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No. 91680-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DELMIS SPIVEY,

Petitioner,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

BRIEF OF RESPONDENT CITY OF BELLEVUE

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 ORIGINAL

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I. INTRODUCTION

Presumptions are the “bats of the law, flitting in the twilight but disappearing in the sunshine of actual fact.”¹

Under RCW 51.32.185, firefighters who develop certain medical conditions, including melanoma, are entitled to a prima facie rebuttable evidentiary presumption that the condition is an occupational disease. If the firefighter first establishes that the presumption applies, the burden of production shifts to the firefighter’s employer to present evidence that the condition was caused by factors unrelated to the firefighter’s employment. If the employer overcomes the presumption, the burden returns to the firefighter to prove by a preponderance of the evidence that the medical condition is an occupational disease.

In this matter, the Board of Industrial Insurance Appeals (Board) heard testimony from a number of experts that the medically recognized cause for the development of melanoma is ultraviolet light exposure - sunlight. The Board also heard testimony that Spivey developed a melanoma that the pathologist described as being “sun damaged skin.” The melanoma occurred on Spivey’s upper back in an area below his collar that would not be exposed to sun while at work. Based on the testimony, the Board found that the City of Bellevue (City) successfully

¹ *In re Indian Trail Trunk Sewer*, 35 Wn.App. 840, 670 P.2d 675 (1983) quoting *Mockowik v. Kansas City, St. J. & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906).

rebutted the presumption that Spivey's melanoma was an occupational disease. Moreover, the Board went on to conclude that Spivey had not otherwise proven that his melanoma was an occupational disease because sun exposure was not a distinctive condition of his employment.

Presumptions are not evidence and only serve to establish which party has the burden of going forward with evidence on an issue. Here, the superior court sitting in its appellant capacity, also concluded that the City had successfully rebutted the prima facie presumption.²

In order to give effect to RCW 51.52.115 which places the burden of proof "in all court proceedings" on the appealing party the superior court correctly determined that whether the City met its burden of production to rebut the prima facie presumption in RCW 51.32.185 is a question of law. This Court should affirm.

II. STATEMENT OF THE ISSUES

1. **Is whether an employer has rebutted the prima facie presumption in RCW 51.32.185 decided as a question of law, which avoids conflict with RCW 51.52.115, and allows the statutes to work in harmony?**
2. **Where Spivey placed the merits of whether the prima facie presumption in RCW 51.32.185 had been rebutted at issue, did he waive any argument that he lacked notice?**

² The jury will therefore have to decide whether the Board was correct that Spivey did not establish his melanoma arose naturally and proximately out of his employment as a firefighter.

3. **Where the Legislature explicitly considered and then rejected language awarding all attorney fees and costs to a claimant who prevails under the presumption in RCW 51.32.185, is Mr. Spivey entitled to an award of attorney fees and costs before the Board where he did not prevail?**

III. STATEMENT OF THE CASE

A. Procedural Background.

In December 2011, Spivey saw his dermatologist Dr. Jane Leonhardt for an irregularly shaped spot on his upper back below his collar. BR 1272. Dr. Leonhardt performed a biopsy of the spot, which was sent to a pathologist for a histopathological evaluation. Reviewing the biopsy under a microscope, the pathologist found that Spivey had “sun damaged skin with an atypical proliferation of melanocytes at the dermal-epidermal junction.” BR 904, 1281-1282. This was consistent with Dr. Leonhardt’s physical examination which noted that Spivey’s head, neck, trunk, and upper extremities had many lentigos, areas of skin with increased pigment production. BR 1267-69. Lentigos are also known as “sun freckles” and are caused by chronic sun exposure over the course of a person’s life. Id. This irregular spot of sun damaged skin was diagnosed as a melanoma. BR 901.

Spivey filed a claim for an occupational injury with the Department of Labor and Industries (Department) contending that his melanoma was an occupational disease. BR 360. Spivey’s claim for

benefits was rejected by the Department BR 86. Spivey appealed the Department's denial of his claim to the Board. The Board conducted two days of hearing and accepted the perpetuation deposition transcripts of five additional witness. See BR 62-63.

B. The Evidence Before The Board Established That Sun Exposure Was The Cause Of Spivey's Melanoma.

The City presented substantial evidence from four separate medical experts at the Board. The testimony established that on a more probable than not basis sun exposure was the cause of Spivey's melanoma. See Dr. Hackett BR 964-1087, Dr. Chien BR 489-561, Dr. Weiss BR 416-489, Dr. Leonhardt BR 1242-1342. Additionally, the City's experts testified that there is no known association between the inhalation of a substance or the contact of a substance to a person's skin that can cause melanoma, rebuffing Spivey's theory that exposure to "smoke, fumes, and toxic substances" caused his melanoma. Dr. Chien BR 515-517, Dr. Weiss BR 430-432, Dr. Leonhardt BR 1285-87.

The Board also heard testimony that Spivey is a career firefighter who began working full-time with the City of Bellevue in approximately 1995. When not working he enjoys a variety of outdoor recreational activities including coaching Junior and High School football (10+ years),

hunting, fishing, and riding a bike both for exercise and for a while as a commuter. BR 366-374.

While working for the Bellevue Fire Department, Spivey admitted he could not think of any incident where he was not wearing his SCBA (Self Contained Breathing Apparatus) and personal protective equipment in the course of fighting a fire. BR 375-377. There was also testimony that Spivey has a number of recognized risk factors for melanoma, including a predominately English background, freckles over his body, the use of a tanning bed on several occasions, and a history of sunburns as a child which were severe enough to use Solarcane. BR 365-69.

The Board also heard testimony that during a routine dermatological exam on December 22, 2011, Spivey's dermatologist, Dr. Janie Leonhardt, noted that Spivey had many lentigines (areas of pigmentation) over his head, neck, trunk and extremities. BR 1267-69. Lentigines or lentigos, also known as "sun freckles," are the result of cumulative sun exposure over a person's lifetime. *Id.* Similarly, Dr. Leonhardt also testified that Spivey had an area of actinic keratosis, also known as solar keratosis, on his right ear. Actinic keratosis is a result of cumulative sun exposure and is a recognized risk factor for melanoma. BR 1285-1286.

Dr. Leonhardt testified in this matter that the medical literature supports the relationship between ultraviolet radiation exposure (sun) and the development of melanoma. BR 1293. Dr. Leonhardt further testified that she was not aware of any scientific literature or medical evidence that would support a causal link between development of melanoma and the inhalation of a substance or the contact of a substance to a person's skin. BR 1287-88.

Notably, here the atypical lentigo which was biopsied from Spivey was of "sun-damaged skin" and represented an evolving melanoma. BR 904, 1281-82.

Dr. John Hackett performed a medical exam of Spivey and reviewed Spivey's medical records and deposition testimony. Dr. Hackett noted that ultraviolet (UV) light is the medically recognized risk factor that is most strongly associated with the development of melanoma. BR 972-973. He further testified sun exposure is the most common form of UV exposure. *Id.* He testified, on a more probable than not basis, the melanoma on Spivey's upper back was the result of ultraviolet light exposure and was not work related. BR 988, 991. His opinion was

supported in part by the fact that the skin where the lesion developed had evidence of sun damage on biopsy.³ BR 991.

Dr. Noel Weiss an epidemiologist from the University of Washington also testified regarding the associations between UV exposure and melanoma and the lack of scientific evidence to support chemical exposure as a potential cause for melanoma. Dr. Weiss testified that on a more probable than not basis, it would be incorrect to infer firefighters are at an increased risk for the development of melanoma. BR 426. He went on to explain that a handful of studies which suggest otherwise suffer from problems with incomplete data or actually had occurrence rates similar to the general population. BR 426, 435-37, 440. Similarly, he testified that he is not aware of any studies that would indicate that the inhalation of a substance, including diesel fumes, can lead to the development of melanoma. BR 430. Ultimately, Dr. Weiss testified that there is no causal association between the exposure sustained as a firefighter and the development of melanoma. He testified more likely than not that Spivey's melanoma was not related to his firefighting. BR 488.

Dr. Andy Chien is a dermatologist and melanoma researcher for the University of Washington. He is a peer reviewer for 10-12 scientific

³ Dr. Hackett also noted that he has never seen a firefighter work with their shirt off and Spivey's melanoma was located in an area of his upper back that would not be exposed to sun when wearing a shirt. BR 989-91, BR 370.

journals and has published articles on the risk factors for melanoma. BR 494. Dr. Chien testified that the two most strongly accepted causes of malignant melanoma are genetics and ultraviolet light. BR 510. He explained that 85% of the gene mutations associated with the development of melanoma are attributable to an ultraviolet light signature. BR 499. As such, even a one-time use of a tanning bed increases the risk of developing melanoma. BR 515. Addressing Spivey's theory that exposure to toxic substances in the course of firefighting caused his melanoma, Dr. Chien explained, there is no medical research to indicate that the inhalation of a substance including smoke, soot, diesel fumes, or "polycyclic aromatic hydrocarbon" can lead to the development of melanoma. BR 515-17. Dr. Chien also addressed whether it was possible to develop melanoma due to absorption through the skin. Dr. Chien testified, there is no evidence that the exposure to soot, ash, or diesel fumes on a person's skin can lead to the development of melanoma. BR. 517.

In contrast to the City's witnesses, Spivey relied on the testimony of one family practice physician, Dr. Kenneth Coleman. Dr. Coleman never examined Spivey nor even spoke with him. Similarly, Dr. Coleman did not review any of Spivey's medical records before forming his opinions. BR 944. Instead, Dr. Coleman simply testified that based on his review of a number of medical articles firefighters have an increased

incidents of melanoma. BR 918, 954. Therefore, he surmised that exposures from firefighting must have contributed to Spivey's melanoma. BR 924-25, 944, 953.

On October 9, 2014 the full Board of Industrial Insurance Appeals issued its final decision affirming the order of the Department. The Board concluded that the City had rebutted, by a preponderance of the evidence, the statutory presumption embodied in RCW 51.32.185 that Spivey's melanoma was an occupational disease. The Board further found that Spivey's melanoma was not an occupational disease within the meaning of RCW 51.08.140. BR 6-12.

Spivey appealed the final Decision and Order of the Board to King County Superior Court pursuant to RCW 51.52.115, CP 1-2.

C. The Superior Court Found That The City's Evidence Rebutted The Prima Facie Presumption In RCW 51.32.185.

In preparation for the appeal to superior court, on February 27, 2015 the City filed *Respondent City of Bellevue's Motion for Determination of Legal Standard on Review and to Strike Portions of Dr. Coleman's Testimony*. In its motion, the City requested the court to rule that the prima facie presumption in RCW 51.32.185 is a question of law to be determined by the court. In support of its motion, the City cited the evidence developed before the Board (referenced above) that Spivey's

melanoma developed in an area of “sun damaged skin” and that sun exposure on a more probable than not basis was the cause of Spivey’s melanoma. CP 17-125.

On March 6, 2015, Petitioner filed *Plaintiff’s Response in Opposition to City of Bellevue’s Motion*. In his opposition, Spivey framed one of the issues before the superior court as “Did the City of Bellevue rebut the statutory presumption in RCW 51.32.185? No.” CP 130. He further advocated that “The City failed to provide a preponderance of credible, admissible evidence rebutting the presumption of firefighter malignant melanoma.” CP 137-140. Spivey requested that the “City’s appeal should be dismissed”⁴ and argued the evidence supported a conclusion that the superior court should determine the City failed to rebut the presumption. CP 137, 146. In support of his arguments Spivey cited to the Board record and attached a declaration containing excerpts from the Board record for the superior court to consider. CP 147-148.

On March 27, 2015, the superior court heard oral argument on the City’s motion and ruled that “Respondent City of Bellevue’s Motion for Determination of Legal Standard on Review is Granted, and the City has met its burden to rebut the presumption of occupational disease within the

⁴ Procedurally, Spivey was actually the appealing party. However, Spivey’s intent was clearly to have the superior court rule in his favor finding the City had not rebutted the prima facie presumption. Additionally, Spivey suggests the superior court could find the City has not rebutted the presumption in the conclusion of his briefing. CP 146.

meaning of RCW 51.32.185.” The court denied Respondent’s motion to strike portions of Dr. Coleman’s testimony. CP 174-176.

On April 6, 2015 Spivey filed a motion for reconsideration of the superior court’s decision that the City had met its burden to rebut the presumption of occupational disease. The court denied Spivey’s motion for reconsideration on April 27, 2015. CP 215-22, 240-44.

IV. STANDARD OF REVIEW

In any workers’ compensation appeal where the issue is a workers’ entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympic Brewing Co. v. Dept. of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), overruled on other grounds, *Windust v. Dept. of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015).

RCW 51.52.115 provides a superior court with appellant authority to conduct a de novo review of decisions of the Board. However, the findings and decision of the Board of Industrial Insurance Appeals are presumed to be correct and the burden of proof rests with the party challenging the Board’s decision. WPI 155.03; *Harrison Mem’l Hosp. v. Gagnon*, 110 Wn.App. 475, 477, 40 P.3d 1221 (2002). The Board’s decision shall be reversed only if the Board misconstrued the law or found facts inconsistent with the preponderance of the evidence. RCW

51.52.115; *McClelland v. ITT Rayonier*, 65 Wn.App. 386, 828 P.2d 1138 (1992).

V. ARGUMENT

A. The Superior Court Properly Decided The City Rebutted The Presumption As A Question Of Law.

A person seeking benefits for an occupational disease has the burden of persuasion to establish by a preponderance of evidence that their condition arose naturally and proximately out of their employment. RCW 51.08.140, *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 476, 745 P.2d 1295 (1987). RCW 51.32.185 provides a narrow exception to this rule for the benefit of firefighters that shifts the initial burden in certain circumstances. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 41, 357 P.3d 625 (2015); *Raum v. City of Bellevue*, 171 Wn.App. 124, 286 P.3d 695 (2012) *review denied*, 176 Wn.2d 1024, 301 P.3d 1047 (2013). Once a firefighter meets his or her initial burden to demonstrate RCW 51.32.185 is applicable, the statute creates a prima facie evidentiary presumption that shifts the burden to the employer unless or until the employer rebuts the presumption. *Raum*, 171 Wn.App. at 141. If the employer presents sufficient evidence to rebut the presumption, the firefighter must then show that his or her condition arose naturally and proximately out of employment. *Id.* at 147.

At issue in this matter is the nature of the prima facie presumption. The wording of RCW 51.32.185, prior case law regarding the nature of presumptions, and procedural considerations are all consistent with the prima facie presumption shifting the burden of production to an employer. A burden of production deals with the quantity of evidence necessary to sustain a proposition and is decided as a question of law by a judge. *In re Dependency of C.B.*, 61 Wn.App. 280, 282, 810 P.2d 518 (1991). In this case, the superior court properly determined the evidence developed by the City before the Board rebutted the prima facie presumption in RCW 51.32.185.

In contrast, Spivey advocates that whether the prima facie presumption has been rebutted is a question of fact. Implicit to Spivey's argument is the premise that the prima facie presumption is a legal conclusion that alters the burden of persuasion throughout the case.⁵ Spivey Br. 2-3, 12. However, Spivey provides no authority that the legislature intended to alter the overall burden of persuasion in a workers' compensation case in derogation of long established precedent. *See e.g. Olympic Brewing Co. v. Dep't. of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), overruled on other grounds, *Windust v. Dept. of*

⁵ As the Court can decide this matter based on statutory grounds there is no need to reach the constitutional arguments raised by Spivey. To the extent necessary, the City relies on the Department's briefing in this regard.

Labor & Indus., 52 Wn.2d 33, 323 P.2d 241 (1958). Spivey's interpretation also reads out of the statute the term "prima facie" rendering the statutory text superfluous. It is a maxim of statutory interpretation that all words within a statute must be given meaning such that no word is left superfluous. *Burton v. Twin Commander Aircraft LLC.*, 171 Wn.2d 204, 221, 254 P.3d 778 (2011). Instead, the term prima facie is given meaning when interpreted in context of this Court's prior decisions addressing the nature of presumptions and the understanding that a prima facie presumption relates to the burden of production on an issue not the ultimate burden of persuasion for the entire matter.

Over 70 years ago in *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 123 P.2d 780 (1942) this Court articulated that where a presumption operates as an inference of fact "the presumption does not have the force of evidence, but merely gives rise to a procedural rule, that is to say, the presumption itself does not shift the ultimate burden of proof from plaintiff to defendant, but simply casts upon the defendant the burden of going forward with evidence to meet the presumption." *Bradley*, 13 Wn.2d at 63. This Court went on to add when the "degree and character" of evidence submitted by the defendant is sufficient the "presumption disappears entirely from the case, casting upon the plaintiff the burden of producing competent evidence to meet the evidence of the defendant" and

ultimately the plaintiff's burden of persuasion. *Id.* at 64. Although *Bradley* was published over 70 years ago its principles continues to be relied upon today.⁶ See *In re Indian Trial Trunk*, 35 Wn.App.at 670 (“A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary.”) *Taufen v. Estate of Kirpes*, 155 Wn.App. 598, 230 P.3d 199 (2010)(Rebuttable statutory presumption disappears once the burden of production is meet by opposing party).

In drafting RCW 51.32.185 and creating the prima facie presumption for the benefit of firefighters the legislature is presumed to have in mind decisions of the Supreme Court. *Miller v. Paul Revere Life Ins. Co.*, 81 Wn.2d 302, 308, 501 P.2d 1063 (1972); *Occidental Life Ins. Co. v. Powers*, 192 Wn. 475, 74 P.2d 27 (1937). Thus, the legislature would have been aware that a presumption is not evidence and does not

⁶ Spivey relies on *Burrier v. Mut. Life Ins. Co. of New York*, 63 Wn.2d 266, 387 P.2d 58 (1963) and *Nelson v. Schubert*, 98 Wn.App. 754, 994 P.2d 225 (2000) for the proposition that a jury is entitled to decide whether a presumption has been rebutted. *Burrier* and *Nelson* each applied the Morgan theory of presumptions treating whether the presumptions had been overcome as a question of fact. These cases are distinguishable from the present matter. The Morgan theory of presumptions is incompatible with the burden of persuasion on appeal to superior court of a Board decision. The burden of persuasion is on the appealing party, which in this case is Spivey. RCW 51.52.115. Applying a Morgan theory analysis on appeal to determine whether the prima facie presumption has been overcome incorrectly places the burden of persuasion on the non-appealing party, here the City. This contradicts by RCW 51.52.115 and a number of cases holding the burden of persuasion is on the appealing party. See, e.g., *Harrison Mem'l Hosp.*, 110 Wn. App. at 477. In contrast, the prima facie presumption in RCW 51.32.185 and the burden of persuasion on appeal found in RCW 51.52.115 are harmonized under the Thayer theory of presumptions. The Thayer theory places the burden of production on the party against whom it operates and disappears once sufficient evidence is produced. *In re Estate of Langeland*, 177 Wn. App. 315, 321 n.7, 312 P.3d 657 (2013), review denied, 180 Wn.2d 1009 (2014). This theory both preserves the prima facie presumption for the benefit of firefighters and does not conflict with burden of persuasion on appeal.

alter the underlying burden of persuasion in a matter. Instead, a presumption establishes which party has the burden of going forward with evidence on an issue. *In re Indian Trunk*, 35 Wn.App. at 604. Moreover, once sufficient evidence is introduced the presumption disappears having lost its efficacy. *Id.*; *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 378, 353 P.2d 663, 665 (1960); *Tire Towne, Inc. v. G& L Service Co.*, 10 Wn.App. 184, 188, 518 P.2d 240 (1973).

Against this backdrop, the legislature crafted a prima facie rebuttable evidentiary presumption that operates as an inference of fact for the benefit of firefighter. Contrary to Spivey's assertions, the legislature did not alter the underlying burden of persuasion relieving a firefighter from having to prove he or she was entitled to benefits. Instead, the firefighter is relieved of his or her initial burden at the outset of the case to establish causation unless and until the employer rebuts the prima facie presumption. *Raum*, 171 Wn.App. at 141. In this way, the firefighter benefits from the presumption for certain conditions by having an avenue to seek industrial insurance benefits where existing science or the current understandings of medical causation may otherwise preclude a claim.

Traditionally, a presumption of fact could be rebutted by simply the introduction of prima facie evidence countering the presumed fact. *Bates v. Bowles White & Co.*, 56 Wash.2d 374, 378, 353 P.2d 663 (1960).

However, in RCW 51.32.185 the legislature specified the prima facie presumption is rebutted by a preponderance of evidence.

Contrary to Spivey's assertion, specifying the quantum of evidence necessary to rebut the prima facie presumption does not convert the presumption to a question of fact. *See Taufen v. Estate of Kirpes*, 155 Wn.App. 598, 603-604, 230 P.3d 199 (2010)(Estate bore its "burden of production" to overcome statutory rebuttable presumption in favor of survivorship on joint account. By statute, clear and convincing evidence was required to overcome the presumption). Instead, it is a recognition of the general rule that even prima facie evidence would rebut a presumption. Thus, the legislature gave the presumption more weight than would ordinarily apply. Specifying the quantity of evidence necessary to overcome the presumption provides the judge with a measure from which to evaluate whether a rational trier of fact could conclude on a more probable than not basis the firefighter's condition is not an occupational disease. *See In re Dependency of C.B.*, 61 Wn.App. 280, 283-287, 810 P.2d 518 (1991)(Discussing a party meets its burden of production by producing evidence from which a rational trier of fact could find in its favor depending on the quantum of evidence prescribed). As such, the question of whether an employer has met its burden of production to present a preponderance of evidence from which a rational trier of fact

could find in its favor to rebut the prima facie presumption are decided as questions of law.

This is in keeping with the narrow interpretation of RCW 51.32.185. *Gorre*, 184 Wn.2d at 41. Deciding the sufficiency of evidence as a question of law also harmonizes RCW 51.32.185 and RCW 51.52.115. It preserves the long standing precedent that the party appealing an order of the Board has the burden of proof, and it avoids placing a burden on an employer who prevailed before the Board. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Similarly, deciding the sufficiency of evidence to rebut the prima facie presumption as a question of law also avoids the potential for a placing a double burden on an employer who loses before the Board and appeals to superior court. In such a situation, if the prima facie presumption is treated as a question of fact the appealing employer would be saddled with a two adverse presumptions: the presumption in RCW 51.32.185 that the firefighter's condition is an occupational disease and the presumption on appeal in RCW 51.52.115 that the Board's decision is presumed correct. As a number of decisions have articulated, a presumption which imposes a double burden on a party to a lawsuit is ordinarily considered to be prejudicial because it disadvantages the party who already has the burden of proof in a matter. *Peacock v. Piper*, 81 Wn.2d 731, 504 P.2d 1124

(1973); *Graving v. Dorn*, 63 Wash.2d 236, 386 P.2d 621 (1963); *Mills v. Pacific County*, 48 Wash.2d 211, 292 P.2d 362 (1956); *Hutton v. Martin*, 41 Wash.2d 780, 252 P.2d 581 (1953).

Deciding whether an employer's evidence rebuts the prima facie presumption as a question of law is also in accord with how the presumption has been treated in other cases. *See Raum*, 171 Wn.App. at 144 (In the absence of the RCW 51.32.185 presumption, a claimant is still able to argue his condition arose naturally and proximately from employment); *Gorre*, 184 Wn.2d at 47 (Where the prima facie presumption does not arise, a firefighter may still seek workers' compensation benefits without the benefit of the presumption).

If the presumption is rebutted the firefighter may still prove his or her condition qualifies as an occupational disease without the benefit of the presumption under RCW 51.08.140. If however, the presumption is treated as a question of fact and the employer is able to overcome the presumption by a preponderance of evidence the firefighter is foreclosed from otherwise establishing his or her condition is occupational because they will be unable to prove a necessary element of their case.⁷ Additionally, treating the presumption as a question of fact on appeal

⁷ In other words if an employer proves by a preponderance of evidence that a firefighters condition either did not arise naturally or proximately out of employment that same evidence could not also be construed to support a firefighter otherwise proving his or her condition is an occupational disease.

procedurally requires the firefighter and employer to present all of their evidence before resolving the threshold issue of whether the presumption is applicable. This wastes both resources for all of the parties involved and the court. If an employer is unable to provide evidence that on a more probable than not basis rebuts either the arising naturally or proximately elements of occupation disease, the firefighter prevails at the outset. If however, the employer meets its burden of production to rebut the presumption, the firefighter may still attempt to prove their condition is occupational under RCW 51.08.140 with the trier of fact considering the competing evidence of each party.

In sum, this court has long articulated presumptions are not evidence and therefore not to be weighed in determining the burden of persuasion in a matter. Instead, presumptions only affect which party has the burden of production on a particular issue. Here, the legislature created RCW 51.32.185 creating a prima facie presumption that shifts the burden of production to an employer to present a preponderance of evidence to establish a firefighter's condition is not an occupational disease. The City met this burden presenting evidence from numerous experts that ultraviolet exposure (sun) is the primary medically recognized risk factor for the development of melanoma. Spivey's melanoma occurred within a biopsy of "sun damaged skin" with associated findings on physical exam

demonstrating Spivey has had a significant amount of cumulative sun exposure over the course of his life.

B. Spivey Placed The Merits Of Whether The Prima Facie Presumption In RCW 51.32.185 Had Been Rebutted At Issue, Thus Waiving Any Argument That He Lacked Notice.

Spivey contends that the superior court erred when it went beyond the issues in the City's and Department's motions and found that the City had rebutted the prima facie presumption in RCW 51.32.185. Spivey asserts that he lacked notice and a meaningful opportunity to be heard on whether the City had rebutted the presumption thus violating principles of due process. BR 26-28.

In its motion the City argued that it met its burden of production under RCW 51.32.185 through both Spivey's own doctors and the City's experts that Spivey's melanoma was the result of ultra violet exposure from the sun and genetic factors. Thus, any presumption in RCW 51.32.185 was negated, and the burden of proof to establish that his melanoma was an occupational disease rest with Spivey. CP 19.

In response, Spivey requested that the superior court decide whether the City had rebutted the prima facie presumption, citing evidence in the Board record and advocating that the City has not rebutted the presumption. Spivey thus placed the merits of whether the prima facie

presumption had been rebutted at issue and cannot now credibly claim he lacked notice and an opportunity to be heard. *See Health Ins. Pool v. Health Care Authority*, 129 Wash.2d 504, 919 P.2d 62 (1996)(Affirming trial court's sua sponte dismissal of non-moving party, following motion for partial summary judgment brought by other party).

Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ ” *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wash.2d 418, 422, 511 P.2d 1002 (1973) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *Dellen Wood Prods., Inc. v. Dep't of Labor & Indus.*, 179 Wn.App. 601, 627, 319 P.3d 847, *review denied*, 180 Wn.2d 1023 (2014).

Here, in opposition to the City's motion regarding the standard of review Spivey specifically framed one of the issues on which he requested relief as “Did the City of Bellevue rebut the statutory presumption in RCW 51.32.185? No.” CP 130. He then went on to affirmatively ask the superior court to dismiss the City's appeal. CP 137.

Moreover, Spivey's opposition to the City's motion devotes numerous pages to arguing the merits of whether the City's evidence rebutted the evidentiary presumption. CP 137-140. More specifically,

Spivey pointed to portions of the testimony from six different witnesses (Dr. Kenneth Coleman, Dr. Noel Weiss, Dr. Andy Chien, Dr. John Hackett, Fire Chief Michael Eisner, and Dr. Janie Leonhardt) complete with specific citations to the Board record, which he argued demonstrated that the presumption had not been rebutted by the City. *Id.* Spivey thus placed the merits of whether the City rebutted the evidentiary presumption at issue and cannot now claim he lacked sufficient notice and an opportunity to be heard too raise a due process concern.

After the superior court ruled the City had rebutted the evidentiary presumption Spivey moved for reconsideration. CP 215-22. Spivey, thus being fully aware of the basis of the superior court's ruling, had the opportunity to again point to the portions of the Board record that he believed illustrated the City had not rebutted the presumption. However, he did not challenge the evidence underlying the superior court's ruling on the presumption.

In sum, when ruling that the City had rebutted the evidentiary presumption the superior court had before it the witness testimony and citations to the Board record that the City advocated rebutted the evidentiary presumption in RCW 51.32.185. The superior court also had both Spivey's arguments and specific citations to the Board record that he believed illustrated the City had not rebutted the presumption. Notably, at

no point did Spivey request the opportunity to present additional briefing or argument to the superior court or seek to cite to the superior court additional evidence from the Board record that he believed illustrated the City had not rebutted the presumption. Thus, despite moving for reconsideration of the superior court's decision Spivey waived the opportunity to argue the merits of whether the City had rebutted the presumption.

The record is clear Spivey placed whether the City had rebutted the evidentiary presumption at issue. He argued that the City could not meet its burden, he cannot now claim he lacked notice simply because the superior court disagreed with his arguments.

C. The Legislative History And Structure Of RCW 51.32.185(7) Illustrate That A Claimant Who Fails To Prevail Before The Board Is Not Entitled To Their Attorney Fees Before The Board.

Spivey contends that despite unsuccessfully appealing the Department's Order to the Board, if it is later determined on appeal that his claim for benefits is allowed, he should be entitled to attorney fees and costs from the outset. This would include both his fees and costs in an unsuccessful appeal to the Board, as well as the additional fees and costs generated by his choice to appeal the Board's decision to superior court. Spivey Br. at 33-35. Although this issue is not before the Court in this

matter because the superior court has not ruled, Spivey's construction of RCW 51.32.185(7) is incorrect.

The legislative history of RCW 51.32.185 and the very structure of the statute demonstrate that the legislature contemplated and rejected allowing a claimant to recover all of his fees and costs.

As originally proposed House Bill 1833, 60th Leg., Reg. Sess. (Wash. 2007) sought to award a claimant who prevails based on prima facie presumption in RCW 51.32.185 all this attorney fees and costs from the date of his application to the Department for benefits:

...whether at the board of industrial insurance appeals or in any court, the employee must be awarded full benefits, attorney fees, expert witness costs, and all other costs from the date of the employee's initial application for benefits.

HB 1833, 60th Leg., Reg. Sess. (Wash. 2007) Sec. 2., (6). The bill proposed to allow a successful claimant to recover all of his fees and costs throughout a matter if he ultimately prevails on the basis of the prima facie evidentiary presumption.

Through the legislative process, the scope of House Bill 1833 was narrowed and the attorney fees provision was recrafted. Engrossed Substitute House Bill (ESHB) 1833, 60th Leg., Reg. Sess. (Wash. 2007), which ultimately became RCW 51.32.185, modified the original bill to specify the attorney fees and costs potentially available at each appellant

level; dealing with the process in two separate clauses. RCW 51.32.185(7)(a) addresses appeals to the Board, whereas RCW 51.32.185(7)(b) addresses an appeal of the Board decision to superior court. Additionally, the legislature conditioned an award of fees and cost on prevailing before each appellate body. More specifically, the Board is directed to award fees and cost if a fire fighter prevails in his appeal to the Board. Whereas a court is directed to award fees if the fire fighter prevails in an appeal of the Board's decision. Thus, in contrast to the HB 1833 which clearly allowed for fees and cost through all stages of litigation and appeal, ESHB 1833 divided the potential award of fees into separate categories and conditioned any award on prevailing before each specific appellate body.

The practical difference is illustrated in this case. Here, Spivey was unsuccessful before the Board and thus was not awarded attorney fees for his appeal to the Board. However, Spivey has now filed an appeal of the Board's decision in superior court. He thus argues that if he ultimately prevails he should be entitled to attorney fees and costs through all stages of this matter including his unsuccessful appeal before the Board. Spivey's construction of RCW 51.32.185(7) is thus akin to what was originally proposed and rejected in HB 1833. However, ESHB 1833 substantially

altered when fees and costs can be awarded conditioning any award on being successful through each appeal.

Accepting Spivey's construction of the statute also creates a situation where an employer, although successful before the Board, is subjected to increased attorney fees and costs if the claimant decides to appeal the Board's decision to superior court and prevails. In such a situation, which is what occurred here, the employer does not have any control over the claimant's decision to appeal, yet bears the potential costs of being liable for all of the claimant's attorney fees and costs incurred throughout the litigation. This result is what the Legislature addressed in creating the two clauses in RCW 51.32.185(7) treating each appeal, whether before the Board or a court, separately for the calculation of attorney fees and costs.

Practically, in this matter Spivey's request for attorney fees and costs is not ripe. A prerequisite to any award of fees and cost under RCW 51.32.185(7) is actually prevailing below and obtaining an order allowing a claim for benefits. Procedurally, Spivey's claim was rejected by the Board and has yet to be heard by the superior court. As such, Spivey is not entitled to an award of fees in this matter.

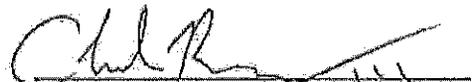
VI. CONCLUSION

The prima facie presumption in RCW 51.32.185 does not alter the burden of persuasion established in RCW 51.52.115. That burden rests with Spivey because he did not prevail before the Board. As such, the City does not carry any burden on appeal. The prima facie presumption in RCW 51.32.185 does not constitute a question of fact on appeal but instead a question of law related to whether the City met its burden of production before the Board to present sufficient evidence to rebut the presumption. Here, the superior court correctly found that the City met its burden. This Court should affirm.

DATED this 10th day of August, 2016

Respectfully submitted,

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No. 91680-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DELMIS SPIVEY,

Petitioner,

v.

CITY OF BELLEVUE AND
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

DECLARATION OF SERVICE

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DECLARATION OF SERVICE

I, Kelly M. Thibodeau, declare under penalty of perjury under the laws of the State of Washington that on August 10, 2016, I caused **Brief of Respondent City of Bellevue** and this **Declaration of Service** to be served on the persons listed below:

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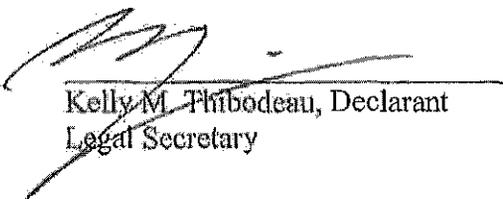
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Case Number: 91680-2
KCSC No.: 14-2-29233-3 SEA
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Documents: Brief of Respondent City of Bellevue and Declaration of Service

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Thank you,

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