It says here -- and I just want to clarify  
17 something you said earlier. Can you see in the  
18 middle where it says the date that Kurt notified the  
19 employer was 12-16 of '08?

20 A. Yes.

21 Q. Okay. Did -- were you with Kurt when he  
22 notified Kevin Gray of the injury or --

23 A. No.

24 Q. Okay.

25 A. 'Cause he -- I was not with him at the

1 doctor, and he left and went right over to the  
2 department to talk to the Chief.

3 MR. ADAMS: Okay. I think that I have -- I  
4 think that's all the questions I have.

5 REFEREE DONOHUE: Okay. Mr. Fuller.

6  
7 CROSS EXAMINATION

8 BY MR. FULLER:

9 Q. Mrs. Aikele, my name is Steve Fuller. I  
10 represent the Idaho State Insurance Fund, Blackfoot  
11 City in this matter.

12 Met your husband when we were at the hearing.  
13 Sorry for your loss.

14 A. Thanks.

15 Q. I truly am. He seemed like a fine  
16 gentleman.

17 Did Mr. Aikele then obtain full retirement?  
18 You were talking about that in direct testimony.

19 A. Did he full -- yes, we were able to work  
20 it out where he did retire.

21 Q. And why is that a benefit to you?

22 A. Because I get the retirement, his PERSI  
23 retirement; and full retirement was going to be more  
24 money than early retirement by far.

25 Q. So since his death, you've been able to

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receive full retirement benefits from PERSI?

A. Yes.

Q. Okay. And that will continue for how long?

A. My lifetime.

Q. Okay. Can you tell me how much that is per month?

A. You should have warned me on that question. Let's see. Seventeen hundred I believe. I'm not exact on that, but it's around seventeen hundred a month.

Q. Are there any other benefits associated with that, health benefits or other things?

A. No, none.

Q. Was there a death benefit paid?

A. By PERSI?

Q. By anyone.

A. By --

Q. By PERSI, by -- through your employer, life insurance.

A. Life insurance, yes.

Q. Okay. Was that obtained through his employment?

A. He'd had a life insurance policy that we had taken out earlier through the employment; but

1 after his death, no. All of the others were self  
2 paid.

3 Q. So there was one life insurance policy --

4 A. Yes.

5 Q. -- through his employment that was --

6 A. Uh-huh. (Affirmative.)

7 Q. You have to wait until I finish.

8 A. Sorry.

9 Q. She can't -- it crosses her fingers.

10 A. Sorry.

11 Q. So there was one life insurance policy  
12 that was obtained through his employment, and that  
13 was paid?

14 A. Yes.

15 Q. You indicated that in February of 2012  
16 the fire department indicated to your husband that he  
17 could no longer serve due to some safety reasons.  
18 What were those safety reasons?

19 A. They really were not given to him. He  
20 was just basically asked that he retire, that they  
21 felt like it was in the best interest. He was never  
22 really given a definite this is why, except that --  
23 that was what we had felt from what -- the  
24 conversation, that it was mostly just safety.

25 MR. FULLER: Okay. I don't have any other

1 questions.

2 REFEREE DONOHUE: I have just one area.

3

4

EXAMINATION

5

BY REFEREE DONOHUE:

6

Q. When I met your husband at the last  
7 hearing --

8

A. Uh-huh. (Affirmative.)

9

Q. -- he seemed pretty strong and  
10 functional. Was he still -- you will know better  
11 than we got from that brief view. Was he strong and  
12 functional when he stopped working in February of  
13 '12?

14

A. He still -- yes, he was. He was weaker  
15 than he had been. I mean definitely. You know, go  
16 through chemo and those things, you're going to see  
17 that waning. Cancer was still fairly controlled.  
18 Yes, he was. We were shocked that he'd been asked to  
19 not work.

20

Q. Was there a point at which you considered  
21 him to be disabled as a result of the cancer?

22

23

24

25

A. The only disability -- no. The only  
disability that I would have really seen was that in  
about February or so, we did change. Dr. Dickson's  
office had basically told us that they had done

1 everything they could, and so we had began going to  
2 the Cancer Treatment Center, which was in Arizona.

3 And so the time travel was probably going to  
4 interfere with work if we had continued that. But  
5 that was something he was willing to work around.  
6 His shift -- his men were really good to trade shifts  
7 with him if need be, you know. So it's something we  
8 could have still worked around.

9 But, no. He was functional, did very well. We  
10 went on family trips. He climbed mountains, beat us  
11 to the top. He did well until October and started to  
12 go downhill drastically in October; but to that  
13 point, yes, he was still very well functional.

14 REFEREE DONOHUE: Thank you.

15 Any redirect?

16 MR. ADAMS: I do not have any redirect.

17 REFEREE DONOHUE: Anything further?

18 MR. FULLER: No.

19 REFEREE DONOHUE: All right. You're excused.

20 Thank you.

21 THE WITNESS: Okay.

22 REFEREE DONOHUE: Next witness.

23 MR. ADAMS: Kevin Gray, the fire chief.

24 REFEREE DONOHUE: I'll let you figure out the  
25 phone system. We'll have a recess while you sort



1 that out.

2 MR. ADAMS: Okay.

3 (Short delay.)

4 REFEREE DONOHUE: We'll go on record now.

5 The court reporter will put you under oath for  
6 purposes of testimony.

7

8 KEVIN GRAY,

9 called as a witness by and on behalf of the Claimant,  
10 being first duly sworn, was examined and testified as  
11 follows:

12

13 DIRECT EXAMINATION

14 BY MR. ADAMS:

15 Q. Chief Gray, this is Andy Adams. I  
16 represent Kurt Aikele and Denise Aikele in this  
17 matter. Just have a few quick questions for you.

18 You are the fire chief of the City of  
19 Blackfoot; is that correct?

20 A. Yes.

21 Q. Okay. And how long have you been there  
22 in that capacity?

23 A. Oh, 19 years.

24 Q. And you worked with Kurt Aikele during  
25 that time?

1 A. I have, uh-huh. (Affirmative.)

2 Q. And how long did you work with Kurt  
3 during that time?

4 A. Well, I was hired before Kurt. So I've  
5 worked for -- you know, with Kurt for, you know, ever  
6 since Kurt's been here. So 20 some years.

7 Q. Okay.

8 A. I've been his supervisor for the 19,  
9 though.

10 Q. Okay. And what, what was Kurt's duties  
11 there at the fire station?

12 A. Kurt started out as a firefighter EMT.  
13 And then -- oh, and I'm, I'm guessing. About ten  
14 years ago he became a, a shift commander and captain;  
15 and that would put him in charge of the shift, seven  
16 other guys that he is in charge of, their day-to-day  
17 routine.

18 Q. Okay. And what, what is the day-to-day  
19 routine of a firefighter?

20 A. You know, daily stuff around the  
21 station -- cleanup, repair equipment, handle all fire  
22 and EMS calls. That's pretty much it.

23 Q. When you go out on a call, have things --  
24 when you first started working -- or when Kurt first  
25 started working there with Kurt, when you went on a

1 fire call, are the protocols different now than they  
2 were then?

3 A. No, no. I think they're probably pretty  
4 much the same protocols, procedures, and -- yeah.

5 Q. Okay. When you go on a fire call of any  
6 kind, when you get there, what are some of the things  
7 that you're supposed to do?

8 A. Well, it's always, you know, rescue first  
9 any patients in the -- people in the building, you  
10 know; and then exposures; and then, of course, put  
11 the fire out, extinguishment, so.

12 Q. Is there special equipment that you're  
13 supposed to use at a fire call?

14 A. You know, all the equipment is stocked  
15 the same. We've got air packs. The SCBAs are, are  
16 onboard. You know, saws, axes, water hose, you know,  
17 they're all, they're all staffed exactly the same or  
18 stocked exactly the same.

19 Q. Is there equipment that is designed to  
20 protect the firefighters' lungs?

21 A. There is.

22 Q. And what is that called?

23 A. Called SCBAs or self-contained breathing  
24 apparatus.

25 Q. And how does that, I guess, fit to the

1 face; or how does that work?

2 A. They, they provide a positive pressure  
3 inside the mask so contaminants don't come inside the  
4 mask. The -- you carry an air bottle on your back,  
5 has an alarm-warning system when, when you get down  
6 to 500 pounds of air; and then, you know, of course,  
7 that's when you're supposed to come out and change  
8 bottles.

9 But, yeah, they're a positive-pressure mask  
10 that -- everybody has their own mask and -- which is  
11 different. It used to be, you know, they were just  
12 set on the trucks. Now everybody has their own  
13 masks. You know, as of the last, I'm guessing, six,  
14 eight years, everybody has their own masks. But, you  
15 know, they've always been provided on the trucks.

16 Q. Okay. Are they required for every time  
17 you go to a fire, or are there some fires you don't  
18 need them?

19 A. You know, it's kind of personal  
20 preference. The shift commanders are, you know, the  
21 ones that determine -- you know, make sure their guys  
22 wear the, the pos -- the PPE; and, you know, it's --  
23 there's policies that, that say you wear them  
24 through, you know, the entire fire including, you  
25 know, mop-up and stuff like that. But, you know,

1 it's, it's just kind of all personal preference.

2 Q. Okay. What is mop-up?

3 A. Mop-up's when the, when the fire's out  
4 and you're looking for hotspots, just kind of  
5 cleaning stuff up and just kind of finishing up the  
6 fire.

7 Q. Okay. So in a hot -- what is a hotspot?

8 A. Hotspot's just, just, you know, a, a spot  
9 underneath some clothes or something that's still  
10 smoldering.

11 Q. Okay.

12 A. Sorry.

13 Q. Oh, no. I apologize. Only thing I know  
14 about firefighting's what I've seen in TV. So I  
15 apologize.

16 Now, the -- how many trucks do you have there  
17 at the fire department that Kurt was working at?

18 A. We have four -- five.

19 Q. And how -- when -- all those trucks go  
20 out at the same time?

21 A. No, no. They're just -- some are backup.  
22 Some are used for different -- you know, one's a  
23 ladder truck, you know. One's a, a pumper tanker we  
24 use out in the district where we don't have hydrants.  
25 You know, one we use in town. But they're all set up

1 the same. They're all Class A pumpers.

2 Q. Okay. Are they diesels or gas?

3 A. Diesels.

4 Q. What type of -- when those diesel trucks  
5 start up, do they put off like a plume of smoke?

6 A. Uh-huh. (Affirmative.) They do.  
7 Several years ago we received a grant. We have a  
8 ventilation system now for, for our equipment.

9 Q. Okay.

10 A. So it's all -- they're all -- I got hoses  
11 all hooked to them now, and it was a grant through  
12 FEMA we received.

13 Q. Okay. And you said "several years ago".  
14 Do you know how long ago that was?

15 A. You know, I don't. I don't right  
16 offhand. I, I want to say six, eight years.

17 Q. Okay. So for the -- what would you do  
18 between -- before that to get rid of the smoke?

19 A. You know, just open the engine room  
20 doors, just open the bay doors, and pull the  
21 equipment out.

22 Q. Okay. This is probably a bad question.  
23 But what type of fires is a common fire? Is it a  
24 building fire? Grass fire? Like most of the time  
25 when you go out, what type of fire are we looking at?



1 you, but I wanted to ask you. During the 20 years  
2 that you've worked with Mr. Aikele, did you have a  
3 chance to observe his use of protective gear?

4 A. I have.

5 Q. Would you say Mr. Aikele was careful in  
6 using protective breathing apparatus?

7 A. Yep. I would say -- yep. He -- Kurt was  
8 good about using it.

9 MR. FULLER: Okay. That's all the questions I  
10 have.

11 REFEREE DONOHUE: I want a little bit of  
12 detail.

13

14

EXAMINATION

15 BY REFEREE DONOHUE:

16 Q. This is Doug Donohue, Chief Gray. I'm  
17 the Referee in the case. I'm going to be making the  
18 proposed decision.

19 As I recall, in our earlier hearing, Mr. Aikele  
20 was talking about the diesel fumes when maintenance  
21 was being performed on the engines permeating the  
22 rest of the building where, where they were living  
23 while they were on shift.

24 Can you talk to me about the physical layout  
25 and the extent to which that, that fumes problem may



1 have pushed into the living area?

2 A. You know, we've -- our -- we're on one  
3 floor. We, we have a basement, but that's just for  
4 some training and office staff.

5 But there's one door that goes from the engine  
6 room where the apparatus is held back into -- there's  
7 a long hall, and then they go into your dorms and  
8 then back into the kitchen area and the day area.  
9 Like I said, there's one, one door there that goes  
10 back there.

11 But, you know, everybody -- you know, you'd  
12 open the, the bay doors when you fire up equipment.  
13 That was just pretty much standard procedure. But,  
14 anyway, like I said, there's just one door that led  
15 into the quarters.

16 Q. Okay. And did you notice a problem, an  
17 odor of diesel fumes in the living areas?

18 A. I haven't.

19 REFEREE DONOHUE: Okay. I think that's all I  
20 need.

21 Any other questions?

22 MR. ADAMS: Just a couple.

23

24

25

REDIRECT EXAMINATION

1  
2 BY MR. ADAMS:

3 Q. This is Mr. Adams again, Chief Gray.

4 Just a -- I just wanted to clarify. Earlier  
5 did you say it was -- in regards to wearing the  
6 masks, was it -- did you say it was personal  
7 preference or it was policy that they should wear the  
8 mask during the firefighting?

9 A. We, we do have policy, if you're going  
10 in, that you wear masks.

11 Q. Okay. Okay. In your training  
12 simulations, do -- are you trained with masks?

13 A. We are.

14 MR. ADAMS: Okay. I think that is all the  
15 questions that I have.

16 MR. FULLER: I have no other questions.

17 REFEREE DONOHUE: Thank you, Chief Gray. We  
18 appreciate your time today.

19 MR. ADAMS: Thank you, Chief Gray.

20 THE WITNESS: You bet. Thank you.

21 (Short delay.)

22 REFEREE DONOHUE: Any other witnesses today?

23 MR. ADAMS: Not from the Claimant side.

24 REFEREE DONOHUE: Okay. Defense?

25 MR. FULLER: No.

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REFEREE DONOHUE: Very well then.

Mrs. Aikele, what happens now is we get the testimony from the doctors by way of post-hearing deposition. I won't be there, but I'll get a transcript of everything they said like I'll have a transcript from today's hearing.

Once we have that, each side gets to give me a written argument on the issues and why they think they should win them; and once I have all of that, then I will very carefully go through everything that I have. Obviously there wasn't much after the first hearing, and I had only given it a brief look. I'll give it careful consideration also, and I'll make my decision. My decision is a recommendation to the three Commissioners in the case.

I'm kind of walking the long way around the barn here to tell you I need you to be patient. It's important to us to be quick. It is. But it's more important to be thorough, make sure we get it right; and we want to do that.

So unless you have any questions, we're finished for today.

Very well. Okay. Thanks.

We're in recess.


(Proceedings recessed at 9:53 a.m.)

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REPORTER'S CERTIFICATE

I, SANDRA J. BEEBE, Certified Shorthand Reporter, State of Idaho, do hereby certify that the foregoing transcript, consisting of Pages 1 to 36, inclusive, is a true and accurate record of the proceedings had on the date and at the time indicated therein as stenographically reported by me to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of December, 2013.

  
SANDRA J. BEEBE, C.S.R.  
C.S.R. No. 42

	<b>8th</b> [1] - 19:1	<b>alleged</b> [1] - 1:23 <b>allowed</b> [1] - 6:10 <b>almost</b> [2] - 19:12, 32:9 <b>Alyce</b> [1] - 4:21 <b>Andy</b> [1] - 26:15 <b>anticipated</b> [1] - 9:9 <b>anyway</b> [1] - 34:14 <b>apologize</b> [2] - 30:13, 30:15 <b>apparatus</b> [3] - 28:24, 33:6, 34:6 <b>appearing</b> [1] - 5:9 <b>appreciate</b> [1] - 35:18 <b>appropriate</b> [1] - 14:1 <b>area</b> [4] - 24:2, 34:1, 34:8 <b>areas</b> [1] - 34:17 <b>argument</b> [3] - 2:25, 3:2, 36:8 <b>arguments</b> [3] - 2:24, 10:1, 10:4 <b>Arizona</b> [1] - 25:2 <b>associated</b> [1] - 22:12 <b>Association</b> [4] - 4:7, 4:20, 5:18, 5:19 <b>attached</b> [2] - 4:22, 5:2 <b>attend</b> [1] - 19:10 <b>axes</b> [1] - 28:16	2:5 <b>big</b> [2] - 4:2, 4:3 <b>birthday</b> [1] - 15:9 <b>bit</b> [1] - 33:11 <b>Blackfoot</b> [6] - 1:8, 12:10, 12:13, 17:1, 21:10, 26:19 <b>blood</b> [4] - 14:22, 14:23, 15:2, 16:5 <b>boring</b> [1] - 7:22 <b>bottle</b> [1] - 29:4 <b>bottles</b> [1] - 29:8 <b>braces</b> [1] - 14:17 <b>breathing</b> [2] - 28:23, 33:6 <b>brief</b> [3] - 3:9, 24:11, 36:12 <b>briefed</b> [1] - 10:16 <b>briefly</b> [2] - 18:4, 32:22 <b>brought</b> [1] - 20:4 <b>building</b> [3] - 28:9, 31:24, 33:22 <b>bulk</b> [1] - 32:3 <b>business</b> [1] - 32:3	<b>checks</b> [1] - 14:22 <b>cheek</b> [3] - 13:3, 13:5, 13:7 <b>chemo</b> [4] - 16:2, 16:3, 16:8, 24:16 <b>chemotherapy</b> [1] - 13:10 <b>chief</b> [5] - 15:18, 25:23, 26:15, 26:18, 32:21 <b>Chief</b> [7] - 15:19, 16:16, 21:2, 33:16, 35:3, 35:17, 35:19 <b>chose</b> [1] - 16:6 <b>Christmas</b> [1] - 16:2 <b>City</b> [6] - 1:8, 12:9, 12:12, 17:1, 21:11, 26:18 <b>claim</b> [3] - 10:19, 11:2, 11:3 <b>Claimant</b> [9] - 1:11, 1:18, 1:23, 3:20, 9:4, 11:7, 11:14, 26:9, 35:23 <b>Claimant's</b> [1] - 10:8 <b>clarified</b> [1] - 3:6 <b>clarify</b> [2] - 20:16, 35:4 <b>Class</b> [1] - 31:1 <b>cleaning</b> [1] - 30:5 <b>cleanup</b> [1] - 27:21 <b>climbed</b> [1] - 25:10 <b>close</b> [1] - 17:16 <b>clothes</b> [1] - 30:9 <b>clots</b> [4] - 14:23, 15:3, 16:5 <b>Code</b> [3] - 1:19, 1:20, 1:21 <b>combined</b> [1] - 11:3 <b>comfort</b> [1] - 4:14 <b>comfortable</b> [1] - 4:15 <b>commander</b> [1] - 27:14 <b>commanders</b> [1] - 29:20 <b>Commission</b> [4] - 1:9, 7:14, 10:2, 10:15 <b>Commissioners</b> [1] - 36:15 <b>common</b> [1] - 31:23 <b>complications</b> [1] - 13:11 <b>complied</b> [1] - 1:18 <b>concerned</b> [3] - 16:5, 16:18, 17:15 <b>condition</b> [1] - 1:22 <b>consider</b> [1] - 3:8 <b>consideration</b> [1] - 36:13 <b>considered</b> [2] - 3:18, 24:20 <b>contacted</b> [1] - 5:17 <b>contain</b> [1] - 6:24 <b>contained</b> [1] - 28:23
<b>'08</b> [1] - 20:19 <b>'12</b> [1] - 24:13	9			
0	<b>9:01</b> [1] - 1:2 <b>9:53</b> [1] - 36:25			
<b>08-040432</b> [1] - 1:10	A			
1	<b>A.M</b> [1] - 1:2 <b>a.m</b> [1] - 36:25 <b>ability</b> [1] - 9:21 <b>able</b> [2] - 21:19, 21:25 <b>accident</b> [1] - 1:24 <b>according</b> [2] - 1:6, 1:14 <b>ADAMS</b> [29] - 2:4, 3:23, 5:16, 6:17, 7:20, 8:4, 9:6, 11:7, 11:19, 12:1, 12:3, 12:8, 13:15, 13:25, 14:4, 15:7, 15:13, 20:6, 21:3, 25:16, 25:23, 26:2, 26:14, 32:15, 34:22, 35:2, 35:14, 35:19, 35:23 <b>Adams</b> [7] - 1:12, 2:2, 3:20, 5:15, 8:3, 26:15, 35:3 <b>address</b> [3] - 6:20, 10:13, 10:21 <b>addressed</b> [1] - 10:13 <b>admissibility</b> [1] - 5:10 <b>admission</b> [1] - 3:21 <b>admit</b> [1] - 7:6 <b>admitted</b> [6] - 7:3, 7:9, 7:10, 7:12, 7:14, 8:2 <b>affect</b> [1] - 3:1 <b>aggravated</b> [1] - 20:3 <b>ago</b> [3] - 27:14, 31:7, 31:14 <b>ago"</b> [1] - 31:13 <b>agreed</b> [1] - 7:4 <b>ahead</b> [3] - 2:13, 4:15, 14:3 <b>Aikele</b> [23] - 1:7, 2:18, 4:18, 5:24, 10:6, 10:17, 11:8, 11:9, 11:21, 12:9, 12:17, 12:20, 12:24, 21:9, 21:17, 26:16, 26:24, 32:11, 33:2, 33:5, 33:19, 36:2 <b>AIKELE</b> [2] - 11:10, 11:13 <b>Aikele's</b> [1] - 8:23 <b>air</b> [3] - 28:15, 29:4, 29:6 <b>alarm</b> [1] - 29:5 <b>alarm-warning</b> [1] - 29:5			
2				
<b>2</b> [3] - 1:15, 4:4, 4:6 <b>20</b> [2] - 27:6, 33:1 <b>2000</b> [1] - 19:1 <b>2008</b> [2] - 14:12, 14:19 <b>2010</b> [1] - 4:18 <b>2012</b> [6] - 16:14, 16:15, 17:7, 17:9, 19:2, 23:15 <b>2013</b> [1] - 1:1 <b>21</b> [3] - 12:14, 18:3 <b>23</b> [1] - 20:15 <b>26</b> [2] - 4:18, 12:16 <b>29</b> [3] - 3:20, 4:2, 8:1				
4				
<b>4</b> [1] - 1:1				
5				
<b>500</b> [1] - 29:6				
6				
<b>6</b> [1] - 8:1				
7				
<b>7</b> [1] - 4:6 <b>72-604</b> [1] - 1:21 <b>72-701</b> [1] - 1:20 <b>72-706</b> [1] - 1:20				
8				
<b>8</b> [1] - 8:1 <b>803</b> [2] - 7:7				
	B	<b>backup</b> [1] - 30:21 <b>bad</b> [1] - 31:22 <b>barn</b> [1] - 36:17 <b>basal</b> [2] - 13:1, 13:7 <b>basement</b> [1] - 34:3 <b>basis</b> [1] - 5:10 <b>battle</b> [1] - 8:10 <b>bay</b> [2] - 31:20, 34:12 <b>beat</b> [1] - 25:10 <b>became</b> [1] - 27:14 <b>become</b> [3] - 10:1, 10:4, 10:25 <b>becomes</b> [1] - 8:7 <b>becoming</b> [1] - 10:9 <b>began</b> [2] - 14:10, 25:1 <b>behalf</b> [2] - 11:14, 26:9 <b>benefit</b> [4] - 3:2, 11:2, 21:21, 22:15 <b>benefits</b> [10] - 1:23, 1:25, 2:6, 2:21, 10:19, 10:24, 22:1, 22:12, 22:13 <b>best</b> [2] - 16:21, 23:21 <b>bet</b> [1] - 35:20 <b>better</b> [1] - 24:10 <b>between</b> [2] - 8:16, 31:18 <b>bifurcated</b> [2] - 1:16,	<b>cancer</b> [19] - 6:6, 8:6, 8:23, 9:23, 9:24, 12:22, 12:23, 12:24, 12:25, 13:18, 13:19, 15:11, 15:22, 19:18, 20:4, 24:17, 24:21, 32:11 <b>Cancer</b> [1] - 25:2 <b>Cancers</b> [1] - 4:24 <b>capacity</b> [1] - 26:22 <b>captain</b> [2] - 17:4, 27:14 <b>careful</b> [2] - 33:5, 36:13 <b>carefully</b> [1] - 36:10 <b>carry</b> [1] - 29:4 <b>cartilage</b> [1] - 14:7 <b>case</b> [2] - 33:17, 36:15 <b>Causality</b> [1] - 4:23 <b>causation</b> [7] - 8:7, 8:22, 9:20, 10:2, 10:13, 19:18, 19:24 <b>caused</b> [2] - 1:23, 8:23 <b>cell</b> [2] - 13:1, 13:7 <b>Center</b> [1] - 25:2 <b>certain</b> [1] - 18:21 <b>certainly</b> [1] - 19:22 <b>chance</b> [1] - 33:3 <b>chances</b> [1] - 20:1 <b>change</b> [2] - 24:24, 29:7 <b>charge</b> [2] - 27:15, 27:16 <b>checked</b> [1] - 15:2	C

<p>contaminants [1] - 29:3  continue [1] - 22:3  continued [1] - 25:4  controlled [1] - 24:17  conversation [1] - 23:24  correct [4] - 4:6, 4:9, 9:6, 26:19  counsel [2] - 9:4, 10:18  counsel's [1] - 13:16  couple [2] - 17:22, 34:22  course [3] - 3:12, 28:10, 29:6  court [1] - 26:5  covered [1] - 2:7  created [1] - 17:2  CROSS [2] - 21:7, 32:19  crosses [1] - 23:9  CT [3] - 14:25, 15:2, 15:5  culminated [1] - 2:17</p>	<p>16:21, 21:2, 23:16, 30:17  Department [3] - 12:10, 12:13, 17:1  deposition [6] - 3:15, 6:15, 7:2, 9:7, 10:11, 36:4  depositions [5] - 9:1, 9:3, 9:8, 9:10, 9:16  describe [1] - 18:4  designed [1] - 28:19  detail [1] - 33:12  determine [1] - 29:21  developed [2] - 8:6, 9:20  develops [1] - 8:6  diagnosed [1] - 12:23  diagnosis [5] - 2:8, 6:5, 15:6, 15:23, 19:15  Dickson [7] - 5:22, 8:16, 9:5, 19:8, 19:14, 19:17  Dickson's [2] - 9:7, 24:24  died [1] - 10:17  diesel [3] - 31:4, 33:20, 34:17  diesels [2] - 31:2, 31:3  different [4] - 2:23, 28:1, 29:11, 30:22  difficult [1] - 9:15  dimer [2] - 14:22, 14:24  direct [1] - 21:18  DIRECT [2] - 11:18, 26:13  disability [2] - 24:22, 24:23  disabled [1] - 24:21  discussing [1] - 2:5  district [1] - 30:24  Docket [1] - 1:9  doctor [3] - 10:8, 10:9, 21:1  doctors [1] - 36:3  doctors' [1] - 9:16  document [1] - 5:1  documents [2] - 3:22, 3:25  done [2] - 24:25, 32:9  Donohue [1] - 33:16  DONOHUE [48] - 1:5, 2:9, 2:13, 2:19, 2:22, 3:7, 3:12, 3:24, 4:2, 4:4, 4:7, 4:11, 4:14, 5:12, 5:15, 6:8, 6:13, 6:18, 6:21, 7:17, 7:21, 7:24, 8:18, 9:12, 11:5, 11:9, 11:11, 12:7, 13:20, 14:3, 19:22, 21:5, 24:2, 24:5, 25:14, 25:17,</p>	<p>25:19, 25:22, 25:24, 26:4, 32:17, 33:11, 33:15, 34:19, 35:17, 35:22, 35:24, 36:1  door [3] - 34:5, 34:9, 34:14  doors [3] - 31:20, 34:12  dorms [1] - 34:7  Doug [1] - 33:16  down [3] - 8:10, 8:16, 29:5  downhill [1] - 25:12  Dr [15] - 3:16, 5:22, 6:25, 7:11, 8:17, 9:2, 9:5, 9:7, 10:12, 14:20, 19:14, 19:17, 24:24  drastically [1] - 25:12  due [2] - 8:24, 23:17  duly [2] - 11:15, 26:10  during [4] - 26:24, 27:3, 33:1, 35:8  duties [1] - 27:10</p>	<p>35:1  examined [2] - 11:15, 26:10  Example [1] - 4:24  except [1] - 23:22  exception [1] - 5:3  excuse [2] - 4:19, 19:4  excused [1] - 25:19  Exhibit [3] - 3:15, 18:3  exhibit [3] - 18:18, 18:19, 20:11  exhibits [8] - 3:13, 3:19, 6:23, 7:4, 7:13, 19:4, 20:12  experiences [1] - 12:24  expert [2] - 5:5, 6:9  experts [1] - 8:10  explored [1] - 3:4  exposure [1] - 8:24  exposures [1] - 28:10  extending [1] - 10:10  extent [3] - 1:25, 6:13, 33:25  extinguishment [1] - 28:11  extra [1] - 7:25</p>	<p>34:12  fire's [1] - 30:3  firefighter [3] - 8:5, 27:12, 27:19  Firefighters [5] - 4:8, 4:21, 4:24, 5:18, 5:20  firefighters [2] - 6:6, 9:22  firefighters' [2] - 5:17, 28:20  firefighting [1] - 35:8  firefighting's [1] - 30:14  fires [5] - 17:5, 29:17, 31:23, 32:2, 32:4  First [1] - 20:13  first [9] - 1:15, 7:3, 11:6, 11:15, 26:10, 27:24, 28:8, 36:11  fit [1] - 28:25  five [3] - 12:15, 13:8, 30:18  floor [1] - 34:3  follows [3] - 1:15, 11:16, 26:11  footnotes [1] - 6:4  formality [1] - 7:17  forth [4] - 1:19, 2:2, 5:11, 10:22  forward [1] - 14:5  forwarded [3] - 5:19, 5:20, 5:23  fought [1] - 17:5  foundation [2] - 5:11, 6:14  founded [1] - 6:3  four [2] - 10:20, 30:18  four-year [1] - 10:20  free [1] - 4:14  full [14] - 3:18, 12:14, 16:12, 16:13, 16:14, 16:25, 17:3, 17:16, 17:18, 17:23, 21:17, 21:19, 21:23, 22:1  Fuller [7] - 1:13, 2:10, 8:19, 21:5, 21:9, 32:17, 32:21  FULLER [34] - 2:11, 2:14, 2:20, 2:23, 3:11, 4:1, 4:3, 4:5, 4:9, 4:12, 4:16, 5:14, 6:12, 6:19, 6:22, 7:22, 8:20, 9:7, 9:14, 11:24, 12:6, 13:21, 13:24, 14:1, 14:11, 14:13, 19:21, 21:8, 23:25, 25:18, 32:20, 33:9, 35:16, 35:25  fumes [3] - 33:20, 33:25, 34:17  functional [4] - 24:10,</p>
D		E	F	
<p>d-dimer [2] - 14:22, 14:24  daily [1] - 27:20  Dane [2] - 8:16, 19:8  date [5] - 14:20, 17:12, 17:14, 18:1, 20:18  dated [1] - 4:18  dates [1] - 13:22  day-to-day [2] - 27:16, 27:18  deadlines [1] - 9:13  dealt [1] - 1:16  death [9] - 1:25, 2:20, 3:2, 10:19, 11:2, 12:18, 21:25, 22:15, 23:1  deceased [1] - 1:8  December [4] - 14:19, 15:8, 15:12, 19:1  DECEMBER [1] - 1:1  decided [1] - 14:21  decision [5] - 2:17, 10:15, 33:18, 36:14  Defendants [1] - 1:12  Defense [1] - 3:24  defense [1] - 35:24  definite [1] - 23:22  definitely [1] - 24:15  delay [2] - 26:3, 35:21  Denise [3] - 11:8, 11:20, 26:16  DENISE [1] - 11:13  department [4] -</p>	<p>28:1, 29:11, 30:22  difficult [1] - 9:15  dimer [2] - 14:22, 14:24  direct [1] - 21:18  DIRECT [2] - 11:18, 26:13  disability [2] - 24:22, 24:23  disabled [1] - 24:21  discussing [1] - 2:5  district [1] - 30:24  Docket [1] - 1:9  doctor [3] - 10:8, 10:9, 21:1  doctors [1] - 36:3  doctors' [1] - 9:16  document [1] - 5:1  documents [2] - 3:22, 3:25  done [2] - 24:25, 32:9  Donohue [1] - 33:16  DONOHUE [48] - 1:5, 2:9, 2:13, 2:19, 2:22, 3:7, 3:12, 3:24, 4:2, 4:4, 4:7, 4:11, 4:14, 5:12, 5:15, 6:8, 6:13, 6:18, 6:21, 7:17, 7:21, 7:24, 8:18, 9:12, 11:5, 11:9, 11:11, 12:7, 13:20, 14:3, 19:22, 21:5, 24:2, 24:5, 25:14, 25:17,</p>	<p>early [2] - 17:25, 21:24  eight [4] - 29:14, 31:16, 32:1, 32:6  either [2] - 5:13, 7:7  employed [2] - 12:9, 12:12  employer [3] - 15:14, 20:19, 22:19  employment [6] - 6:7, 8:24, 22:23, 22:25, 23:5, 23:12  EMS [1] - 27:22  EMT [1] - 27:12  engine [2] - 31:19, 34:5  engines [1] - 33:21  enlarged [1] - 15:4  entire [1] - 29:24  equipment [7] - 27:21, 28:12, 28:14, 28:19, 31:8, 31:21, 34:12  especially [1] - 9:16  essence [1] - 8:22  Evaluating [1] - 4:23  events [1] - 19:25  evidence [2] - 5:10, 9:19  exact [4] - 17:12, 17:14, 18:1, 22:10  exactly [3] - 18:7, 28:17, 28:18  EXAMINATION [7] - 11:18, 21:7, 24:4, 26:13, 32:19, 33:14,</p>	<p>face [1] - 29:1  fairly [4] - 2:2, 8:20, 16:19, 24:17  FALLS [1] - 1:1  family [2] - 15:9, 25:10  far [6] - 2:23, 5:21, 6:1, 10:25, 20:7, 21:24  February [10] - 4:18, 16:15, 17:7, 17:9, 17:13, 17:25, 23:15, 24:12, 24:24  feet [1] - 14:16  felt [3] - 16:20, 23:21, 23:23  FEMA [1] - 31:12  few [1] - 26:17  figure [1] - 25:24  fine [2] - 3:11, 21:15  fingers [1] - 23:9  finish [1] - 23:7  finished [1] - 36:22  finishing [1] - 30:5  Fire [3] - 12:10, 12:13, 17:1  fire [19] - 23:16, 25:23, 26:18, 27:11, 27:21, 28:1, 28:5, 28:11, 28:13, 29:17, 29:24, 30:6, 30:17, 31:23, 31:24, 31:25, 32:5,</p>	<p>forward [1] - 14:5  forwarded [3] - 5:19, 5:20, 5:23  fought [1] - 17:5  foundation [2] - 5:11, 6:14  founded [1] - 6:3  four [2] - 10:20, 30:18  four-year [1] - 10:20  free [1] - 4:14  full [14] - 3:18, 12:14, 16:12, 16:13, 16:14, 16:25, 17:3, 17:16, 17:18, 17:23, 21:17, 21:19, 21:23, 22:1  Fuller [7] - 1:13, 2:10, 8:19, 21:5, 21:9, 32:17, 32:21  FULLER [34] - 2:11, 2:14, 2:20, 2:23, 3:11, 4:1, 4:3, 4:5, 4:9, 4:12, 4:16, 5:14, 6:12, 6:19, 6:22, 7:22, 8:20, 9:7, 9:14, 11:24, 12:6, 13:21, 13:24, 14:1, 14:11, 14:13, 19:21, 21:8, 23:25, 25:18, 32:20, 33:9, 35:16, 35:25  fumes [3] - 33:20, 33:25, 34:17  functional [4] - 24:10,</p>

<p>24:12, 25:9, 25:13  <b>functioned</b> [1] - 17:5  <b>Fund</b> [2] - 1:9, 21:10</p> <p style="text-align: center;">G</p>	<p><b>hose</b> [1] - 28:16  <b>hoses</b> [1] - 31:10  <b>hospital</b> [1] - 14:25  <b>hot</b> [2] - 11:10, 30:7  <b>hotspot</b> [1] - 30:7  <b>hotspot's</b> [1] - 30:8  <b>hotspots</b> [1] - 30:4  <b>hundred</b> [2] - 22:9, 22:11  <b>husband</b> [3] - 21:12, 23:16, 24:6  <b>hydrants</b> [1] - 30:24</p>	<p>J</p>	<p>34:1, 34:17  <b>look</b> [4] - 6:15, 7:4, 13:2, 36:12  <b>looking</b> [3] - 13:6, 30:4, 31:25  <b>looks</b> [2] - 18:6, 20:13  <b>loss</b> [1] - 21:13  <b>lung</b> [10] - 8:6, 9:24, 12:22, 12:23, 12:24, 13:19, 15:11, 15:21, 19:18, 32:11  <b>lungs</b> [3] - 15:2, 15:3, 28:20  <b>lymph</b> [1] - 15:4</p>	<p><b>moved</b> [1] - 15:1  <b>moving</b> [1] - 16:5  <b>MS</b> [1] - 11:10</p> <p style="text-align: center;">N</p>
<p><b>G-u-i-d-o-t-t-i</b> [1] - 4:25  <b>gas</b> [1] - 31:2  <b>gear</b> [1] - 33:3  <b>gears</b> [1] - 32:9  <b>general</b> [2] - 9:22, 9:25  <b>gentleman</b> [1] - 21:16  <b>Girardi</b> [2] - 4:21, 5:8  <b>given</b> [8] - 3:7, 6:25, 7:13, 11:2, 14:16, 23:19, 23:22, 36:12  <b>goll</b> [1] - 15:5  <b>grant</b> [2] - 31:7, 31:11  <b>grass</b> [2] - 31:24, 32:4  <b>Gray</b> [12] - 15:18, 15:19, 16:16, 20:14, 20:22, 25:23, 26:15, 32:21, 33:16, 35:3, 35:17, 35:19  <b>GRAY</b> [1] - 26:8  <b>great</b> [1] - 14:15  <b>greater</b> [1] - 9:23  <b>guess</b> [1] - 28:25  <b>guessing</b> [3] - 27:13, 29:13, 32:6  <b>Guidotti</b> [2] - 4:25, 5:12  <b>guys</b> [3] - 11:22, 27:16, 29:21</p>	<p>I</p>	<p>K</p>	<p>M</p>	<p><b>name</b> [1] - 21:9  <b>narrative</b> [2] - 13:18, 14:6  <b>need</b> [7] - 2:3, 6:20, 8:15, 25:7, 29:18, 34:20, 36:17  <b>needed</b> [1] - 17:22  <b>needs</b> [2] - 3:5, 7:25  <b>Negative</b> [1] - 13:12  <b>never</b> [2] - 2:17, 23:21  <b>news</b> [2] - 15:10, 15:11  <b>next</b> [2] - 15:5, 25:22  <b>nodes</b> [1] - 15:4  <b>none</b> [1] - 22:14  <b>notice</b> [4] - 1:7, 1:14, 1:18, 34:16  <b>notified</b> [2] - 20:18, 20:22  <b>November</b> [1] - 14:9  <b>numbered</b> [1] - 3:20</p>
<p style="text-align: center;">H</p> <p><b>half</b> [2] - 16:10, 16:23  <b>hall</b> [1] - 34:7  <b>handle</b> [1] - 27:21  <b>handwriting</b> [1] - 18:22  <b>health</b> [1] - 22:13  <b>hear</b> [1] - 13:22  <b>heard</b> [1] - 3:1  <b>hearing</b> [20] - 1:7, 1:15, 1:16, 2:5, 2:16, 2:17, 3:14, 3:16, 6:15, 6:22, 6:23, 9:1, 9:9, 12:4, 21:12, 24:7, 33:19, 36:3, 36:6, 36:12  <b>hearsay</b> [3] - 5:3, 6:8, 19:21  <b>held</b> [1] - 34:6  <b>help</b> [2] - 4:12, 18:19  <b>high</b> [1] - 14:24  <b>hired</b> [1] - 27:4  <b>holiday</b> [1] - 16:3  <b>Honor</b> [1] - 8:4  <b>hooked</b> [1] - 31:11</p>	<p><b>IDAHO</b> [2] - 1:1  <b>Idaho</b> [5] - 1:8, 1:19, 1:20, 1:21, 21:10  <b>identified</b> [1] - 18:7  <b>Illness</b> [1] - 20:13  <b>IME</b> [1] - 10:8  <b>important</b> [2] - 36:18, 36:19  <b>including</b> [1] - 29:24  <b>income</b> [1] - 2:6  <b>incorporated</b> [1] - 3:17  <b>indicated</b> [2] - 23:15, 23:16  <b>Indicating</b> [1] - 13:3  <b>Industrial</b> [1] - 1:9  <b>industrial</b> [1] - 1:24  <b>informed</b> [3] - 15:14, 15:17, 15:21  <b>Injury</b> [1] - 20:13  <b>injury</b> [1] - 20:22  <b>inside</b> [2] - 29:3  <b>insurance</b> [5] - 22:20, 22:21, 22:24, 23:3, 23:11  <b>Insurance</b> [2] - 1:9, 21:10  <b>intend</b> [2] - 8:25, 9:3  <b>interest</b> [2] - 16:21, 23:21  <b>interesting</b> [4] - 2:11, 7:5, 10:5, 10:25  <b>interfere</b> [1] - 25:4  <b>international</b> [1] - 4:7  <b>International</b> [3] - 4:20, 5:18, 5:19  <b>ish</b> [1] - 17:11  <b>issue</b> [9] - 2:12, 2:15, 3:5, 8:7, 10:12, 10:14, 10:24, 10:25, 17:24  <b>issues</b> [4] - 1:14, 1:17, 2:20, 36:8  <b>it'll</b> [1] - 8:14</p>	<p>L</p>	<p><b>maintenance</b> [1] - 33:20  <b>marked</b> [2] - 18:2, 18:3  <b>married</b> [6] - 11:22, 11:23, 12:5, 12:8, 12:17, 18:9  <b>MARY</b> [1] - 11:13  <b>mask</b> [5] - 29:3, 29:4, 29:9, 29:10, 35:8  <b>masks</b> [5] - 29:13, 29:14, 35:6, 35:10, 35:12  <b>matter</b> [4] - 1:7, 8:21, 21:11, 26:17  <b>McKinlay</b> [1] - 14:20  <b>mean</b> [1] - 24:15  <b>meant</b> [1] - 17:19  <b>medical</b> [4] - 8:21, 9:20, 10:13, 19:23  <b>meetings</b> [1] - 19:10  <b>meets</b> [1] - 5:2  <b>men</b> [1] - 25:6  <b>mention</b> [1] - 9:1  <b>mentioned</b> [1] - 18:24  <b>met</b> [2] - 21:12, 24:6  <b>middle</b> [1] - 20:18  <b>money</b> [2] - 7:25, 21:24  <b>month</b> [2] - 22:7, 22:11  <b>months</b> [2] - 17:14, 17:22  <b>mop</b> [3] - 29:25, 30:2, 30:3  <b>mop-up</b> [2] - 29:25, 30:2  <b>mop-up's</b> [1] - 30:3  <b>morning</b> [2] - 1:5, 32:10  <b>morphed</b> [1] - 10:9  <b>most</b> [2] - 20:8, 31:24  <b>mostly</b> [1] - 23:24  <b>motion</b> [1] - 7:8  <b>mountains</b> [1] - 25:10</p>	<p>O</p> <p><b>oath</b> [1] - 26:5  <b>objection</b> [13] - 2:9, 3:21, 3:25, 4:5, 4:10, 4:16, 5:9, 6:11, 7:19, 7:20, 13:20, 13:21, 19:21  <b>objections</b> [1] - 6:18  <b>observe</b> [1] - 33:3  <b>obtain</b> [2] - 9:23, 21:17  <b>obtained</b> [2] - 22:22, 23:12  <b>obviously</b> [1] - 36:11  <b>Occupational</b> [1] - 4:23  <b>October</b> [2] - 25:11, 25:12  <b>odor</b> [1] - 34:17  <b>offhand</b> [1] - 31:16  <b>office</b> [2] - 24:25, 34:4  <b>onboard</b> [1] - 28:16  <b>once</b> [2] - 36:7, 36:9  <b>oncologist</b> [3] - 5:23, 19:7, 19:8  <b>one</b> [10] - 6:20, 23:3, 23:11, 24:2, 30:25, 34:2, 34:5, 34:9, 34:14  <b>one's</b> [2] - 30:22, 30:23  <b>ones</b> [1] - 29:21  <b>open</b> [3] - 31:19, 31:20, 34:12</p>

<p><b>opening</b> [1] - 8:3  <b>opinion</b> [3] - 5:7, 6:9, 19:18  <b>opposed</b> [1] - 3:2  <b>original</b> [2] - 2:4, 2:15  <b>orthotics</b> [1] - 14:17  <b>own</b> [3] - 29:10, 29:12, 29:14</p>	<p><b>population</b> [1] - 9:25  <b>pos</b> [1] - 29:22  <b>poses</b> [1] - 2:11  <b>position</b> [2] - 10:5, 10:8  <b>positive</b> [2] - 29:2, 29:9  <b>positive-pressure</b> [1] - 29:9  <b>possibly</b> [1] - 14:21  <b>post</b> [4] - 6:15, 9:1, 9:9, 36:3  <b>post-hearing</b> [4] - 6:15, 9:1, 9:9, 36:3  <b>pounds</b> [1] - 29:6  <b>PPE</b> [1] - 29:22  <b>preference</b> [3] - 29:20, 30:1, 35:7  <b>preparation</b> [1] - 5:7  <b>prepare</b> [1] - 18:19  <b>prepared</b> [3] - 5:24, 6:20, 20:14  <b>present</b> [1] - 1:11  <b>presented</b> [1] - 10:1  <b>pressure</b> [2] - 29:2, 29:9  <b>pretty</b> [6] - 8:5, 8:12, 24:9, 27:22, 28:3, 34:13  <b>previously</b> [3] - 3:1, 7:13, 10:5  <b>problem</b> [2] - 33:25, 34:16  <b>problems</b> [1] - 8:8  <b>procedure</b> [1] - 34:13  <b>procedures</b> [1] - 28:4  <b>Proceedings</b> [1] - 36:25  <b>prognosis</b> [1] - 19:15  <b>proof</b> [1] - 19:23  <b>propensity</b> [1] - 9:23  <b>proposed</b> [1] - 33:18  <b>protect</b> [1] - 28:20  <b>protective</b> [2] - 33:3, 33:6  <b>protocols</b> [2] - 28:1, 28:4  <b>provide</b> [1] - 29:2  <b>provided</b> [1] - 29:15  <b>pull</b> [1] - 31:20  <b>pumper</b> [1] - 30:23  <b>pumpers</b> [1] - 31:1  <b>purpose</b> [1] - 3:15  <b>purposes</b> [2] - 10:2, 26:6  <b>pushed</b> [1] - 34:1  <b>pushing</b> [1] - 17:18  <b>put</b> [6] - 11:24, 12:3, 26:5, 27:15, 28:10, 31:5</p>	<p style="text-align: center;">Q</p> <p><b>quarters</b> [1] - 34:15  <b>questions</b> [11] - 21:4, 24:1, 26:17, 32:9, 32:16, 32:25, 33:9, 34:21, 35:15, 35:16, 36:21  <b>quick</b> [2] - 26:17, 36:18  <b>quite</b> [2] - 10:4, 18:10</p>	<p>26:16  <b>represented</b> [2] - 1:11, 1:12  <b>required</b> [2] - 9:13, 29:16  <b>requirements</b> [2] - 1:19, 5:3  <b>requires</b> [1] - 7:7  <b>rescue</b> [1] - 28:8  <b>research</b> [1] - 6:3  <b>rest</b> [1] - 33:22  <b>result</b> [2] - 6:7, 24:21  <b>results</b> [1] - 15:15  <b>retire</b> [2] - 21:20, 23:20  <b>retirement</b> [9] - 17:16, 17:18, 17:23, 21:17, 21:22, 21:23, 21:24, 22:1  <b>return</b> [2] - 16:4, 16:21  <b>Rexburg</b> [1] - 19:9  <b>rid</b> [1] - 31:18  <b>ripened</b> [1] - 10:15  <b>room</b> [3] - 19:14, 31:19, 34:6  <b>routine</b> [2] - 27:17, 27:19  <b>Rule</b> [1] - 7:7  <b>rule</b> [3] - 5:3, 7:5, 7:6  <b>run</b> [6] - 2:24, 10:6, 10:7, 11:1, 14:22</p>	<p><b>sets</b> [1] - 4:3  <b>seven</b> [1] - 27:15  <b>seventeen</b> [2] - 22:9, 22:10  <b>several</b> [2] - 31:7, 31:13  <b>shift</b> [5] - 25:6, 27:14, 27:15, 29:20, 33:23  <b>shifting</b> [1] - 32:8  <b>shifts</b> [1] - 25:6  <b>shocked</b> [1] - 24:18  <b>Short</b> [2] - 26:3, 35:21  <b>show</b> [2] - 9:19, 9:22  <b>sick</b> [1] - 17:17  <b>side</b> [2] - 35:23, 36:7  <b>signature</b> [2] - 18:10, 18:12  <b>signed</b> [1] - 4:21  <b>simple</b> [1] - 8:5  <b>simply</b> [3] - 3:2, 7:8, 10:7  <b>simulations</b> [1] - 35:12  <b>sits</b> [1] - 10:23  <b>situation</b> [2] - 7:18, 20:4  <b>six</b> [2] - 29:13, 31:16  <b>smoke</b> [2] - 31:5, 31:18  <b>smoldering</b> [1] - 30:10  <b>somewhat</b> [1] - 2:21  <b>son's</b> [1] - 15:9  <b>sorry</b> [5] - 12:1, 21:13, 23:8, 23:10, 30:12  <b>sort</b> [2] - 15:22, 25:25  <b>special</b> [2] - 14:17, 28:12  <b>spot</b> [1] - 30:8  <b>staff</b> [1] - 34:4  <b>staffed</b> [1] - 28:17  <b>stand</b> [1] - 4:10  <b>standard</b> [1] - 34:13  <b>start</b> [2] - 14:5, 31:5  <b>started</b> [8] - 14:15, 16:2, 16:3, 16:8, 25:11, 27:12, 27:24, 27:25  <b>State</b> [2] - 1:9, 21:10  <b>statement</b> [1] - 8:3  <b>station</b> [2] - 27:11, 27:21  <b>statute</b> [10] - 2:15, 2:24, 2:25, 8:8, 10:3, 10:6, 10:7, 10:10, 10:19, 10:20  <b>statutorily</b> [1] - 11:1  <b>stayed</b> [1] - 17:7  <b>Steve</b> [2] - 21:9, 32:21  <b>still</b> [8] - 16:19, 17:4, 24:10, 24:14, 24:17, 25:8, 25:13, 30:9  <b>stipulate</b> [1] - 12:6  <b>stipulated</b> [2] - 11:21,</p>
<p style="text-align: center;">P</p> <p><b>packs</b> [1] - 28:15  <b>Page</b> [1] - 20:15  <b>page</b> [1] - 18:5  <b>Pages</b> [1] - 18:4  <b>pages</b> [1] - 18:13  <b>paid</b> [3] - 22:15, 23:2, 23:13  <b>pain</b> [3] - 14:15, 14:17, 14:21  <b>paramedic</b> [1] - 17:5  <b>part</b> [4] - 3:16, 5:4, 7:12, 11:3  <b>Part</b> [1] - 1:15  <b>particular</b> [3] - 5:1, 9:24, 18:18  <b>parties</b> [1] - 3:9  <b>pass</b> [2] - 12:20, 18:25  <b>passed</b> [2] - 2:8, 2:18  <b>past</b> [1] - 2:6  <b>patient</b> [1] - 36:17  <b>patients</b> [1] - 28:9  <b>payable</b> [1] - 2:1  <b>people</b> [1] - 28:9  <b>per</b> [2] - 6:5, 22:7  <b>performed</b> [1] - 33:21  <b>permeating</b> [1] - 33:21  <b>permission</b> [3] - 13:16, 13:17  <b>PERSI</b> [4] - 21:22, 22:1, 22:16, 22:19  <b>person</b> [1] - 9:25  <b>personal</b> [3] - 29:19, 30:1, 35:6  <b>Pfoertner</b> [1] - 9:2  <b>phone</b> [2] - 25:25, 32:24  <b>physical</b> [1] - 33:24  <b>place</b> [1] - 1:6  <b>placed</b> [1] - 10:14  <b>places</b> [1] - 9:17  <b>plume</b> [1] - 31:5  <b>podiatrist</b> [1] - 14:16  <b>point</b> [10] - 2:22, 8:15, 9:3, 10:18, 16:1, 16:4, 16:6, 17:17, 24:20, 25:13  <b>policies</b> [1] - 29:23  <b>policy</b> [5] - 22:24, 23:3, 23:11, 35:7, 35:9</p>	<p style="text-align: center;">R</p> <p><b>read</b> [3] - 7:7, 7:11, 7:15  <b>reading</b> [2] - 5:21, 7:23  <b>really</b> [8] - 3:4, 9:21, 17:16, 17:21, 23:19, 23:22, 24:23, 25:6  <b>reasons</b> [2] - 23:17, 23:18  <b>receive</b> [1] - 22:1  <b>received</b> [4] - 3:19, 6:6, 31:7, 31:12  <b>recess</b> [2] - 25:25, 36:24  <b>recessed</b> [1] - 36:25  <b>recognize</b> [1] - 18:10  <b>recommendation</b> [1] - 36:14  <b>record</b> [7] - 7:8, 7:12, 7:16, 7:23, 11:24, 12:3, 26:4  <b>REDIRECT</b> [1] - 35:1  <b>redirect</b> [2] - 25:15, 25:16  <b>referee</b> [2] - 5:16, 8:4  <b>Referee</b> [2] - 9:14, 33:17  <b>Referee's</b> [1] - 13:15  <b>reference</b> [2] - 3:17, 6:24  <b>regards</b> [1] - 35:5  <b>relied</b> [1] - 6:25  <b>remain</b> [1] - 16:13  <b>remained</b> [3] - 16:14, 17:6, 17:8  <b>remaining</b> [1] - 1:17  <b>remember</b> [4] - 13:3, 14:8, 17:14, 18:1  <b>remembers</b> [1] - 15:9  <b>removed</b> [3] - 13:2, 13:7, 13:10  <b>repair</b> [1] - 27:21  <b>repaired</b> [1] - 14:9  <b>report</b> [1] - 6:25  <b>Report</b> [1] - 20:13  <b>reporter</b> [1] - 26:5  <b>represent</b> [2] - 21:10,</p>	<p style="text-align: center;">R</p> <p><b>read</b> [3] - 7:7, 7:11, 7:15  <b>reading</b> [2] - 5:21, 7:23  <b>really</b> [8] - 3:4, 9:21, 17:16, 17:21, 23:19, 23:22, 24:23, 25:6  <b>reasons</b> [2] - 23:17, 23:18  <b>receive</b> [1] - 22:1  <b>received</b> [4] - 3:19, 6:6, 31:7, 31:12  <b>recess</b> [2] - 25:25, 36:24  <b>recessed</b> [1] - 36:25  <b>recognize</b> [1] - 18:10  <b>recommendation</b> [1] - 36:14  <b>record</b> [7] - 7:8, 7:12, 7:16, 7:23, 11:24, 12:3, 26:4  <b>REDIRECT</b> [1] - 35:1  <b>redirect</b> [2] - 25:15, 25:16  <b>referee</b> [2] - 5:16, 8:4  <b>Referee</b> [2] - 9:14, 33:17  <b>Referee's</b> [1] - 13:15  <b>reference</b> [2] - 3:17, 6:24  <b>regards</b> [1] - 35:5  <b>relied</b> [1] - 6:25  <b>remain</b> [1] - 16:13  <b>remained</b> [3] - 16:14, 17:6, 17:8  <b>remaining</b> [1] - 1:17  <b>remember</b> [4] - 13:3, 14:8, 17:14, 18:1  <b>remembers</b> [1] - 15:9  <b>removed</b> [3] - 13:2, 13:7, 13:10  <b>repair</b> [1] - 27:21  <b>repaired</b> [1] - 14:9  <b>report</b> [1] - 6:25  <b>Report</b> [1] - 20:13  <b>reporter</b> [1] - 26:5  <b>represent</b> [2] - 21:10,</p>	<p style="text-align: center;">S</p> <p><b>sad</b> [1] - 32:13  <b>safety</b> [5] - 16:19, 23:17, 23:18, 23:24  <b>Sandi</b> [1] - 7:24  <b>saws</b> [1] - 28:16  <b>scan</b> [1] - 14:25  <b>SCBAs</b> [2] - 28:15, 28:23  <b>scheduled</b> [1] - 15:5  <b>scientifically</b> [1] - 9:21  <b>scratch</b> [2] - 19:4  <b>se</b> [1] - 6:5  <b>seat</b> [1] - 11:10  <b>second</b> [3] - 1:22, 6:20, 7:2  <b>Section</b> [1] - 1:20  <b>see</b> [8] - 2:22, 6:3, 8:9, 15:1, 18:5, 20:17, 22:9, 24:16  <b>seeks</b> [1] - 1:23  <b>seem</b> [1] - 2:21  <b>self</b> [2] - 23:1, 28:23  <b>self-contained</b> [1] - 28:23  <b>serve</b> [1] - 23:17  <b>set</b> [7] - 1:19, 2:2, 3:19, 4:2, 9:10, 29:12, 30:25</p>	<p><b>sets</b> [1] - 4:3  <b>seven</b> [1] - 27:15  <b>seventeen</b> [2] - 22:9, 22:10  <b>several</b> [2] - 31:7, 31:13  <b>shift</b> [5] - 25:6, 27:14, 27:15, 29:20, 33:23  <b>shifting</b> [1] - 32:8  <b>shifts</b> [1] - 25:6  <b>shocked</b> [1] - 24:18  <b>Short</b> [2] - 26:3, 35:21  <b>show</b> [2] - 9:19, 9:22  <b>sick</b> [1] - 17:17  <b>side</b> [2] - 35:23, 36:7  <b>signature</b> [2] - 18:10, 18:12  <b>signed</b> [1] - 4:21  <b>simple</b> [1] - 8:5  <b>simply</b> [3] - 3:2, 7:8, 10:7  <b>simulations</b> [1] - 35:12  <b>sits</b> [1] - 10:23  <b>situation</b> [2] - 7:18, 20:4  <b>six</b> [2] - 29:13, 31:16  <b>smoke</b> [2] - 31:5, 31:18  <b>smoldering</b> [1] - 30:10  <b>somewhat</b> [1] - 2:21  <b>son's</b> [1] - 15:9  <b>sorry</b> [5] - 12:1, 21:13, 23:8, 23:10, 30:12  <b>sort</b> [2] - 15:22, 25:25  <b>special</b> [2] - 14:17, 28:12  <b>spot</b> [1] - 30:8  <b>staff</b> [1] - 34:4  <b>staffed</b> [1] - 28:17  <b>stand</b> [1] - 4:10  <b>standard</b> [1] - 34:13  <b>start</b> [2] - 14:5, 31:5  <b>started</b> [8] - 14:15, 16:2, 16:3, 16:8, 25:11, 27:12, 27:24, 27:25  <b>State</b> [2] - 1:9, 21:10  <b>statement</b> [1] - 8:3  <b>station</b> [2] - 27:11, 27:21  <b>statute</b> [10] - 2:15, 2:24, 2:25, 8:8, 10:3, 10:6, 10:7, 10:10, 10:19, 10:20  <b>statutorily</b> [1] - 11:1  <b>stayed</b> [1] - 17:7  <b>Steve</b> [2] - 21:9, 32:21  <b>still</b> [8] - 16:19, 17:4, 24:10, 24:14, 24:17, 25:8, 25:13, 30:9  <b>stipulate</b> [1] - 12:6  <b>stipulated</b> [2] - 11:21,</p>



<p>12:4  <b>stocked</b> [2] - 28:14,  28:18  <b>stopped</b> [2] - 17:9,  24:12  <b>straightforward</b> [3] -  8:11, 8:13, 8:20  <b>strong</b> [2] - 24:9, 24:11  <b>structure</b> [2] - 32:2,  32:5  <b>structures</b> [1] - 32:7  <b>study</b> [3] - 5:22, 6:4,  6:5  <b>stuff</b> [4] - 17:17, 27:20,  29:25, 30:5  <b>submission</b> [1] - 4:17  <b>supervisor</b> [1] - 27:8  <b>supposed</b> [3] - 28:7,  28:13, 29:7  <b>surgery</b> [1] - 14:5  <b>sustained</b> [1] - 6:11  <b>switched</b> [1] - 10:18  <b>Switzerland</b> [1] - 9:17  <b>sworn</b> [2] - 11:15,  26:10  <b>system</b> [3] - 25:25,  29:5, 31:8</p>	<p><b>torn</b> [1] - 14:7  <b>total</b> [1] - 12:16  <b>tough</b> [1] - 17:21  <b>town</b> [1] - 30:25  <b>trade</b> [1] - 25:6  <b>trained</b> [1] - 35:12  <b>training</b> [2] - 34:4,  35:11  <b>transcript</b> [3] - 3:13,  36:5, 36:6  <b>transpired</b> [1] - 19:25  <b>travel</b> [1] - 25:3  <b>treating</b> [4] - 5:23,  10:9, 19:6, 19:8  <b>treatise</b> [6] - 4:23, 5:2,  5:4, 5:20, 6:24, 7:6  <b>Treatment</b> [1] - 25:2  <b>trips</b> [1] - 25:10  <b>truck</b> [1] - 30:23  <b>trucks</b> [5] - 29:12,  29:15, 30:16, 30:19,  31:4  <b>truly</b> [1] - 21:15  <b>trying</b> [2] - 9:11, 20:15  <b>TTD</b> [4] - 2:5, 2:20, 3:1,  10:24  <b>TV</b> [1] - 30:14  <b>two</b> [3] - 4:3, 16:10  <b>type</b> [5] - 8:23, 9:24,  31:4, 31:23, 31:25</p>	<p><b>walking</b> [1] - 36:16  <b>waning</b> [1] - 24:17  <b>warned</b> [1] - 22:8  <b>warning</b> [1] - 29:5  <b>water</b> [1] - 28:16  <b>weaker</b> [1] - 24:14  <b>wear</b> [4] - 29:22, 29:23,  35:7, 35:10  <b>wearing</b> [1] - 35:5  <b>WEDNESDAY</b> [1] - 1:1  <b>week</b> [1] - 14:10  <b>weeks</b> [1] - 16:10  <b>well-founded</b> [1] - 6:3  <b>whole</b> [2] - 8:7, 32:25  <b>wife</b> [1] - 1:11  <b>wildland</b> [2] - 32:1,  32:3  <b>willing</b> [1] - 25:5  <b>win</b> [1] - 36:9  <b>wish</b> [1] - 4:11  <b>witness</b> [4] - 11:6,  11:14, 25:22, 26:9  <b>WITNESS</b> [8] - 12:2,  13:23, 14:12, 14:14,  15:8, 20:1, 25:21, 35:20  <b>witness's</b> [1] - 5:5  <b>witnesses</b> [1] - 35:22  <b>wondering</b> [1] - 14:23  <b>words</b> [1] - 2:25  <b>writing</b> [1] - 18:14  <b>written</b> [1] - 36:8</p>
T	U	Y
<p><b>tables</b> [1] - 7:23  <b>tanker</b> [1] - 30:23  <b>ten</b> [3] - 27:13, 32:2,  32:6  <b>terms</b> [1] - 8:21  <b>test</b> [3] - 14:22, 15:12,  15:15  <b>testified</b> [2] - 11:15,  26:10  <b>testify</b> [2] - 5:6, 5:24  <b>testifying</b> [3] - 5:13,  6:10, 7:1  <b>testimony</b> [7] - 5:5,  5:7, 10:21, 19:23,  21:18, 26:6, 36:3  <b>thereby</b> [1] - 10:10  <b>they've</b> [1] - 29:15  <b>third</b> [1] - 1:25  <b>thorough</b> [1] - 36:19  <b>three</b> [5] - 9:8, 16:10,  16:23, 36:15  <b>timing</b> [1] - 10:22  <b>today</b> [9] - 3:6, 3:19,  5:25, 8:13, 10:21,  10:22, 35:18, 35:22,  36:22  <b>today's</b> [1] - 36:6  <b>tolled</b> [1] - 1:21  <b>took</b> [2] - 10:11, 14:25  <b>top</b> [1] - 25:11</p>	<p><b>under</b> [2] - 1:21, 26:5  <b>underneath</b> [1] - 30:9  <b>unfortunately</b> [1] -  10:16  <b>unh</b> [1] - 13:12  <b>unh-uh</b> [1] - 13:12  <b>union</b> [1] - 5:17  <b>unless</b> [2] - 7:18, 36:21  <b>up</b> [7] - 29:25, 30:2,  30:5, 30:25, 31:5, 34:12  <b>up's</b> [1] - 30:3</p> <p style="text-align: center;">V</p> <p><b>ventilation</b> [1] - 31:8  <b>versus</b> [1] - 1:8  <b>view</b> [1] - 24:11  <b>volume</b> [1] - 6:19  <b>Volume</b> [5] - 4:4, 4:6,  6:22, 19:3, 20:12  <b>volunteer</b> [1] - 12:15</p> <p style="text-align: center;">W</p> <p><b>wait</b> [1] - 23:7  <b>waive</b> [1] - 9:12</p>	<p><b>year</b> [6] - 10:20, 14:11,  14:12, 19:1, 32:2, 32:7  <b>years</b> [14] - 12:14,  12:15, 12:16, 13:4,  13:8, 16:24, 26:23,  27:6, 27:14, 29:14,  31:7, 31:13, 31:16, 33:1</p> <p style="text-align: center;">Z</p> <p><b>Zuckerman</b> [5] - 3:16,  7:11, 8:17, 9:2, 10:12  <b>Zuckerman's</b> [1] - 6:25</p>