Supreme Court No. 92197-1

Court of Appeals No. 71101-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

WILFRED A. LARSON, Respondent

v.

CITY OF BELLEVUE, Petitioner

and

DEPARTMENT OF LABOR
AND INDUSTRIES, Defendant.

PETITION FOR REVIEW

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Cheryl A. Zakrzewski, WSBA # 15906
Chad Barnes, WSBA # 30480
Assistant City Attorneys
Attorneys for Petitioner City of Bellevue
450 – 110th Avenue NE
Bellevue, WA 98004
(425) 452-6829

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A. INTRODUCTION

The Court of Appeals disregarded this Court's precedent that stretches over the last 75 years and the unambiguous mandate in RCW 51.52.115 that the court and jury presume that a decision of the Board of Industrial Insurance Appeals (Board) is correct and that it is the appealing party's burden to prove otherwise. RCW 51.32.185. RCW 51.52.115. This applies to "all" superior court proceedings in workers' compensation cases, including cases under RCW 51.32.185, which provides for a rebuttable presumption that certain conditions contracted by a firefighter are occupational diseases. This presumption was applied at the Board, and the Board decided the City of Bellevue (City) rebutted it when it showed that Wilfred Larson's (Larson's) melanoma was contracted due to non-occupational exposure to ultraviolet radiation through sun exposure and the use of tanning beds and genetic factors.

Larson appealed to the superior court. At the superior court, it was Larson's burden under RCW 51.52.115 to demonstrate that the Board's decision was incorrect. The Court of Appeals obviated this statutory burden by approving a jury instruction which suggested that it was the City's burden to prove correct the key decision of the Board that the firefighter presumption of occupational disease had been rebutted. Such a

ruling conflicts with the long-line of cases providing that it is the appealing party's burden to prove the decision of the Board incorrect. Nothing in the statutory scheme indicates that the Legislature intended to repeal RCW 51.52.115 for the purposes of firefighters in RCW 51.32.185.

As it is, the law is in muddle. Do courts presume the Board is correct under RCW 51.52.115? Do they require the prevailing employer to disprove a presumption that was declared rebutted by the Board under RCW 51.32.185? How is the jury to handle the two differing presumptions when RCW 51.52.115 states the burden of proof applies to the appealing party in "all" superior court proceedings? The Court of Appeals decision provides no clear path to resolve these questions, and this presents an issue of substantial public interest because of the reoccurring nature of firefighter claims. The Industrial Insurance Act is a compromise between business and labor, in exchange for "sure and certain relief." RCW 51.04.010. There is no sure and certain relief for workers, employers, and the Department in the absence of resolution on how to apply RCW 51.52.115 and RCW 51.32.185. This Court should grant review to determine these issues.

B. IDENTITY OF PETITIONER AND DECISION

The Petitioner is the City of Bellevue, which is the self-insured employer of Respondent Wilfred Larson under RCW Title 51, the

Industrial Insurance Act. The City seeks review of the Court of Appeals, Division One's decision in *Larson v. City of Bellevue*, __ Wn. App., ____ P.3d ___ (No. 71106-06-I, July 13, 2015), and reconsideration denied on August 7, 2015; *see* Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in failing to apply the burden of proof to Larson in the superior court action?

2. Did the Court of Appeals err in placing the presumption contained in RCW 51.32.185 above the presumption contained in RCW 51.32.115?

3. Did the Court of Appeals err in failing to recognize that the jury was improperly instructed on the rebuttal presumption contained in RCW 51.32.185?

4. Did the Court of Appeals err in determining that the presumption of occupational disease in RCW 51.32.185 created a Morgan-like presumption extending throughout the duration of the case?

5. Did the Court of Appeals err in concluding that that superior court could award Larson the attorney fees and costs he incurred before the Board where he did not prevail?

D. STATEMENT OF THE CASE

This case involves the applicability of the statutory evidentiary rebuttable presumption and attorney fee-shifting provisions of RCW 51.32.185.[1] Larson filed a claim for workers' compensation benefits with the Department of Labor and Industries (Department) in 2009

[1] RCW 51.32.185 is attached as Appendix B.

claiming that his malignant melanoma was an occupational disease. CP 29, 281. The Department initially allowed the claim. CP 45, 43. The City appealed the Department's allowance to the Board. CP 40-41. The Board entered a final decision that reversed the order of the Department and concluded that the City had rebutted, by a preponderance of evidence, the evidentiary presumption embodied in RCW 51.32.185 that Larson's melanoma was an occupational disease and concluded that Larson's melanoma was not an occupational disease within the meaning of RCW 51.08.140. CP 26-35. This was based on evidence that Larson contracted melanoma as a result of his recreational sun exposure, his exposure to ultraviolet radiation while using tanning beds, and the presence of unique genetic risk factors including his fair skin, fair colored hair, blue/green eyes, and numerous freckles. CP 27-28.

Larson appealed the Board's decision to King County Superior Court. CP 1-2. The jury returned a verdict determining that the City had not rebutted the evidentiary presumption. CP 1775. The court entered judgment in favor of Larson, and the City appealed to Division One, which affirmed the trial court. *See Larson,* No. 71101-6-I, slip op. at 32.

The Court of Appeals rejected the City's claim that the trial court's jury instructions erroneously allocated the burden of proof as required by RCW 52.32.185(1)'s rebuttable evidentiary presumption. The Court also

affirmed an award to Larson of his attorney fees before the Board, although Larson did not prevail before the Board. The City moved for reconsideration, which was denied.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review because the decision of the Court of Appeals is in conflict with the decisions of this Court, with the previous decisions of the Court of Appeals, and raises issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(1),(2),(4).

RCW 51.52.115 provides unambiguously that the Board decision is presumed correct and it is the Board decision that is reviewed:

> 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. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified.

(Emphasis added.) This statute applies to "*all*" superior court proceedings from a decision of the Board and requires that such decision "*shall* be prima facie correct." Yet the Court of Appeals ignored this statute and the burden it placed on Larson to disprove the Board's decision that the firefighter presumption did not apply.

If a firefighter has claimed that the presumption of occupational disease contained in RCW 51.32.185 is applicable to his claim and the Board decision is appealed to superior court, the superior court shall apply RCW 51.52.115 to require the appealing party to prove the Board order incorrect in "all" proceedings. Unfortunately, the Court of Appeals placed RCW 51.32.185 in ascendance over RCW 51.52.115. Not only does this conflict with numerous decisions of this Court and the Court of Appeals, but it also presents an issue of substantial public interest because the case law on RCW 51.52.115 is left in disarray.

1. THE DECISION BY THE COURT OF APPEALS DIRECTLY CONFLICTS WITH PREVIOUS DECISIONS FROM THIS COURT AND OTHER COURTS OF APPEAL REGARDING THE BURDEN OF PROOF ON APPEAL FROM A BOARD DECISION.

This Court should grant the City's petition because the Court of Appeals improperly applied the presumption created by RCW 51.32.185(1) and in doing so came in direct conflict with RCW 51.52.115 and previous decisions of both this Court and the Court of Appeals. RCW 51.52.115 governs the burden of proof on appeal from the Board and provides that the findings and decision of the Board shall be prima facie correct and that the burden of proof shall be on the party attacking them. *See Gorre v. City of Tacoma*, __ Wn.2d __, __P.3d __, 2015 WL 5076290, at *2 (No. 90620-3, Aug. 27, 2015) ("The Board's

decision and order is presumed correct, and the party challenging that decision carries the burden on appeal to the superior court" in a firefighter presumption case); *Schafer Bros. Logging Co. v. Department of Labor & Industries*, 4 Wn.2d 720, 104 P.2d 747 (1940); *Groff v. Department of Labor & Industries*; 65 Wn.2d 35, 395 P.2d 633 (1964); *Belnap v. Boeing Co.*, 64 Wn. App. 212, 823 P.2d 528 (1992); *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 897 P.2d 431 (1995). In *Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries*, 43 Wn.2d 584, 587, 262 P.2d 536 (1953), this Court held that "One sustains the burden of proving that a decision of the board is erroneous when one demonstrates that there is not sufficient evidence to support it."

RCW 51.32.185 presumes certain conditions are occupational diseases when contracted by a firefighter. With RCW 51.32.185, the statute provides that this presumption can be "rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities."

Since the Board found that the City had rebutted the presumption of occupational disease contained in RCW 51.32.185 and that Larson had failed to otherwise prove that his melanoma was an occupational disease

as defined by RCW 51.08.140, Larson had the burden of proof on appeal to show that the Board was incorrect. The City had no burden on appeal.

The first question on the special verdict form was whether the Board had correctly decided that the employer had rebutted, by a preponderance of evidence, that the Larson's melanoma was an occupational disease. CP 1775-1776. Thus, the jury was being asked to examine whether the City had met its burden to rebut the presumption. However, it was Larson's burden to prove that the decision by the Board was erroneous because there was not sufficient evidence to support it. The City did not have the burden to prove that the Board had made the correct decision.

The decision in this matter therefore is in conflict with prior precedent, for two reasons. First, it conflicts with the recognition in *Gorre*, which is a firefighter presumption case, that RCW 51.52.115 requires the burden of proof to be on the appealing party. And it conflicts with the long-line of Supreme Court cases and Court of Appeals cases that place the burden of proof on the appealing party. The burden in RCW 51.52.115 applies to "all" proceedings before the superior court, and there is no indication that the Legislature intended a different rule to apply in firefighter presumption cases.

Second, the Court of Appeals decision conflicts with *La Vera v. Department of Labor & Indus*tries, 45 Wn.2d 413, 415, 275 P.2d 426 (1954), which held that RCW 51.52.115 does not allow the jury to test the Board's decision with reference to the burden of proof before the Board. Here, the Court of Appeals decision requires the jury to look back and examine whether the City carried its burden to rebut the presumption before the Board. In doing so, the decision conflicts with RCW 51.52.115 and *La Vera* by instructing the jury as to the City's burden of proof that applied before the Board. This question required the jury to weigh whether the City carried its burden of proof at the Board, at a point in the process where the Board's decision is presumed correct and the City has no burden. Because of the conflict with Supreme Court and Court of Appeals precedent, this Court should take review. RAP 13.4(b)(1), (2).

2. PLACING RCW 51.32.185 OVER RCW 51.52.115 PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST BECAUSE SUCH A HOLDING WILL CAUSE CONFUSION BY COURTS, WORKERS, EMPLOYERS, AND THE DEPARTMENT.

The Court of Appeals has created a confusing landscape regarding the application of RCW 51.52.115 and RCW 51.32.185. The Court of Appeals decision that employers have the burden of proof under one statute where they do not have the burden of proof under another statute creates chaos in the law that only this Court can resolve. The Court of

Appeals decision fails to address how the parties can be accorded the benefits of the presumptions to which they are entitled as the case proceeded through the various levels of appeal. This warrants review under RAP 13.4(b)(4) as it is of interest to courts, workers, employers, and the Department to have this resolved.

3. THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT THE PRESUMPTION OF OCCUPATIONAL DISEASE IN RCW 51.32.185 CREATES A MORGAN-LIKE PRESUMPTION EXTENDING THROUGHOUT THE DURATION OF THE CASE IGNORING EARLIER PRECEDENT IN *RAUM.*

Even accepting that the Court of Appeals was correct to place RCW 51.32.185 over RCW 51.52.115, the Court of Appeals incorrectly determined the nature of presumption. The Court of Appeals analyzed whether the evidentiary presumption created in RCW 51.32.185 is consistent with the Thayer theory of presumptions or the Morgan theory. Under the Thayer theory, a presumption places the burden of producing evidence on the party against whom it operates but disappears if that party produces contrary evidence. *Larson,* No. 71101-6-I, slip op. at 9. In contrast, under the Morgan theory a presumption does not disappear upon the production of contrary evidence but continues throughout the trial, and the court instructs the jury that the party against whom the presumption

operates has the burden of proving that the presumed fact is not true or does not exist. *Id.*

In this matter, the Court of Appeals adopted the Morgan theory holding an employer contesting an award of industrial insurance benefits has both the burden of production and burden of persuasion throughout the case. Thus, the Court of Appeals concluded that it was not error to allow the jury to decide if the employer has rebutted the presumption. *Id.* at 18.

The Court of Appeals decision is incorrect for three reasons. First, the Court of Appeals decision presupposes that the jury should be instructed on the RCW 51.32.185 presumption when in fact under RCW 51.52.115 it is Larson that should have the burden of proof. Second, the superior court should have decided the question about the firefighter presumption because it is a question of law about the quantum of evidence to meet it, as it involves a burden of production. This is particularly true given the nature of the presumptions here where, RCW 51.52.115 control, to place the burden on Larson.

Third, the Court's decision ignores the text of RCW 51.32.185 stating that the presumption is only "prima facie" and may be rebutted by a preponderance of evidence. The Court of Appeals' logic reads out of the statute the term "prima facie" treating the presumption as conclusive and enduring throughout the case. Had the Legislature intended this to be the

true, the statute could have been written without the use of the term "prima facie." Instead, the Legislature made use of the term "prima facie" in describing the presumption, meaning that the presumption established in RCW 51.32.185 must be less than conclusive and enduring. All words within a statute must be given meaning and no word is superfluous. *Burton v. Twin Commander Aircraft LLC,* 171 Wn.2d 204, 221, 254 P.3d 778 (2011); *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). The Court of Appeals here did not address the term "prima facie" within the statute. Instead, the logic adopted by the Court of Appeals that under the Morgan theory a presumption does not disappear upon the production of contrary evidence conflicts with the very text of RCW 51.32.185.

Borrowing from the Court of Appeals analysis, the use of the term "prima facie" evidences a legislative intent more akin to a Thayer presumption. That is, once contrary evidence is introduced the presumption disappears. *Larson,* No. 71101-6-I, slip op. at 9. Black's Law Dictionary defines "prima facie" as "At first sight; on first appearance but subject to further evidence or information the agreement is prima facie valid." *Black's Law Dictionary* (10th ed. 2014). Thus, "at first sight" or "on first appearance" the presumption of occupational disease arising under RCW 51.32.185 may apply to a qualifying firefighter but "subject to further evidence or information" the presumption is rebutted and

disappears. The definition of prima facie and its use in RCW 51.32.185 are in keeping with a Thayer presumption. As such, once an employer challenging an award of industrial benefits presents a preponderance of contrary evidence, the presumption of occupational disease should disappear.

The court in *Raum v. City of Bellevue*, 171 Wn. App. 124, 141, 286 P.3d 695 (2012) even discussed the operation of the presumption in RCW 51.32.185 consistent with a Thayer presumption in stating "If RCW 51.32.185's rebuttable evidentiary presumption applies, that burden shifts to the employer *unless and until the employer rebuts the presumption.*" (emphasis added).

Employment discrimination cases illustrate an analogous application of a Thayer presumption and how this type of prima facie presumption operates. The discrimination cases establish the elements necessary for an employee's prima facie case, the allocations of the resulting procedural burdens of production, and the ultimate burden of persuasion. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), the Supreme Court established the elements by which a prima facie case of discrimination could be established. Washington courts adopted the *McDonnell Douglas* standard and articulated the formula for trying a discrimination case. Once a

plaintiff has set forth the elements to establish a prima facie case of discrimination, the employer must articulate a legitimate, nondiscriminatory reason for the employment action. The employer's burden at this stage is not one of persuasion, but rather a burden of production. To go forward, the employer need only articulate reasons sufficient to meet its burden. Once the employer fulfills its burden of production, to create a genuine issue of material fact the plaintiff must satisfy his ultimate burden of persuasion and show that the employer's articulated reasons are a mere pretext for what, in fact, is a discriminatory purpose. *Grimwood v. Univ. of Puget Sound, Inc.,* 110 Wn.2d 355, 362-365, 753 P.2d 517 (1988). As articulated by the court in *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002), the appellate court's job is simply to pass upon whether the burden of production had been met, not whether the evidence produced is persuasive. "That is the jury's role, once the burden of production has been met." *Id.*

The policy for adopting the burden shifting in employment cases is analogous to what the Legislature intended in adopting RCW 51.32.185. Both are intended to give employees a benefit at the outset because of the difficult nature of their claims. In both instances, the employee starts with a favorable presumption of liability or responsibility if certain basic

criteria are met, and it is incumbent upon the employer to produce evidence to rebut the presumption in order for the case to proceed further. However, once the employer can put forth alternative causes or explanations, the benefit given to the employee disappears and the employee must produce competent evidence to prove his/her case.

4. THE DECISION BY THE COURT OF APPEALS FAILED TO RECOGNIZE THAT JURY INSTRUCTION NO. 9 INCORRECTLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF.

An occupational disease is one that arises naturally and proximately out of the conditions of employment. While the Court of Appeals recognized that to rebut the presumption of occupational disease under RCW 51.32.185, the City only had to produce evidence at the Board level that Larson's melanoma failed to arise naturally or proximately out of his employment, the Court of Appeals found no error with jury instruction no. 9, which informed the jury incorrectly as to the City's burden before the Board. *Larson*, No. 71101-6-I, slip op. at 19-20.

Jury instruction no. 9 frames the City's burden at the Board level in terms of disproving that Larson's melanoma arose naturally out of the conditions of his employment as a firefighter and also disproving that his employment was a proximate cause of his melanoma. Paragraph 3 of jury instruction 9 provides:

> At the hearing before the Board of Industrial Insurance Appeals, the **burden of proof is on the employer to rebut** the presumption that **1)** claimant's malignant melanoma arose naturally out of his conditions of employment as a firefighter **and, 2)** his employment is a proximate cause of his malignant melanoma. (emphasis added)

In answering the first question on the special verdict form, the jury was required to look back to jury instruction no. 9 to determine what the City had been required to do to rebut the presumption at the Board level:

> 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?
>
> ANSWER: _____ (Write "yes" or "no")

The instruction and special verdict form were in error because they placed the burden on the City instead of on Larson. Moreover, the jury was instructed that in order to determine if the Board correctly decided the City had rebutted the presumption of occupational disease, the City was required to rebut *both* the arising naturally element *and* the proximate

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cause elements of RCW 51.08.140.[2] Therefore, if the jury believed the City had failed to present a preponderance of evidence to rebut both propositions the special verdict form required the jury to conclude the Board's decision was incorrect. Here, the jury answered Question 1 of the special verdict as "NO" indicating their belief that the Board was incorrect in determining the employer had rebutted the presumption that Larson's malignant melanoma was an occupational disease.[3]

The instruction thus saddled with City with the double burden of disproving both elements of an occupational disease claim in order for the jury to decide whether or not the Board's decision was correct. *See e.g. Lappin v. Lucurell*, 13 Wn. App. 277, 286, 534 P.2d 1038 (1975) ("A presumption which imposes a double burden on a party to a lawsuit is ordinarily considered to be prejudicial.").

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[2] The Court of Appeals decision notes that jury instruction 9 directly tracks the statutory definition of RCW 51.08.140. *Larson,* No. 71101-6-I, slip op. at 20. While this is true, it illustrates the error with the instruction. The City is not attempting to prove that the elements necessary to establish an occupational disease are present, which would require proof of both the arising naturally *and* proximately elements. To the contrary, the City's burden in rebutting the presumption of occupational disease is to show that *either* of the necessary element is absent. Therefore, because the grammatical construction of the jury instruction uses the conjunction "and" plus a comma between the 1) arising naturally and 2) proximately element it incorrectly states the City's burden of proof is to disprove both elements of occupational disease.

[3] Because of the instructional error, the jury may have believed the City rebutted the arising naturally element or had rebutted the proximate cause element. However, if the jury believed the City had not rebutted both elements, it was incorrectly instructed the City had not met its burden of proof. Therefore, the jury was required to answer special verdict question one as a "NO", which is what occurred here.

The jury should not have been instructed about the RCW 51.32.185 presumption. But if was instructed *arguendo*, the jury should have been instructed that the City could rebut RCW 51.32.185(1)'s presumption by presenting a preponderance of evidence that *either* Larson's melanoma did not arise naturally from the conditions of employment *or* that his employment was not the proximate cause of the melanoma.

5. THE DECISION BY THE COURT OF APPEALS FAILS TO RECOGNIZE THAT THERE IS NO AUTHORITY THAT PROVIDES THE SUPERIOR COURT WITH THE RIGHT TO AWARD LARSON HIS ATTORNEY FEES AND COSTS BEFORE THE BOARD.

The Court of Appeals erroneously upheld an award to Larson by the superior court of the attorney fees he had incurred before the Board. Pursuant to RCW 51.32.185(7)(b), Larson is entitled to attorney fees and costs incurred as part of his appeal to superior court. However, because he was not the prevailing party before the Board, he is not entitled to recover his attorney fees and costs incurred in the Board proceeding. Attorney fees and costs incurred before, or as part of, the earlier appeal before the Board are not compensable pursuant to RCW 51.32.185(7)(b). The only way a worker can obtain fees incurred before the Board is if the worker satisfies RCW 51.32.185(7)(a):

> When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

Under the plain terms of the statute, Larson is not entitled to the fees he incurred before the Board. It was the City who appealed the Department's allowance of Larson's claim to the Board, and the Board's final decision did not allow Larson's claim. Consequently, Larson was not entitled to an award of attorney fees and costs for work at the Board under RCW 51.32.185(7). Furthermore, RCW 51.32.185(7)(a) provides that only the Board can order an award of fees incurred at the Board level. The superior court had no authority to award fees incurred before the Board.

F. CONCLUSION

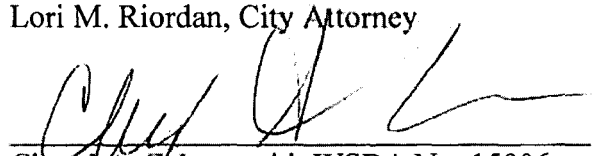
As it stands now courts, workers, employers, and the Department are all faced with the dilemma of how to follow RCW 51.52.115's mandate to place the burden of proof on the appealing party in firefighter cases. The Court of Appeals has created a hopeless conflict with the statute and with the case law, which will affect all parties involved in firefighter cases to which RCW 51.32.185 also applies. This Court should

take review to resolve the dilemma by holding that RCW 51.52.115 controls.

Dated this 4th day of September, 2015.

Respectfully submitted,

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



Cheryl A. Zakrzewski, WSBA No. 15906
Chad R. Barnes, WSBA No. 30480
Assistant City Attorneys
Attorneys for Appellant City of Bellevue

DECLARATION OF SERVICE

I, Kelly M. Thibodeau, declare under penalty of perjury under the laws of the State of Washington that on September 4, 2015, I caused **CITY OF BELLEVUE'S PETITION FOR DISCRETIONARY REVIEW** and this **DECLARATION OF SERVICE** to be served on the persons listed below:

Ron Meyers
Ron Meyers & Associates, PLLC
8765 Tallon Lane NE, Suite A
Lacey, WA 98516
ron.m@rm-law.us

Anastasia Sandstrom
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle WA 98104 – 3188
anas@atg.wa.gov

By way of:

Email and ABC Legal Messenger on September 4, 2015.

DATED at Bellevue, Washington on this 4th day of September, 2015.

Kelly M. Thibodeau, Declarant
Legal Secretary

APPENDIX A

Larson v. City of Bellevue, et al. Division I No. 71101-6-I

Published Opinion filed July 13, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILFRED A. LARSON, Respondent, v. CITY OF BELLEVUE, Appellant, DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.	No. 71101-6-I DIVISION ONE PUBLISHED OPINION FILED: July 13, 2015

LEACH, J. — The city of Bellevue (City) appeals the superior court's judgment reversing the Board of Industrial Insurance Appeals (Board). The Board reversed a Department of Labor and Industries (Department) award of benefits to firefighter Wilfred Larson under RCW 51.32.185 for his malignant melanoma, a form of skin cancer. The City challenges the trial court's jury instructions, its rulings about expert testimony, and the sufficiency of the evidence to support the jury's verdict. It also claims that the trial court should not have awarded Larson attorney fees.

Because the trial court's instructions correctly allocated the burdens of production and persuasion as required by RCW 52.32.185(1)'s rebuttable

presumption and otherwise correctly stated the law, did not mislead the jury, and allowed each party to argue its case, we reject the City's instructional error claims. Because the City fails to demonstrate any abuse of discretion in the trial court's challenged evidentiary rulings, we affirm those rulings. And because RCW 51.32.185(7)(b) provides for a prevailing claimant's recovery of "all reasonable costs of the appeal" to "any court," the court properly awarded Larson attorney fees incurred at both the trial and Board levels.

FACTS

In 2009, Wilfred Larson was diagnosed with malignant melanoma on his low back. Larson worked as a firefighter and emergency medical technician for the City since 1979. The Department allowed his claim for benefits, finding his melanoma to be an occupational disease under RCW 51.32.185(1). The City appealed to the Board, and an industrial appeals judge dismissed Larson's claim on the City's summary judgment motion. Larson sought review of this decision by the Board, which reversed the judge and remanded for a hearing. After a hearing, the judge issued a proposed decision and order finding that "Wilfred Larson's condition, diagnosed as melanoma, did not arise naturally and proximately out of the distinctive conditions of his employment with the City of Bellevue Fire Department." The Board denied Larson's petition for review, and the judge's decision became a final decision and order.

Larson appealed to superior court. The testimony in the Board record not stricken by the trial court was read to a jury. Larson presented the testimony of his witnesses first.

Larson testified about exposure at work to smoke, fumes, and toxic substances until 2010, when he was transferred to the training division. On cross-examination, he acknowledged that he engaged in outdoor activities in the summer and sometimes would not wear a shirt. He testified that he occasionally tanned in a tanning bed to prepare for summer trips in order to avoid sunburn. The City elicited testimony from Larson's wife that the Larson family took yearly trips to Lake Chelan in the summers, that her husband would get a little pink in the sun, and that he had freckles, green eyes, and light brown hair.

Over objection, the jury heard testimony from Larson's expert witness, Dr. Kenneth Coleman, who is board-certified in family practice. He testified that Larson's firefighter work probably was one cause of his malignant melanoma.

The jury then was read Board proceeding testimony from the City's witnesses. Dr. Andy Chien, a dermatologist and melanoma expert, testified that ultraviolet (UV) light exposure and genetic factors cause melanoma and that those with fair skin and red- or blonde-colored hair and light eyes have the highest risk for developing melanoma. He testified that UV light from sun and tanning beds is a known carcinogen for the skin. Dr. Chien testified that for male

patients melanoma most often occurs on the low back. He testified that sun exposure on cloudy days, intermittent high-intensity sun exposure, or sun exposure without a blistering sunburn can lead to melanoma. He also testified that Larson probably developed melanoma from recreational UV exposure and genetic risk factors. He testified that he has not seen data showing an increased occupational risk of melanoma for firefighters.

Dr. Noel Weiss, an epidemiologist, testified about his familiarity with relevant medical literature addressing any connection between firefighters' occupational exposure and melanoma. He testified that while these studies showed higher incidences of skin cancer in firefighters, the results are unreliable to show that firefighters experience higher incidence of melanoma than the general population.

Dr. Sarah Dick, a dermatologist, treated Larson's melanoma. She testified that it was her "highest suspicion" that UV exposure caused Larson's melanoma. She testified that as a fair-skinned redhead, Larson belonged to a population having a higher risk of melanoma. She opined that if he had not worked as a firefighter, he could have developed melanoma. She also testified that she never advised him to stop working as a firefighter.

The Board and the trial court both excluded, as cumulative, testimony from Dr. John Hackett, a dermatologist who had examined Larson for the City.

The City, at the end of the testimony, asked the trial court to rule, as a matter of law, that the City had established by a preponderance of the evidence that Larson's work as a firefighter was not a cause of his melanoma. According to the City, this would leave one issue for the jury to decide: did Larson prove that his melanoma was an occupational disease? The trial court denied the City's motion.

Over the objection of the City, the trial court submitted to the jury this special verdict form:

> **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?
>
> **ANSWER:** _____ (Write "yes" or "no")
>
> (**INSTRUCTION:** If you answered "no" to Question 1, do not answer any further questions. If you answered "yes" to Question 1, answer Question 2.)
>
> **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?
>
> **ANSWER:** _____ (Write "yes" or "no")

The jury answered "No" to the first question and did not proceed further. The trial court entered a judgment in Larson's favor that also awarded Larson attorney fees and costs incurred before the Board and the court. The City

appeals. The Department has filed a respondent's brief supporting the City's position on the operation of RCW 51.32.185(1).

STANDARD OF REVIEW

In appeals under RCW 51.52.110, this court reviews the trial court's factual findings for substantial evidence and if the court's conclusions of law flow from those findings.[1] At the superior court, the Board's decision is prima facie correct. To prevail in the superior court, the appellant must establish otherwise by a preponderance of the evidence.[2] This court reviews the adequacy of jury instructions de novo.[3] Courts liberally construe the Industrial Insurance Act, Title 51 RCW, resolving doubts in favor of the worker.[4]

ANALYSIS

This case presents six issues for this court to resolve:

1. What are the parties' burdens of production and persuasion when the rebuttable presumption of RCW 51.32.185(1) applies?
2. Did the trial court correctly instruct the jury about RCW 51.32.185(1)?
3. Does substantial evidence support the jury's finding that the Board incorrectly decided that the City had rebutted by a preponderance of

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[1] Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).
[2] Ruse, 138 Wn.2d at 5-6.
[3] City of Bellevue v. Raum, 171 Wn. App. 124, 142, 286 P.3d 695 (2012), review denied, 176 Wn.2d 1024 (2013).
[4] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

the evidence the presumption that Larson's melanoma was an occupational disease?

4. Did the trial court abuse its discretion when admitting and excluding expert opinion testimony?
5. Did the trial court err by refusing to instruct the jury that it should give the testimony of Larson's treating physician, Sarah Dick, MD, special consideration?
6. Does RCW 51.32.185(7)(b) authorize an award of attorney fees and costs incurred before the Board to a claimant who loses before the Board but prevails in superior court?

We address these issues in the order listed.

RCW 51.32.185(1) Presumption

We must decide how the presumption created by RCW 51.32.185(1) affects the burden of proof in this case. The burden of proof has two parts: a burden of production and a burden of persuasion.[5] A party with the burden of production on a particular fact in issue must produce sufficient evidence to warrant submitting that issue to the trier of fact.[6] Whether a party has produced a

[5] Fed. Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 433, 886 P.2d 172 (1994).

[6] State v. Paul, 64 Wn. App. 801, 806, 828 P.2d 594 (1992).

sufficient quantity of evidence to submit the factual issue to the trier of fact presents a legal question to be decided by the court.[7]

A party with the burden of persuasion must convince the trier of fact that the contested fact is true to a certain degree, using one of these three levels of persuasion: (1) beyond a reasonable doubt; (2) clear, cogent, and convincing; or (3) preponderance of the evidence.[8] It comes into play when each party has met its burden of production and all of the evidence has been introduced.[9] It requires that the trier of fact weigh the credibility of witnesses and the persuasiveness of the evidence.

RCW 51.32.185(1) contains a presumption that applies when a firefighter alleges certain occupational diseases:

> In the case of firefighters . . . , there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140.

This statute also provides a way to rebut this presumption: "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

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[7] Paul, 64 Wn. App. at 806.
[8] Paul, 64 Wn. App. at 807.
[9] Fed. Signal Corp., 125 Wn.2d at 433.

products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities."

The parties disagree about how this presumption works. Although they do not identify them by name, each advocates a version of the two principal competing theories of presumptions, the Thayer theory and the Morgan theory. "Under the Thayer theory, a presumption places the burden of production of evidence on the party against whom it operates but disappears if that party produces contrary evidence."[10] Under the Morgan theory, a presumption shifts the burden of proof as to the presumed fact.[11] Under the Morgan theory, a presumption does not disappear upon the production of contrary evidence but continues throughout the trial, and the court instructs the jury that the party against whom the presumption operates has the burden of proving that the presumed fact is not true or does not exist.[12]

The City claims that RCW 51.32.185(1) creates a Thayer-like presumption. The City contends that if a firefighter shows that he has a qualifying disease, in this case melanoma, the presumption relieves him from presenting competent medical evidence relating that melanoma to his work

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[10] In re Estate of Langeland, 177 Wn. App. 315, 321 n.7, 312 P.3d 657 (2013), review denied, 180 Wn.2d 1009 (2014).

[11] Langeland, 177 Wn. App. at 321 n.8.

[12] 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 301.15, at 241-42 (5th ed. 2007).

duties to establish that it is an occupational disease. Instead, the condition is presumed to be an occupational disease, and at this point in the production of evidence, the firefighter has proved a prima facie case for relief.

According to the City, RCW 51.32.185(1) then shifts the burden of production to the employer to show by a preponderance of the evidence that the melanoma is not an occupational disease. The City contends that whether the employer has met this burden presents a question of law. If the Board decides that the employer has met this burden of production, the presumption disappears. The firefighter continues to have a burden of persuasion that requires him to establish by a preponderance of the evidence that his condition is an occupational disease, now without the benefit of the statutory presumption.

Under the City's interpretation of RCW 51.32.185(1), because the Board found that Larson's melanoma "did not arise naturally and proximately out of the distinctive conditions of his employment," the City claims that the Board must first have decided as a matter of law that the City rebutted the occupational disease presumption by a preponderance of the evidence. Otherwise, the Board would never have made the quoted factual finding. Therefore, the City contends that when Larson appealed to the superior court, the court should have reviewed the Board's legal conclusion that the City had rebutted the presumption as a question of law to be decided by the court and should not have submitted it to the jury to

decide as a question of fact. Instead, the trial court should have submitted to the jury as a question of fact whether Larson had established by a preponderance of the evidence that his melanoma was an occupational disease.

Larson asserts that the Morgan theory applies. Larson claims that the RCW 51.32.185(1) presumption shifts to the employer both the burden of production and the burden of persuasion. Once a firefighter shows that he suffers from a qualifying disease, RCW 51.32.185(1) establishes a presumption that the condition is an occupational disease and imposes upon the employer the burden of producing evidence sufficient to establish otherwise by a preponderance of the evidence. Larson contends that whether the employer has produced this preponderance of evidence presents a question of fact. Therefore, Larson asserts that the Board weighed the conflicting evidence and answered a question of fact when it decided that the City had rebutted the presumption. When Larson appealed to the superior court, he was entitled to have a jury decide this question of fact.

Unlike many states, Washington has not adopted an analogue to Fed. R. Evid. 301, addressing the use of presumptions.[13] "Washington cases apply the Thayer theory to some, but not all, presumptions and provide no general rule about when it applies."[14] Other Washington cases identify presumptions that

[13] 5 TEGLAND, § 301.8, at 220.
[14] Langeland, 177 Wn. App. at 322.

shift the burden of proof.[15] The Washington Pattern Jury Instructions recognize Washington cases treat different presumptions differently.[16] Washington case law, the text of RCW 51.32.185(1), the public policy motivating the legislature to adopt this statute, and decisions of other jurisdictions convince us that the trial court properly allowed the jury to decide if the City had rebutted the statutory presumption.

The Washington Supreme Court has approved allowing a jury to decide if the record includes sufficient evidence to overcome a presumption.[17] In Luna de la Peunte v. Seattle Times,[18] the court considered an appeal from a trial court's submission to a jury whether the defendant in a libel action had rebutted a presumption that the reputation and character of the plaintiff was good. It rejected this challenge, reasoning as follows:

> The difficulty, however, lies not so much with the statement of law as with its application. When and by whom is it to be said that the evidence is sufficient to rebut a presumption? In some cases, doubtless, it may be said by the court, as a matter of law. In other cases, it may very properly be left to the jury to say. Simply because some witness takes the stand and swears to facts which, if true, would rebut the presumption, does not require the court to hold, as a matter of law, that the presumption has been rebutted.

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[15] Langeland, 177 Wn. App. at 322.

[16] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 24.03, cmt. at 268-69 (6th ed. 2012) (WPI).

[17] Luna de la Peunte v. Seattle Times, 186 Wash. 618, 626-28, 59 P.2d 753 (1936); Karp v. Herder, 181 Wash. 583, 590, 44 P.2d 808 (1935); Steele v. N. Pac. Ry., 21 Wash. 287,302-03, 57 P. 820 (1899).

[18] 186 Wash. 618, 626-28, 59 P.2d 753 (1936).

> . . . .
>
> The sum and substance of all that has been written on the force and effect of presumptions is that, in the first instance, it is for the court to say whether or not the evidence is sufficient, as a matter of law, to overcome a presumption. If not, the question may be left to the jury, under proper instruction.[19]

Thus, unless the trial court could rule as a matter of law that the City had proved by a preponderance of the evidence that Larson's melanoma was not an occupational disease, it properly submitted this question to the jury. To make this ruling, CR 50(a)(1)[20] requires that "there is no legally sufficient evidentiary basis for a reasonable jury to find or to have found" for Larson on the issue. Because, as we discuss below, sufficient evidence supports the jury's verdict in favor of Larson, the record does not meet the CR 50(a)(1) standard. As a result, we do not address whether a court could ever decide as a matter of law that the evidence produced rebutted the presumption.

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[19] Luna de la Peunte, 186 Wash. at 627-28.

[20] *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

The text of RCW 51.32.185(1) supports the conclusion that this statute shifts both the burden of persuasion and production. RCW 51.32.185(1) states that the "presumption of occupational disease may be rebutted by a preponderance of the evidence." Although the statute does not define "preponderance of the evidence," WPI 21.01 does:

> 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 [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

Neither party suggests a different definition, nor are we aware of any reason to use a different one. Thus, the statute requires a quality of proof to rebut the presumption and a weighing of all the evidence to determine if the evidence produced achieves the necessary level of persuasiveness. This presents a question of fact requiring an evaluation of the credibility of witnesses and the persuasiveness of evidence. Logically, this presumption shifts to the City the burden of proof as to the presumed fact of occupational disease.[21]

Division Two of this court appears to have reached this conclusion in Gorre v. City of Tacoma:[22] "[T]he burden shifts to the employer to rebut the

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[21] 5 TEGLAND, § 301.15, at 246.

[22] 180 Wn. App. 729, 758, 324 P.3d 716 (2014), review granted, 181 Wn.2d 1033 (2015).

presumption by a preponderance of the evidence by showing that the origin or aggravator of the fire fighter's disease did not arise naturally and proximately out of his employment."[23] The City must present evidence to "show that his diseases did not arise from his fire fighter employment."[24]

A leading commentator on Washington evidence law suggests that a presumption written in terms of the level of proof required to overcome it follows the Morgan theory and that the WPI adopts this view.[25] A note for use of one pattern instruction supports his view. WPI 24.05 provides, "[If you find] [Because] (insert the basic facts), the law presumes (insert the presumed fact), and you are bound by that presumption unless you find [by a preponderance of the evidence] [by clear, cogent, and convincing evidence] that (insert the contrary of presumption)." This pattern instruction parallels the presumption and rebuttal provision of RCW 51.32.185(1). The note on use for this instruction states,

> This instruction is proper only for rebuttable mandatory presumptions that affect the burden of proof, when the presumed fact has been challenged and constitutes a jury question. It should therefore not be given if the court can rule on the presumed fact or

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[23] The Department argues that the trial court impermissibly allowed Larson to present his evidence prior to the City and that this prejudiced the City in the jury's determination. But at trial Larson had the burden to prove either the Board incorrectly decided the City met its burden or, if not, that Larson could show his melanoma was an occupational disease. Because Larson was entitled to the "full opportunity to be heard" under RCW 51.52.115, the court properly allowed him to proceed first.

[24] Gorre, 180 Wn. App. at 758 n.37.

[25] 5 TEGLAND, § 301.15, at 242-43.

> facts as a matter of law. The bracketed phrase "if you find" should be used if the basic facts are also a jury question. The bracketed word "because" should be used if the basic facts are admitted or can otherwise be determined to exist as a matter of law. In applying this instruction, the user should pick out the appropriate burden of proof necessary to rebut the presumption and then give a definition of that burden.

This note on use suggests that the Washington Supreme Court Committee on Jury Instructions would consider the presumption of RCW 51.32.185(1) as a rebuttable presumption that affected the burden of proof.

The Morgan theory of presumptions provides that when a presumption reflects a strong social policy, the presumption should shift the burden of persuasion.[26] For this reason, a number of jurisdictions have applied the Morgan theory to statutes substantively similar to RCW 51.32.185(1).[27] For example, the New Hampshire Supreme Court decided the apparent purpose of an analogous New Hampshire statute was to implement a social policy of providing compensation to firefighters suffering identified diseases where the medical evidence fails to establish the cause of the disease.[28] To give full effect to the legislative intent, the court applied the statutory presumption "with a force

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[26] Edmund M. Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906, 930 (1931).

[27] Cunningham v. City of Manchester Fire Dep't, 129 N.H. 232, 525 A.2d 714 (1987); Montgomery County Fire Bd. v. Fisher, 298 Md. 245, 468 A.2d 625, 631 (1983); Byous v. Mo. Local Gov't Emps. Ret. Sys. Bd. of Trs., 157 S.W.3d 740, 746 (Mo. Ct. App. 2005); City of Littleton v. Indus. Claim Appeals Office of State, No. 10CA1494, 2012 WL 5360912 (Colo. App. Nov. 1, 2012), cert. granted, Oct. 15, 2013.

[28] Cunningham, 129 N.H. at 236-37.

consistent with the legislative concerns underlying the presumption."[29] The court decided that the Thayer theory would be inconsistent with the policy objective of the presumption and applied the Morgan theory.[30] The North Dakota Supreme Court has described the purpose of North Dakota's analogous statute as relieving firefighters of the nearly impossible burden of proving firefighting actually caused their disease.[31]

The Washington Legislature first adopted RCW 51.32.185 for similar reasons:

> The legislature finds that the employment of fire fighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that fire fighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for fire fighters.[32]

When the legislature amended RCW 51.32.185 in 2002 to add a presumption for melanoma, it made a finding that "[a] 1990 review of fire fighter epidemiology calculated a statistically significant risk for melanoma among fire fighters."[33] Our governor vetoed the bill section containing this finding.[34] But this legislative

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[29] Cunningham, 129 N.H. at 237.

[30] Cunningham, 129 N.H. at 237.

[31] Wanstrom v. N.D. Workers Comp. Bureau, 2001 ND 21, ¶7, 621 N.W.2d 864, 867.

[32] WASHINGTON LAWS, 1987, ch. 515, § 1.

[33] WASHINGTON LAWS, 2002, ch. 337, § 1(e).

[34] WASHINGTON LAWS, 2002, ch. 337, note: governor's explanation of partial veto.

history makes clear the social purpose of the presumption. We agree with the New Hampshire Supreme Court's conclusion that the Morgan theory should be applied to the presumption to give it the force intended by the legislature.

The City and Department cite employment discrimination cases to argue that once Larson established his prima facie case, the City only had a burden of production at this stage, an issue of law not reviewable by a jury. We do not find this analogy of employment discrimination procedure to the operation of a statutory presumption persuasive. It ignores Washington case law cited above and the text of RCW 51.32.185(1).

In summary, once a firefighter proves that he suffers from a qualifying disease described in RCW 51.32.185(1), this statute's presumption shifts the burdens of production and persuasion to the entity contesting an award of industrial insurance benefits. The trial court did not err in allowing the jury to decide if the City had rebutted this presumption. Our conclusion comports with a liberal construction of the Industrial Insurance Act in favor of the worker.[35]

Jury Instructions about RCW 51.32.185(1)

The City contends that jury instruction 9 misstated the proof required to rebut RCW 51.32.185(1)'s presumption. It claims that the third paragraph of this instruction told the jury that the City had to rebut "two elements" of the definition

[35] Dennis, 109 Wn.2d at 470.

of occupational disease to rebut the statutory presumption when it only had to rebut one "element." The City argues that the special verdict form exacerbated this erroneous statement of the law because it required the jury to reference the flawed instruction and contained the word "presumptions," indicating to the jury that more than one existed. It argues this prejudiced the City's ability to argue its case theory. Larson argues that the City improperly objected to the claim precluding this court's review and, regardless, that the instruction correctly stated the law.

Instruction 9 states,

> 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 1) claimant's malignant melanoma arose naturally out of his conditions of employment as a firefighter and, 2) 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 bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Sufficient instructions permit parties to argue their case theories, do not mislead the jury, and, when read as a whole, accurately inform the jury of applicable law.[36]

RCW 51.08.140 defines "occupational disease": "'Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." Instruction 9 breaks this definition into two parts—that malignant melanoma arose naturally out of conditions of employment and that employment was a proximate cause of the melanoma. It directly tracks the statutory definition. We agree that the City needed to disprove only one of the two parts to rebut RCW 51.32.185(1)'s presumption. Nothing in instruction 9 contradicts this. And, contrary to the City's assertion, the special verdict form did not contain the word "presumptions" or place an improper additional burden of proof on the City. Thus, we conclude that instruction 9 and the special verdict form correctly stated the law, did not mislead the jury, and allowed the City to argue its theory of the case.

Sufficiency of the Evidence

The City argues that substantial evidence did not support the jury's finding that the Board incorrectly decided that the City rebutted the presumption that

[36] Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 194, 668 P.2d 571 (1983).

Larson's melanoma was an occupational disease. A court will not overturn a jury verdict if substantial evidence exists to support it.[37] "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true."[38]

We must decide if Larson presented substantial evidence that rebuts the presumption that the Board correctly decided the case.[39] The Board heard testimony from three of the City's medical expert witnesses. Through these witnesses, the City elicited expert and lay testimony showing that UV rays from the sun and tanning beds as well as genetic factors can cause melanoma. This testimony suggested that Larson had a higher risk for melanoma for reasons not related to his occupation. Dr. Chien, in particular, identified recreational UV exposure and genetic risk factors as the cause of melanoma diagnosed in a firefighter with Larson's history. Epidemiologist Dr. Weiss, testifying for the City, opined that in his professional opinion the studies showing firefighters experience higher incidence of melanoma produced unreliable results. And Dr. Dick, Larson's treating dermatologist, testified that it was her "highest suspicion" that

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[37] Roellich v. Dep't of Labor & Indus., 20 Wn.2d 674, 680, 148 P.2d 957 (1944).

[38] Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

[39] See Wenatchee Sportsmen Ass'n, 141 Wn.2d at 176.

UV exposure caused his melanoma. She testified that Larson could have developed melanoma even if he had not been a firefighter.

But Larson points to evidence in the record demonstrating that a reasonable juror could find flaws in the City's case. Dr. Chien testified, for example, that it is unknown what quantity or dose of UV exposure one requires to develop melanoma and that the exact cause of melanoma can never be determined. He testified on cross-examination that "if you look at whether or not asking about someone's chronic sun exposure can predict their risk for melanoma, the studies so far have said that it cannot." Larson elicited testimony to show the jury that Dr. Chien does not know the time or circumstance when a person becomes positive for melanoma and that he had not examined Larson. Dr. Chien acknowledged that he was not familiar enough with what a firefighter does to know if he or she is exposed to ionizing radiation, a form of UV exposure which he testified can be a cause of melanoma.

Larson asked Dr. Weiss, the City's witness epidemiologist, about a 2007 "Registry Based Case Control Study of Cancer in California Firefighters." Dr. Weiss testified, "In this study, they did find a suggestion of [a] 50 percent increase in risk, of melanoma among firefighters." He identified a potential design flaw, testifying that the study's "results are helpful" because the study added to all of the studies but that it is one small piece of evidence. When asked

about a bias for UV exposure in this study, Weiss testified that he believes that bias "would not be terribly large." He testified, "[L]et's say all of the studies collectively found a 50 percent increase. I wouldn't think that the potential difference in sun exposure would be responsible for all of that difference."

Dr. Dick testified that to her knowledge there is no way to look at a biopsy or the melanoma and determine what caused it and that there can be more than one cause to one's malignant melanoma. When the City asked her medical opinion about whether Larson would have developed skin cancer if he didn't work as a firefighter, she answered, "At this point I don't know if I can give a medical opinion because I don't know enough details of what he does at work." When pressed, she continued, "[N]ot knowing his exposure to UV during his work, assuming he's covered at work, then do I think—do I think he would have gotten skin cancer if he wasn't a firefighter? Yeah, he could have."

While the City elicited expert testimony to highlight Larson's nonoccupational risks for developing melanoma, a jury could reasonably conclude from the testimony of these witnesses that the City had not disproved firefighting as a more probable than not cause for Larson's melanoma. Thus, substantial evidence existed to support a finding that the Board incorrectly concluded the City rebutted its presumption.

Expert Testimony Decisions

This court reviews a trial court's admission or rejection of expert testimony for an abuse of discretion, looking to see if the court made a manifestly unreasonable decision or based it on untenable grounds.[40]

The City challenges the trial court's admission of expert testimony from Larson's expert, Dr. Coleman, and the court's rejection of testimony by its own expert, Dr. Hackett. The City claims Dr. Coleman's testimony did not qualify him as an expert under ER 702 and provided untrustworthy and unreliable evidence that allowed the jury to speculate about medical causation. Alternatively, it argues that the trial court should have stricken portions of his testimony because it responded to Larson's leading questions and constituted an improper use of learned treatises.

ER 702 governs testimony by experts: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This rule provides a two-step inquiry: does a witness qualify as an expert and will the expert testimony be helpful to the trier of fact?[41] Expert

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[40] Esparza v. Skyreach Equip., Inc., 103 Wn. App. 916, 924, 15 P.3d 188 (2000); T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

[41] Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

testimony must be "sufficiently trustworthy and reliable to remove the danger of speculation and conjecture" from the jury.[42] Courts usually admit expert testimony "under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons."[43]

Larson's expert witness, Dr. Coleman, testified about the content of 12 peer-reviewed scientific articles based on his "extensive review" of them for trial. He is a licensed medical doctor, is board-certified in family practice medicine, and has run several hospital emergency departments. He diagnoses skin diseases, does biopsies, recognizes changes in skin lesions, and testified to his familiarity with the causes of melanoma as part of his practice and through expert witness work on a different case. Based on his reading of the articles, he testified about the relationship between chemicals and cancer, firefighters' occupational exposure to chemicals, increased incidence of melanoma in firefighters, and literature that identifies risk factors for malignant melanoma aside from sunlight. Coleman formed an opinion, based on those articles and his training and experience, that Larson's "occupational exposure as a firefighter must be considered here on a more-probable-than-not-basis as one of the causes for his development of malignant melanoma."

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[42] State v. Maule, 35 Wn. App. 287, 294, 667 P.2d 96 (1983).

[43] Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

The City cites Harris v. Robert C. Groth, MD, Inc.,[44] to show that Coleman's testimony about the cause of malignant melanoma "is outside his expertise as a family practice physician." In that case, the court held that nonphysicians may give expert testimony but affirmed the trial court's exclusion of expert witness testimony as within the court's discretion.[45] The court stated that "[t]rial courts retain broad discretion in determining whether an expert is qualified."[46]

In this case, the trial court denied the City's motion to strike Dr. Coleman's testimony because "the witness clearly qualifies as an expert with information that would assist the trier of fact, and that's based not only on the recitation of the qualifications, but also my review of the portions of the record that were contained in the briefing." Because Dr. Coleman is a licensed physician who has experience diagnosing skin diseases, including melanoma, we conclude that he had sufficient knowledge and experience to provide useful information to the jury.

The City further challenges portions of Dr. Coleman's testimony involving the articles as inadmissible hearsay. ER 802 bars hearsay, except as permitted by the Rules of Evidence, other court rules, or statute. ER 803(a)(18) provides that statements contained in published treatises, periodicals, or pamphlets on a

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[44] 99 Wn.2d 438, 663 P.2d 113 (1983).
[45] Harris, 99 Wn.2d at 450.
[46] Harris, 99 Wn.2d at 450.

subject of medicine are not hearsay "to the extent . . . relied upon by the expert witness in direct examination." These statements may be read into evidence if the expert testifies to their reliable authority.[47] And ER 703 allows experts to use facts or data reasonably relied upon in the expert's field to form an opinion or make inferences.

The City claims that on direct examination an expert may only "rely upon" treatises, and here, Larson improperly "called to [Dr. Coleman's] attention" the articles' contents. The City, citing no supporting authority, argues that when Dr. Coleman responded by commenting on the articles' correctness, instead of reading the passages to the jury himself, his testimony fell outside of the hearsay exception in ER 803(a)(18).

But ER 803(a)(18) states that "[i]f admitted, the statements may be read into evidence." The rule does not limit who may read them. Dr. Coleman identified the articles as authoritative on the subject of malignant melanoma, that medical experts reasonably rely on these peer-reviewed articles, and that he relied on these in his testimony regarding causation of malignant melanoma. Larson points to multiple examples where Dr. Coleman relied on the articles to form his own conclusions. Thus, the trial court did not abuse its discretion by allowing Dr. Coleman's testimony.

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[47] State v. Rangitsch, 40 Wn. App. 771, 780, 700 P.2d 382 (1985).

The City next asserts that the trial court erred by excluding Dr. Hackett's testimony as cumulative. The City argues that unlike its other expert witnesses, Dr. Hackett examined Larson with the purpose of reviewing risk factors that may have led to Larson's melanoma and would have opined about the role of those risks in Larson's case. For example, the City argues, the jury would have heard testimony from Dr. Hackett about Larson's use of tanning beds, when Dr. Dick failed to ask Larson about this. But Larson testified that he used a tanning bed, and the City established through Dr. Dick's testimony that this could cause his melanoma. Dr. Dick's testimony also reviewed her examination of Larson and addressed risk factors for malignant melanoma. Because the trial court may limit the number of expert witnesses at trial and has discretion to admit cumulative evidence, expert or not,[48] the court did not abuse its discretion in excluding Dr. Hackett's testimony as cumulative.

Attending Physician Instruction

The City contends that the trial court erred when it refused to give WPI 155.13.01, relating to special consideration of an attending physician's testimony. Courts often instruct juries to give special consideration to a claimant's attending physician.[49] Here, however, the trial court expressed concern that the instruction

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[48] Christensen v. Munsen, 123 Wn.2d 234, 241, 867 P.2d 626 (1994).

[49] Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

would be misleading. It reasoned that "it seems odd to me to direct the jury to especially consider the treating physician in a case where the testimony is, I sure wish I had my chart, . . . and where some of the other testimony has been, you know, more elaborate and covering."

In Boeing Co. v. Harker-Lott,[50] this court held that an instruction on special consideration of attending physicians is not mandatory and that a more general instruction still allowed a party to argue its theory of the case. Similarly, the court here instructed the jury that it may determine witness credibility by taking into consideration factors including the "opportunity of the witness to observe or know the things they testify about" and "any personal interest that the witness might have in the outcome or the issues." This instruction allowed the City to argue that Dr. Dick's testimony was especially helpful because she was Larson's only attending physician who testified, was neutral, and did not advise Larson to forgo firefighting or take precautions at work to limit potential recurrence. Because the trial court here included instructions that properly informed the jury and allowed the City to argue its case, the court did not abuse its discretion by declining to give an instruction on special consideration of attending physician's testimony.

[50] 93 Wn. App. 181, 186-87, 968 P.2d 14 (1998).

Attorney Fees

The trial court awarded Larson $67,470.00 in attorney fees and $12,132.42 in costs under RCW 51.32.185(7) and RCW 51.52.130. The City argues that the trial court should not have included in the award fees and costs Larson incurred for his unsuccessful Board appeal. Because the language of RCW 51.52.130 unambiguously provides for recovery "for services before the court only," this statute does not authorize an award of attorney fees for unsuccessful Board appeals ultimately reversed on further appeal to superior court.[51] The City argues that RCW 51.32.185(7) has the same limitation because its text divides recovery into two sections—one for successful board appeals and another for successful appeals to the courts. It argues that this precludes Larson's recovery for his unsuccessful appeal to the Board, regardless of his success at trial.

Larson argues that RCW 51.32.185(7)(b)'s unambiguous language permits recovery. We agree with Larson. When a firefighter claimant successfully appeals at trial court, RCW 51.32.185(7)(b) provides that "the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party." Unlike RCW 51.52.130, it does not limit recovery to "services before the

[51] Borenstein v. Dep't of Labor & Indus., 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957).

court only." We conclude that the plain language of "all reasonable costs of the appeal" includes all, and not only some, of the costs required to succeed on a claims benefit under the Industrial Insurance Act. This construction furthers the purpose of awarding attorney fees in industrial insurance cases: "'to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense'" if the claimant prevailed.[52] It is also consistent with our obligation to construe the Industrial Insurance Act liberally in favor of the worker. The court properly included in its fee and cost award the fees and costs Larson incurred before the Board.

CONCLUSION

The trial court's instructions correctly allocated the burdens of production and persuasion as required by RCW 52.32.185(1)'s rebuttable presumption and otherwise correctly stated the law, did not mislead the jury, and allowed each party to argue its case. Because the City fails to demonstrate any abuse of discretion in the trial court's challenged evidentiary rulings, we affirm those rulings. And because RCW 51.32.185(7) provides for a prevailing claimant's recovery of "all reasonable costs of the appeal" to "any court," the court properly

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[52] Harbor Plywood Corp. v. Dep't of Labor & Indus., 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (quoting Boeing Aircraft Co. v. Dep't of Labor & Indus., 26 Wn.2d 51, 57, 173 P.2d 164 (1946)).

awarded Larson attorney fees incurred at both the trial and Board levels. We affirm the trial court.

Leach, J.

WE CONCUR:

Schindler, J.

Becker, J.

APPENDIX B

RCW 51.32.185

West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

West's RCWA 51.32.185

51.32.185. Occupational diseases--Presumption of occupational disease for firefighters--Limitations--Exception--Rules

Effective: July 22, 2007
Currentness

(1) In the case of firefighters as defined in *RCW 41.26.030(4)(a), (b), and (c) who are covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(2) The presumptions established in subsection (1) of this section shall be extended to an applicable member following termination of service for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment.

(3) The presumption established in subsection (1)(c) of this section shall only apply to any active or former firefighter who has cancer that develops or manifests itself after the firefighter has served at least ten years and who was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. The presumption within subsection (1)(c) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty, primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

(4) The presumption established in subsection (1)(d) of this section shall be extended to any firefighter who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

(5) Beginning July 1, 2003, this section does not apply to a firefighter who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter from the provisions of this section.

(6) For purposes of this section, "firefighting activities" means fire suppression, fire prevention, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and training and other assigned duties related to emergency response.

(7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(c) When reasonable costs of the appeal must be paid by the department under this section in a state fund case, the costs shall be paid from the accident fund and charged to the costs of the claim.

Credits

[2007 c 490 § 2, eff. July 22, 2007; 2002 c 337 § 2; 1987 c 515 § 2.]

Notes of Decisions (13)

West's RCWA 51.32.185, WA ST 51.32.185

Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

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425-452-4081
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CZakrzewski@bellevuewa.gov

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Legal Secretary
City of Bellevue
City Attorney's Office
(425) 452 6830
kthibodeau@bellevuewa.gov