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NO. 71101-6-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WILFRED A. LARSON, et al.,

Respondents,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND INDUSTRIES,

Appellants.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT W. FERGUSON
Attorney General

BEVERLY NORWOOD GOETZ
Senior Counsel
WSBA No. 8434
Labor and Industries Division
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
Office ID No. 91018

ORIGINAL

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I. INTRODUCTION

This is an industrial insurance case under RCW Title 51, involving rejection of a claim. RCW 51.32.185 provides for a rebuttable presumption that firefighters who develop certain conditions have an occupational disease. At issue is whether the superior court erroneously allowed the jury to determine whether the employer, City of Bellevue, met its burden of rebutting the presumption that Wilfred Larson's melanoma was an occupational disease. The Board of Industrial Insurance Appeals had determined that the City rebutted the prima facie presumption in RCW 51.32.185. The Board found Larson's melanoma was not proximately caused by distinctive work exposure, and denied Larson's occupational disease claim. On appeal at superior court, determining whether a party has met its burden of producing evidence sufficient to rebut a prima facie presumption is a question of law, not a question for a jury. Therefore, it was error for the trial court to allow the jury to determine whether the City had rebutted the prima facie presumption.

II. STATEMENT OF THE ISSUE

> Did the trial court err when it allowed the jury to determine whether the City had rebutted the presumption that Larson's melanoma was an occupational disease, when the question of whether the presumption was rebutted was an issue relating to the burden of production, which here is a question of law?

III. COUNTERSTATEMENT OF THE CASE

The Department of Labor and Industries agrees with the City of Bellevue's statement of the case. *See* App's Br. at 4-15.

A. Larson's Cancer Was Initially Presumed To Be an Occupational Disease and the City Was Required To Rebut This Presumption

Wilfred A. Larson, who works as both a firefighter and an EMT for the City of Bellevue (the City), filed a workers' compensation claim alleging that a malignant melanoma on his back was an occupational disease. The Department of Labor and Industries (Department) ordered Larson's claim allowed, based on the statutory presumption contained in RCW 51.32.185 that states "there shall exist a prima facie presumption that . . . cancer [is an] occupational disease . . . ." CP 37. The City appealed the Department's order to the Board of Industrial Insurance Appeals (Board). CP 40-41.

At the Board, the City presented evidence that Larson's melanoma was not caused by firefighting. The City presented three expert witnesses.[1]

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[1] The testimony of the City's fourth expert witness, John P. Hackett, M.D., was disallowed as being cumulative both at the Board and at the trial court. CP 833-844; VRP 29-34. The Industrial Appeals Judge (IAJ) not only determined that the City had rebutted the RCW 51.32.185 presumption, but also granted the City's motion for summary judgment, thus reversing the Department order allowing the claim. CP 510-518. The full Board, on Larson's petition for review, vacated the IAJ's decision and remanded the matter for hearing. CP 550-552. It is thus understandable that the IAJ felt no need of witness testimony beyond what she allowed. But given the trial judge's

Andy Chien, M.D., a board certified dermatologist specializing in melanoma, testified that melanoma is caused by a variety of complex genetic predisposing factors, as well as exposure to ultraviolet light, both from the sun, and from tanning beds. VRP 573-77, 589-603, 608-09. Larson was exposed to the sun in recreation and in tanning beds. VRP 284-92. Dr. Chien also testified that melanoma is not a systemic disease, nor does it arise from inhalation of chemicals or exposure to chemicals. VRP 604, 644-45. Dr. Chien concluded that Larson's melanoma was caused by his occasional recreational exposures to ultraviolet radiation and genetic risk factors. VRP 608. Thus, Larson's working conditions did not play a role in the development of his melanoma. VRP 608-09.

Sarah Dick, M.D., a Board certified dermatologist, and Larson's treating dermatologist, testified that Larson had a number of risk factors that were not occupationally related and that predisposed him to develop a melanoma, including exposure to ultraviolet light, heredity, a decreased immune system, being fair-skinned, as well as use of tanning beds. VRP 722, 724, 726-31. Dr. Dick testified that there is no exposure unique to working as a firefighter that constitutes a risk factor in the development of melanoma, Larson probably would have had melanoma regardless of what work he did. VRP 732.

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rulings regarding the City's burden of proof with respect to the rebuttable presumption it is surprising that the trial judge disallowed the testimony.

Noel Weiss, M.D., an epidemiologist, the majority of whose epidemiological work focused on cancer, testified that the medical literature did not show an increased incidence of malignant melanoma in the firefighting population. VRP 662, 664-65. Dr. Weiss further testified that there was no scientific proof that firefighters were at an increased risk of any form of cancer. VRP 664.

B. The Board Decided That The City Had Rebutted The Presumption

Based on the City's evidence, the Board decided that the City introduced "credible medical evidence demonstrating that Captain Larson's melanoma was proximately caused by specific factors unrelated to his work as a firefighter." CP 33. The Board ruled that the City had met its burden of rebutting the RCW 51.32.185 presumption by a preponderance of evidence and Larson was thus required to produce evidence in opposition. CP 32-33.

Larson presented the testimony of one medical doctor, Kenneth Coleman, M.D. Dr. Coleman is a family practice and emergency medicine doctor who obtained a law degree in 1993 and, since 1989, has worked as a medical legal consultant. VRP 408-09. Dr. Coleman testified about 12 articles that he believed correctly indicated that firefighting is an occupation that results in increased melanoma. VRP 412-30, 498-506.

Based on those articles he testified that Larson's occupation is probably one cause of his melanoma. VRP 508.[2]

The Board, apparently concluding that the City had met its burden of production, went on to weigh the evidence presented by both parties and found the City's evidence to be more persuasive. CP 33. The Board reversed the Department's order and directed that Larson's claim be rejected.

C. At Superior Court the Trial Judge Did Not Rule on Whether the City Rebutted the Firefighter Presumption, but Instead Gave This Question to the Jury

Larson appealed the Board's decision to superior court. CP 1-2. The testimony in the Board record was read to the jury. Larson's witnesses, including Dr. Coleman, were presented first, followed by the testimony of the City's witnesses. The City, at the conclusion of testimony, asked the trial judge to rule that the City had rebutted the prima facie presumption as a matter of law, and that the only issue before the jury was whether Larson had sustained his burden of proving that the Board's decision that his melanoma was not an occupational disease was wrong. VRP 753-54. The trial judge denied the motion. VRP 754. The

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[2] Drs. Chien and Weiss both reviewed the same 12 articles and testified that they only spoke to the incidence of disease, and not to causation, or that the studies were otherwise unreliable with respect to both incidence of melanoma and causation. VRP 651-52; 662-87.

trial judge then turned to a discussion of jury instructions and verdict form. VRP 758.

With respect to Instruction No. 9, the WPI 6th 155.03, "burden of proof" instruction, the trial judge inserted language regarding the rebuttable firefighter presumption. VRP 769-70; CP 1768. The first, second, and fourth paragraphs of Instruction No. 9 recite verbatim WPI 6th 155.03. The third paragraph (italicized here for ease of reference) was added by the trial judge at Larson's request. VRP 765-67, 769-70. The instruction read:

> The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence.
>
> The burden of proof is on the firefighter to establish by a preponderance of the evidence that the decision is incorrect.
>
> *At the hearing before the Board of Industrial Insurance Appeals the burden of proof is on the employer to rebut the presumption that, one, claimant's malignant melanoma arose naturally out of his conditions of employment as a firefighter, and two, his employment is a proximate cause of his malignant melanoma.*
>
> When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

CP 1768. The City excepted to this instruction. VRP 835. The City noted that the instruction was confusing and that it misstated RCW 51.32.185. The City stated that the trial judge was confusing a burden of production with a burden of proof (persuasion), the City had met the burden of production, and proof (persuasion), at the Board, on appeal at superior court, it no longer bore a burden of production, and the burden of proof (persuasion) was on Larson. VRP 777, 785-92.

The City also took exception to Instruction No. 10, the "contention" instruction, which read:

> The plaintiff Wilfred Larson claims that the findings and decision of the Board are incorrect.
>
> 1. Larson claims that the Board incorrectly concluded that the City rebutted the evidentiary presumption that his melanoma was an occupational disease by a preponderance of the evidence.
>
> 2. Larson claims that the Board incorrectly concluded that his melanoma did not arise naturally and proximately from the distinctive conditions of his employment as a firefighter with the City of Bellevue.
>
> The City contends that the Board correctly concluded Mr. Larson's melanoma did not arise naturally and proximately out of the distinctive conditions of his employment, but arose solely as a result of factors unrelated to his employment as a firefighter with the City of Bellevue.

VRP 776-81, 831, 847; CP 1769. The City pointed out that the burden of production was being confused with Larson's burden of proof. VRP 776.

The parties offered different verdict forms. CP 1589-1579, 1703, 1748-1750. The trial judge adopted Larson's verdict form. VRP 824. It read:

> Question 1: Was the Board of Industrial Insurance Appeals correct in deciding that the employer rebutted by a preponderance of the evidence the presumption that plaintiff's malignant melanoma was an occupational disease?
>
> Yes or No?
>
> If you answered "No" to question one, do not answer any further questions.
>
> Question 2: Was the Board of Industrial Insurance Appeals correct in deciding that the plaintiff did not prove by a preponderance of the evidence that his malignant melanoma was an occupational disease?
>
> Yes or No?

CP 71. (The jury answered "no" to question number one. CP 1900-01.)

Instruction No. 12 also addressed the statutory presumption. It read:

> A statute provides that a firefighter's malignant melanoma is presumed to be an occupational disease if he or she served as a firefighter for at least 10 years prior to diagnosis and was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. However, this presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include but is not limited to use of tobacco products, physical fitness and weight, lifestyle, heredity factors and exposure from other employment or nonemployment activities.

CP 1771.

After taking exceptions to individual instructions, and before the jury was instructed, the City further took exception to how the trial judge "approached" the whole issue of the RCW 51.32.185 prima facie presumption. It stated that the instructions created a presumption that occupational disease had been proved, and placed the burden on the City to disprove that Larson's melanoma was an occupational disease. VRP 835. The trial judge did not revise her rulings regarding the instructions or verdict form in response to those exceptions.

The parties then gave closing arguments to the jury. During Larson's closing, he stated that the City still bore the burden of rebutting the statutory presumption. He asked the jury "Did [the City] even rebut the statutory presumption that there's a link between melanoma and firefighting?" VRP 911. Larson pointed to Instruction No. 9 and said:

> At the hearing before the board, the burden of proof is on the employer, right? That's what it says, to rebut the presumption that my client's melanoma was occupational. Right? So that's their burden. They have that burden to rebut that.

VRP 912. Larson stated that the City had to show that Larson's melanoma was not caused by his occupation. "Not only do they have to prove that it's not occupational . . . they have to prove some other cause . . . ." VRP 912-13.

The jury found for Larson. CP 1775-76. The trial court entered judgment for Larson. CP 1900-01. The City appealed. CP 1-2.

IV. SUMMARY OF ARGUMENT

The trial court's instructions and special verdict form, individually and as a whole, impermissibly submitted the question of whether the City had rebutted the presumption that Larson's melanoma was an occupational disease to the jury. Whether the presumption was rebutted, however, is an issue relating to the burden of production, not the burden of persuasion, and, therefore, it should have been decided by a judge. Instruction No. 9 confused the preponderance of evidence standard that Larson had to meet as part of his burden of persuasion on appeal at superior court, with the preponderance of evidence standard that the City had to meet with respect to its burden of production regarding the RCW 51.32.185 rebuttable presumption at the Board. A jury is entitled to resolve factual disputes. Whether the City had met its burden of production was not a factual dispute, but a legal question. It was error to ask the jury to decide a legal issue. The City was prejudiced and is entitled to a new trial.

V. STANDARD OF REVIEW

A superior court reviews decisions under the Industrial Insurance Act de novo, relying on the certified board record. RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44

(2009). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). This is true even when a case involves the firefighter presumption contained in RCW 51.32.185. *See id.*

As an appellate court, this Court reviews the decision of the trial court, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the adequacy of jury instructions and special verdict forms de novo as a question of law. *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61, 995 P.2d 621 (2000); *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994). An instruction, or a special verdict form, that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000).

VI. ARGUMENT

RCW 51.32.185 provides for a rebuttable presumption regarding firefighters and occupational diseases. *Raum*, 171 Wn. App. at 152. This presumption involves the burden of production because the statute specifies that it is a "prima facie" presumption. RCW 51.32.185. It is the trial judge that determines whether a burden of production is met, not the

jury as was done here. *See Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992). The jury instructions improperly allowed the jury to determine whether the burden of production was met.

A. RCW 51.32.185 Creates a Presumption About the Burden of Production That Can Be Rebutted

Per RCW 51.32.185, "In the case of firefighters . . . , there shall exist a prima facie presumption that: [certain conditions]. . . (c) cancer . . . are occupational diseases under RCW 51.08.140." RCW 51.32.185 thus relieves a firefighter from producing evidence to support a claim of occupational disease with respect to certain disease conditions, including cancer, contracted by firefighters. RCW 51.32.185 instead provides that, for firefighters, the existence of certain conditions are prima facie occupational diseases, requiring the Department, or self-insured employer, to produce evidence to rebut the prima facie presumption by a preponderance of evidence.

Evidence that rebuts the prima facie presumption 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). Under this scheme the City had to produce evidence, and did, that Larson's firefighting employment exposures were not implicated in the development of his

melanoma, but rather that his condition was caused by, in Larson's case, the known factors of heredity, or genetic predisposition, and his non-employment, i.e., recreational, exposures to ultraviolet light. *See supra* at 2-4.

RCW 51.32.185 placed a burden of production on the City to present evidence that Larson's disease was not occupationally related. Once the City met its burden of production, the burden then shifted to Larson to present a preponderance of evidence establishing that his claim should be allowed, as Larson, like any other party who has appealed a decision of the Board, bore the burden of proof on that issue. RCW 51.52.115; *see Raum*, 171 Wn. App. at 152. As *Raum* explains, once the presumption has been rebutted, then the jury would weigh the evidence, with the firefighter bearing the burden of proving that the Board erred when it concluded that the worker's occupational disease claim should be rejected:

> RCW 51.32.185's presumption is not conclusive and may be rebutted by a "preponderance of the evidence." RCW 51.32.185(1). If the employer rebuts the presumption, the burden of proof returns to the worker to show he is entitled to benefits, i.e., that he suffers from an "occupational disease" as defined in RCW 51.08.140. *If both parties present competent medical testimony, the jury must weigh the evidence to determine whether the worker's condition "arises naturally and proximately out of employment."* RCW 51.08.140.

Raum, 171 Wn. App. at 152 (emphasis added).

Whether a burden of production is met is decided by a judge, while the issue of whether the burden of persuasion is met is decided by the trier of fact. *See Carle*, 65 Wn. App. at 102; Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 24:5 (2d ed. 2013) ("sufficiency of the evidence to take the case to the jury is a question of law"); *see also* 14A Washington Practice, § 24:1. RCW 51.32.185 creates a burden of production because it addresses what constitutes a prima facie case. RCW 51.32.185. Once a prima facie case exists, as it does here by virtue of RCW 51.32.185, the employer (or Department) has the burden of production, i.e., must produce a preponderance of evidence that the firefighter's disease is not occupational. "The employer's burden at this stage is not one of persuasion, but rather a burden of production." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 364, 753 P.2d 517 (1988) (discussing the burden of production in age discrimination cases).

The fact that RCW 51.32.185 allows the applicable burden of production to be satisfied by a preponderance of the evidence does not transform the question of whether the burden of production was met into a jury question. It merely provides guidance to the trial judge as to what standard to use in determining whether the employer has met the burden of

production. Ordinarily the standard on a burden of production would be "when it could be held as matter of law of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party." *Miller v. Payless Drug Stores of Wash., Inc.*, 61 Wn. 2d 651, 653, 379 P.2d 932 (1963); Tegland, 14A *Washington Practice* § 24:5 (discussing CR 50).[3] Stated another way, "on controverted questions of fact, there is evidence, or there are justifiable inferences from evidence, upon which reasonable minds might reach different conclusions, the questions are for the jury, and not for the court to decide." Tegland, 14A *Washington Practice* § 24:5. This is a lesser standard than preponderance of the evidence. *See* Tegland, 14A *Washington Practice* § 24:1. The Legislature, however, created a higher standard than is ordinarily used to satisfy a burden of production. But it is nonetheless a burden of production, and, therefore, is decided by a judge, not a jury.

Furthermore, "'[t]he sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.'" *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d (1983)). As the *Indian Trail* Court pointed out, "its efficacy is lost when the other party adduces credible evidence to the contrary.

[3] CR 50 is useful as an analogy because it concerns whether the burden of production has been meet. Tegland, § 24:1.

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

As Larson appealed the Board's decision to superior court, he bore the burden of proving by a preponderance of the evidence that the Board erred when it rejected his claim. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This is because, as the appealing party at superior court, Larson carries the burden of persuasion. *See* RCW 51.52.115 ("the burden of proof shall be upon the party attacking [the Board's decision]"); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 484, 40 P.3d 1221 (2002) ("RCW 51.52.115 and the applicable cases plainly allocate the burden of persuasion in superior court to whoever is attacking the findings and decision of the board."). And, as noted, *Raum* shows that in cases involving the presumption under RCW 51.32.185, it remains the case that, once the presumption is rebutted, the party who appealed the Board's decision bears the burden of proving that the Board's decision was incorrect.

Both the City and Larson presented testimony regarding Larson's employment and nonemployment exposures, and expert medical testimony regarding the cause of Larson's melanoma. The Board held that the City

"presented the preponderance of credible medical evidence demonstrating that Captain Larson's melanoma was proximately caused by specific factors unrelated to his work as a firefighter." CP 33. The Board found that Larson wore protective gear whenever he may have been exposed to chemicals or fumes, so did not have any distinctive work exposures. The Board also found he was fair skinned, with green/hazel eyes and many freckles, and had sun exposure on yearly trips to Lake Chelan, and to ultraviolet light in tanning beds, and did not use sunblock. These facts, the Board found, meant that the probable causes of his melanoma were his genetic factors and ultraviolet exposures, not his employment. CP 30-35. The Board's findings were presumed correct at superior court. Larson bore the burden of proving that those findings were incorrect. RCW 51.52.115.[4]

At superior court the trial judge should have similarly decided the threshold question of whether, as a matter of law, the City rebutted the

[4] RCW 51.52.115 provides: "Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110 . . . . In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same . . . . In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

presumption. If the trial judge concluded that the City did not rebut the presumption, then Larson would prevail as a matter of law, and it would be improper to present the case to a jury. Conversely, if the trial judge concluded that the presumption was rebutted, the case would then be submitted to the jury to determine whether the preponderance of the evidence showed that the Board's findings (namely, that Larson's melanoma was not caused by occupational exposures) was incorrect. *See* RCW 51.52.115; *Raum*, 171 Wn. App. at 152.

Key to this process is that *only the evidence the City produced* is used in determining whether the presumption is rebutted. Here the jury first heard Larson's witnesses' testimony, including his expert medical witness, Dr. Coleman, and then heard the City's witness testimony. The jury was instructed to decide whether the presumption was rebutted only after hearing all the evidence. This prejudiced the City because the jury was able to use evidence presented by Larson to decide whether the City had rebutted the statutory presumption or not. It also illustrates why the jury should not decide whether the presumption is rebutted. Unlike a judge, a jury cannot be expected to disregard testimony for one purpose, and consider it for another seemingly similar purpose, unless properly instructed. Here the jury was given no instruction regarding the City's burden of production preponderance standard, as distinct from Larson's

burden of persuasion preponderance standard. Nor is it even likely that the jury would have understood these differing roles had it been properly instructed. At superior court the trial judge erred by asking the jury to decide whether the City rebutted the firefighter presumption.

B. The Court's Instructions Erroneously Placed the Burden of Proof at Superior Court on the City

Taking Instructions No. 9, No. 10, and No. 12 together, the jury was given hopelessly confusing and contradictory statements regarding whether it was the City or Larson who bore the burden of proof on appeal to superior court, since the instructions informed the jury that the City bore the burden of proving that it rebutted the presumption (by showing that Larson's disease was not occupationally related) while Larson bore the burden of proving that the Board's decision was wrong (when it found that Larson's disease was not occupationally related). CP 1768, 1769, 1771. Furthermore, the verdict form invited the jury to believe, incorrectly, that it was the City that bore the burden of proof at superior court, as the verdict form focused on whether the City had rebutted the presumption rather than on whether Larson established that his melanoma was an occupational disease, overcoming the Board's decision to the contrary. CP 1775-76.

Instruction No. 9, in the first two paragraphs, refers to the presumption that the Board findings are correct, and that the presumption is rebuttable by "the firefighter" by a preponderance of evidence. However, the third paragraph refers to a presumption that the firefighter's condition is an occupational disease, and states that "the employer" was required to rebut this. Moreover, Instruction No. 8, the WPI 6th WPI155.02 "Board findings" instruction, makes no mention of any presumption. CP 1767. The jury cannot decide whether a Board finding that is not before it is correct or not. The jury, at a minimum, was given a highly confusing statement, since the instruction directed them to presume both that the Board was correct that Larson did not have an occupational disease, and that Larson was correct that he did. The issue is further confused by the fact that the two presumptions relate to the same issue (whether Larson had an occupational disease or not) and directed the jury to use the same standard in deciding if the presumption was rebutted (a preponderance of the evidence). It is impossible to determine, on this record, whether the jury correctly believed that the burden was on Larson to establish that he had developed an occupational disease, or whether it incorrectly believed that the burden was on the City to establish that he had not developed one. Furthermore, the jury was not told how to reconcile these facially conflicting presumptions.

Instruction No. 9 is not only prejudicially confusing, its third paragraph, referring to the statutory presumption, is not legally correct. It refers to a presumption, rather than a "prima facie presumption." This has the effect of giving the presumption a conclusiveness that it does not enjoy. *Raum*, 171 Wn. App. at 152 (RCW 51.32.185's presumption is not conclusive). Moreover, the RCW 51.32.185 prima facie presumption should have ceased to exist had the trial judge properly ruled on whether it had been rebutted or not. If the trial judge concluded that the prima facie presumption was not rebutted, then Larson should have won and no trial would be necessary. If the trial judge concluded that it was rebutted, then the presumption ceased to exist and the jury should have simply decided the question of whether Larson had proven that the Board's decision rejecting his occupational disease claim was incorrect by a preponderance of evidence.

This confusion can only have been compounded by Instruction No. 10, which, in the paragraph numbered one, refers to the City rebutting an "evidentiary presumption" by a preponderance of evidence, and by Instruction No. 12, which refers to an "occupational disease presumption." Instruction No. 10, although only a "contention" instruction, is legally flawed because it was prejudicial error to introduce the question of the rebuttable firefighter presumption to the jury. It was not relevant, and it

could only mislead the jury into believing that it had to determine whether "the Board incorrectly concluded that the City rebutted the evidentiary presumption that [Larson's] melanoma was an occupational disease by a preponderance of the evidence." CP 1769.

Instruction No. 12 likewise implicitly instructs the jury that there is a presumption of occupational disease and that it needs to decide whether that presumption is rebutted where it states, "this presumption of occupational disease may be rebutted by a preponderance of evidence." CP 1771. The only rational conclusion that the jury could draw from Instruction No. 12 is that the City had to rebut this "occupational disease presumption" because it would make no sense for Larson to rebut his own claim of occupational disease. The special verdict form cemented this error by making the only question for the jury to answer whether *"the employer"* rebutted the presumption. CP 1775.[5] Taken individually and as a whole, the instructions, along with the verdict form, incorrectly stated

[5] Bellevue did not specifically except to the giving of Instruction No. 12 or the verdict form but when prior rulings demonstrate that further discussion is not going to result in a change in confusing, erroneous instructions, or in an erroneous special verdict, a party cannot reasonably be held to have waived its right to assert error on appeal by engaging in what would be a useless act. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997). Likewise, participating in drafting on an issue in which one has already been ruled against does not waive the right to challenge that ruling on appeal and here the trial court was aware of Bellevue's disagreement with its handling of the rebuttable evidentiary presumption. *See, e.g., Gamboa v. Clark*, No. 30826-0-III, 2014 WL 1225933 *3 (Wash. App. Ct. March 25, 2014).

the law when they allowed the jury to determine whether the burden of production was met.

Finally, even assuming for the sake of argument that the jury could decide the issue of whether the City had rebutted the presumption that Larson's condition was an occupational disease, the jury should have been instructed that, in deciding whether the City had met its burden of production and rebutted the presumption, it should consider only the evidence presented by the City, and that it should not consider Larson's evidence until and unless it determined that the City had rebutted the presumption. Instruction No. 10 failed to advise the jury of this, and, in fact, invited it to weigh Larson's evidence when deciding whether the City had failed to rebut the presumption. This was plainly error, as, in deciding whether the City met its burden of production, the jury could only properly consider the evidence presented by the City. And here, of course, no curative instruction would have negated the trial judge's failure to make the threshold determination regarding whether the case could go to the jury or not.

C. The Trial Court's Errors Prejudiced the City by Allowing the Jury To Believe the Burden of Proof Was on the City

Remand for a new trial is necessary here because the trial court's errors prejudiced the City. "Jury instructions are sufficient when they

allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). However, when instructions misstate the law, or when instructions read in conjunction with other instructions together misstate the law, it is presumed that this is prejudicial, and, therefore, reversible error. *Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972) (where instructions are inconsistent or contradictory on a material point, their use is prejudicial, because it is impossible to know what effect they may have on the verdict); *see also Anfinson*, 174 Wn.2d at 860. In particular, a remand is required when the wrong burden of proof is applied. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 920, 640 P.2d 1 (1982).

By itself, Instruction No. 9 constitutes reversible error because it referenced the City's burden to rebut the presumption that Larson's condition was an occupational disease, when, in fact, it was Larson that bore the burden of proof that his claim of occupational disease should have been accepted. This is a clear misstatement of the law, and is presumed prejudicial. *See Anfinson*, 174 Wn.2d at 860. Furthermore, even if the instruction is considered merely misleading rather than a misstatement of the law (since it referenced both Larson and the City's

burden of rebutting a presumption), prejudice is still shown because it plainly invited the jury to believe that the City had the burden of proof.

Even assuming it was proper to ask the jury to decide whether the City met its burden of production by rebutting the presumption under RCW 51.32.185, the jury was not given guidance on how to apply the facially conflicting presumption that Larson both did and did not have a valid occupational disease claim. Nor was the jury informed that it could only consider the evidence presented by the City when deciding whether the City met its burden of production. The City was prejudiced because it had to rebut Larson's evidence, and not just a prima facie presumption.

Nor was the prejudice created by instruction No. 9 cured by any of the other instructions that were given. Even read as a whole, the instructions invited the jury to believe that the City had the burden of proof, that the jury could decide whether the City met its burden of production by rebutting the presumption under RCW 51.32.185, and that the jury could consider the evidence presented by Larson when deciding whether the City had met its burden of production. For the reasons explained above, these were prejudicial misstatements of the law, and, therefore, reversible error occurred.

Finally, there is reversible error because the jury was given responsibility for deciding a legal issue, namely whether the prima facie

presumption was rebutted, which was properly a question for the trial judge. Special verdict forms must also properly inform the trier of fact of applicable law and present an accurate issue to the jury for resolution. *Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 143-44, 955 P.2d 822 (1998).

Here, the jury could not have reasonably concluded that the City failed to rebut the presumption if, in answering that question, it had properly limited its consideration to the evidence presented by the City. The City presented evidence, through three medical witnesses, that the melanoma was caused by ultraviolet exposure (through sunlight and tanning beds) and his genetic risk factors (the physical features related to his Scandinavian heritage), and was not caused by firefighting. VRP 573-77, 589-603, 604, 608-09, 644-45, 662, 664, 722, 724, 726-32. Larson presented one expert witness who testified about 12 articles that he believed showed that exposure as a firefighter was a factor in causing melanoma. *See* VRP 412-30, 498-506, 508. The jury likely relied on this testimony to conclude that the firefighter presumption was rebutted.

The trial court's instructions, were not only confusing and legally erroneous, the error was driven home to the jury by Larson's closing argument. Larson explicitly stated that Instruction No. 12 required the City to bear the burden of proving that Larson had an occupational

disease. VRP 911-13. As the *Capers* Court pointed out, when errors in instructions, or in a special verdict form, are "made manifest by the inaccurate closing arguments" that is "prejudicially misleading" and requires reversal. *Capers*, 91 Wn. App. at 145.

Here, the instructions erroneously stated the law and invited the very misstatements of the law that Larson made during his closing argument. In any event, the instructions were prejudicial as a matter of law because, together with the special verdict form, they directed the jury to apply an incorrect burden of proof, to answer a question as to whether the presumption under RCW 51.32.185 was rebutted that was not properly before them, and to consider the evidence presented by Larson when deciding if the City met its burden of production in rebutting that presumption.

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VII. CONCLUSION

The trial judge erred in giving the question of whether the burden of production created in RCW 51.32.185 had been met to the jury to decide under instructions that were incorrect and misleading. These errors manifestly prejudiced the City and requires remand for a new trial.

RESPECTFULLY SUBMITTED this 27th day of May, 2014.

ROBERT W. FERGUSON
Attorney General

Beverly Norwood Goetz

BEVERLY NORWOOD GOETZ
Senior Counsel
WSBA No. 8434
Labor and Industries Division
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
Office ID No. 91018

NO. 71101-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

WILFRED A. LARSON, Respondent, v. CITY OF BELLEVUE AND DEPARTMENT OF LABOR AND INDUSTRIES, Appellants.	CERTIFICATE OF SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the below date, I caused to be served the Department's Respondent Brief and this Certificate of Service in the below described manner:

Original and a Copy Via ABC Legal Messenger to:

Richard D. Johnson, Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

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ORIGINAL

Copy Via First Class United States Mail, Postage Prepaid to the ff:

Ronald Gene Meyers
Tim Jeffrey Friedman
Ron Meyers & Associates, PLLC
8765 Tallon Lane NE, Suite A
Lacey, WA 98516-6654

Cheryl Ann Zakrzewski
City of Bellevue
PO Box 90012
Bellevue WA 98009-9012

DATED this 27th day of May, 2014.

Erlyn R. Gamad
Legal Assistant