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No. 71101-6-1

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COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

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WILFRED A. LARSON

Respondent

v.

CITY OF BELLEVUE AND DEPARTMENT OF LABOR  
AND INDUSTRIES,

Appellants

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REPLY BRIEF OF APPELLANT CITY OF BELLEVUE

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W. Larson

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ORIGINAL

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## I. INTRODUCTION

RCW 51.32.185 creates a prima facie presumption of occupational disease for firefighters who develop certain medical conditions. However, the employer can rebut the presumption. In this instance, the Board of Industrial Insurance Appeals determined, as a matter of law, that the City had successfully rebutted the presumption and that Larson had failed to produce evidence that his melanoma was an occupational disease. The burden of proof rested with Larson as the appealing party, but the superior court erroneously instructed the jury to determine whether the Board was correct in finding that the City had presented evidence sufficient to rebut the presumption. Furthermore, whether a party has met its burden to rebut a prima facie presumption is a question of law, not a question for the jury. The only question that should have been submitted to the jury was whether the Board had correctly concluded that Larson had failed to meet his burden of proving that his melanoma was an occupational disease. The superior court further erred in its admission of the testimony of Dr. Kenneth Coleman. These errors constitute reversible error and require remand for a new trial.

## II. ARGUMENT

### A. The Superior Court Erroneously Placed The Burden Of Proof On The City.

1. The Operation Of RCW 51.32.185.

RCW 51.32.185(1) contains a prima facie presumption of occupational disease for firefighters with certain occupational disease claims:

(1) In the case of firefighters ... there shall exist a prima facie presumption that: ... (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140.

The statute also contains a rebuttal provision:

. . . 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.

RCW 51.32.185(1).

The parties do not dispute that Larson met his initial burden before the Board to show he had a qualifying disease (malignant melanoma) and thus was entitled to the prima facie presumption of occupational disease. That simply meant that Larson was not required at the outset to present competent medical evidence that his melanoma was related to his firefighting duties and thus an occupational disease. *See Raum*, 171 Wn. App. 124, 147, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

The burden then shifted to the City to show by a preponderance of

evidence that Larson's malignant melanoma was caused by factors unrelated to his work as a firefighter. If the City did not present a preponderance of evidence to rebut the prima facie presumption of occupational disease contained in RCW 51.32.185, the prima facie presumption of occupational disease would stand as a matter of law. There would be nothing to submit to the fact finder. If the City presented a preponderance of evidence to rebut the prima facie presumption of occupational disease, the presumption simply ceased to exist. Larson would then be in the same place as any other employee and would have to come forward with competent evidence that his melanoma was related to his firefighting duties and thus an occupational disease. *Id.*

2. Whether The City Rebutted The Prima Facie Presumption Is A Question of Law.

The prima facie presumption of occupational disease set forth in RCW 51.32.185 functions like any other evidentiary presumption. It is not evidence; its purpose is only to establish which party has the burden of first producing evidence on a matter at issue. *Id.* at 147. By its operation, RCW 51.32.185 places a **burden of production** on the employer to present evidence that the employee's condition is not occupationally related. This burden of production is a legal question which is answered when the court determines whether the employer has produced a

preponderance of evidence rebutting the prima facie presumption that the condition is an occupational disease.

The discrimination cases illustrate exactly how this type of prima facie presumption operates. The discrimination case establishes 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 necessary to establish a prima facie case of discrimination. 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, the plaintiff must satisfy his ultimate burden of persuasion and present evidence 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), it is then the appellate court's job 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.*

3. Whether The City Met Its Burden Of Production And Rebutted The Presumption Is A Question of Law Which Never Should Have Been Submitted To The Jury.

The City prevailed before the Board. The Board determined as a matter of law that the City had rebutted the prima facie presumption of RCW 51.32.185. The Board then issued findings of fact in which it concluded that Larson's "condition, diagnosed as melanoma, did not arise naturally and proximately out of the distinctive conditions of his employment." CP 35. The Board determined Larson had failed to meet his burden of persuasion on the ultimate issue.

In this case, the superior court asked the jury to determine whether the Board's legal conclusion that the City had met its burden of production rebutting the presumption was correct. The superior court erred in sending a question of law to the jury, and in doing so manifestly prejudiced the City and hopelessly confused the jury.

The Board's findings are presumed prima facie correct on appeal to the superior court, and the burden is on the attacking party to prove the Board's findings were incorrect. Furthermore, "where the court submits a

case to the jury, the court shall by instruction advise the jury of the exact findings of the board as to each material issue before the court.” RCW 51.52.115. The only findings of the Board that were submitted to the jury for its review were the findings of fact from the Board’s decision. *See* Jury Instruction No. 8 (CP 1767) and CP 34-35. So, without even informing the jury what the Board had specifically found with respect to the evidence the City submitted to rebut the presumption, the superior court instructed the jury to examine the Board’s legal conclusion on that issue.

Since the only issue the jury should have considered was whether the Board was correct in finding that Larson had failed to meet his burden of persuasion, there was no need to ever reference any burden of proof upon the City in any of the jury instructions. But in doing so with Jury Instructions Nos. 9 and 10, the superior court hopelessly confused the jury. Those instructions first informed the jury that Larson bore the burden of proving that the Board’s decision was incorrect and then told the jury that the City bore the burden of proving that it had rebutted the presumption. This was compounded by the presence of two questions in the Special Verdict Form. The City bore no burden of proof on appeal to the superior court, and it was error for the superior court to so instruct the jury.

Furthermore, even if the jury were to consider whether the City had rebutted the prima facie presumption, the only the evidence that the jury should have considered was that produced by the City. However, the jury was never informed in any instruction that it should consider only the evidence offered by the City. The instructions to the jury left the City with the burden to rebut Larson's evidence not just the prima facie presumption.

There can be no dispute that when examined together, Jury Instructions Nos. 9 and 10 and the Special Verdict Form clearly misstated the law and erroneously placed the burden of proof on the City to disprove that Larson's melanoma was an occupational disease. That was never the City's legal burden on appeal to the superior court.

**B. The Superior Court Did Not Correctly Instruct the Jury As To The Nature Of The Presumption.**

The only issue which should have been submitted to the jury was whether the Board correctly concluded that Larson's melanoma was not an occupational disease. However, assuming this Court finds that it was proper for the jury to decide if the Board was correct in deciding if the City had rebutted the presumption, the City contends that the superior court erred in its analysis of what would be necessary to rebut the prima facie presumption of occupational disease. Larson repeatedly argued at

trial that the City had to affirmatively disprove both elements of an occupational disease claim in order to rebut the presumption, and the superior court so instructed the jury over the City's objection.

RCW 51.08.140 defines an occupational disease as a condition that arises **naturally and proximately** out of employment. Logically then, in order to overcome the prima facie presumption in RCW 51.32.185 that a disease is occupational, the City would need only present a preponderance of the evidence rebutting either that the condition did not arise naturally from the employment **or** that the condition was not proximately caused by the employment. Without one of the necessary elements present, the condition would fail to meet the definition of an occupational disease.

This very issue was discussed in another case involving a firefighter and the presumption of occupational disease under RCW 51.32.185. In *Gorre v. City of Tacoma*, \_\_\_ P.3d \_\_\_ 2014 WL 1632233 (Div. 2, April 24 2014), the firefighter suffered from a respiratory condition. Neither the Board of Industrial Insurance Appeals nor the superior court believed the firefighter's particular respiratory condition qualified as a presumptive firefighter occupational disease under RCW 51.32.185. Therefore, the firefighter was not given the benefit of the presumption and carried the burden of proof to establish his condition

was an occupational disease. The Court of Appeals reversed, finding that the firefighter's respiratory condition did qualify under RCW 51.32.185 as a presumptive occupational disease and that the City should have had the initial burden to rebut the presumption. Importantly, at the end of its opinion, the Court of Appeals remanded the case to the Board for reconsideration with the instructions

(1) to accord Gorre RCW 51.32.185's evidentiary presumption of occupational disease and (2) to shift the burden of rebutting this presumption to the City to disprove this presumed occupational disease by a preponderance of the evidence that the disease did not arise naturally or proximately out of Gorre's employment. (emphasis added).

By using the disjunctive "or," the Court of Appeals recognized the City could meet its burden by presenting sufficient evidence to dispute either the naturally or proximately element of an occupational disease claim.<sup>1</sup>

In this case, the superior court erred in its statements as to what evidence is necessary to rebut the presumption of occupational disease. Instruction No. 9 incorrectly related to the jury that at the Board, the City carried the burden of proof to rebut the presumption that "1) claimant's malignant melanoma arose naturally out of his conditions of employment

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<sup>1</sup> The City acknowledges that Respondent's Brief accurately cited dicta in the *Gorre* opinion where the conjunction "and" is used in place of "or" when discussing the presumption. RB 12. However, greater weight should be accorded the Court's instructions to the Board, where it can be expected the Court was more careful in choosing its language.

as a firefighter and, 2) his employment is a proximate cause of his malignant melanoma.” CP 1768. Thus, the jury was incorrectly instructed that in order to overcome the presumption, the City carried the burden to disprove *both* the arising naturally element and the proximate cause element of an occupational disease claim. This was an incorrect statement of the law.

Furthermore, Question No. 1 of the Special Verdict Form specifically required the jury to determine if the Board was correct in finding the City had rebutted the presumption. CP 1775. Thus, the jury was incorrectly instructed that to answer this question it must examine the evidence and determine, by a preponderance of the evidence, that both the arising naturally and the proximate cause elements had been refuted by the City.

Jury Instruction No. 9, Jury Instruction No. 10 and the Special Verdict Form are all legally erroneous, requiring the verdict be overturned and the case remanded for trial. Not only was the jury erroneously told it was to examine the Board’s legal conclusion that the City had rebutted the presumption, but the jury was erroneously informed that in order to rebut the presumption, the City had to have proven both that Larson’s melanoma did not arise naturally and proximately from his employment as a

firefighter. *Anfison v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (Jury instructions are insufficient if they misstate the law); *Hall v. Corp of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972).

**C. The City Properly Preserved Its Objection To Jury Instruction No. 9.**

Larson contends the City failed to preserve its objection to Jury Instruction No. 9 because the City did not adequately explain the basis of its objection. CR 51(f) provides:

Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

One purpose of CR 51(f) is “to clarify ... the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.” *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979). Another purpose is “to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.” *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d

111, 114, 587 P.2d 160, (1978). “The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983). However, clarity of argument is not determinative. *Trueax v. Ernst Home Center Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

In this case, the discussion of Jury Instruction No. 9 encompasses over nine pages of the trial transcript. RP 765-774. Throughout the discussion, the City maintained that the instruction was confusing and an incorrect statement of the law. The City argued that, as proposed, the instruction misstated the nature of the City’s burden before the Board to rebut the prima facie presumption of occupational disease. The City also argued that as the superior court was crafting the instruction, the burden of proof was being confused with a burden of production. To that end, the City pointed out that both *Raum* and RCW 51.32.185 illustrate that the presumption is an evidentiary presumption that can be overcome with evidence of other occupational or non-occupational causes of the condition and that the City does not have a burden to disprove Larson’s employment was a proximate cause of his melanoma. RP 771-772. The trial judge disagreed with the City’s position and crafted Jury Instruction

No. 9 based on Larson's proposed jury instruction No. 11 with additional language.<sup>2</sup>

Once Jury Instruction No. 9 was crafted in its final form, the City formally took exception to the instruction. Again, the City asserted the instruction was not a correct statement of the law. TR 830. Additionally, following a break in the proceedings the City again sought to preserve the record. Co-counsel for the City put on the record the City's position that the superior court was incorrectly applying the evidentiary presumption to place a burden of proof on the City to disprove an occupational disease has occurred. TR 835. The court stated that the record was clear, that it had made its ruling, and that it was ready for the jury to be brought in. Following this, counsel for the City further sought to explain that the application of the presumption also goes to "question number nine. It's a twofold question that requires us to rebut it, two separate propositions in that." Ideally, the City would have had more opportunity to explain its point, but the Court called to bring in the jury. TR 835.

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<sup>2</sup> The superior court's rejection that RCW 51.32.185 creates an evidentiary presumption is further illustrated at TR 783-792. In this colloquy the court revisits how the presumption operates and references its earlier ruling on instruction "number eight" as a correct statement of law, while recognizing the statute is not "flushed out" and maybe we will "make some new law." TR 791. Notably, the superior court must have meant instruction number nine, which deals with the burden of proof and not number eight which are the findings made by the Board.

On at least four separate occasions the City sought to explain that Jury Instruction No. 9 was a misstatement of law and incorrectly applied the burden of proof on appeal to the superior court. The City also attempted to point out that Instruction No. 9 had two separate propositions the City would be required to rebut as the instruction was crafted. The trial judge was therefore apprised of the nature and substance of the City's objections sufficiently to preserve its objection that Jury Instruction No. 9 is a misstatement of the law.

**D. The Jury's Verdict Is Not Supported by Substantial Evidence.**

The jury answered "No" to the first question on the 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 presumptions 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, then answer Question 2.)

Again, without waiving its objection that the jury should never have been asked whether the Board was correct in finding that the City had successfully rebutted the prima facie presumption of occupational disease,

the City asserts that there can be no dispute that it did in fact produce substantial evidence to rebut the presumption. In deciding that the Board was incorrect in finding that the City had rebutted the presumption that Larson's melanoma was an occupational disease, the jury should have only been examining the evidence put forth by the City. However, when examining the evidence submitted by the City on this issue, there is absolutely no support for the jury's verdict. The City produced substantial evidence that Larson's melanoma arose solely from his ultraviolet (UV) exposure and his genetic factors.

RCW 51.32.185(1) provides a litany of evidence that the employer may submit to rebut the presumption of occupational disease, which "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." Clearly, the statute anticipates only examination of the evidence **produced by the employer** in deciding the issue. This approach is supported by *Raum*, where the appellate court examined only the testimony presented by the employer and found that the employer had rebutted the presumption with medical testimony that specific factors other than employment caused Raum's coronary artery disease. *Raum*, 171 Wn. App at 153.

The City presented the testimony of three witnesses (Drs. Chien, Weiss and Dick) as to the cause of Larson's melanoma. All three medical experts testified that Larson's melanoma was caused by UV exposure and genetic factors and not his work as a firefighter.

Andy Chien, M.D., Ph.D., a leading researcher in the diagnosis and treatment of melanoma, testified:

Q. Do you have any opinion as to the cause of this malignant melanoma?

A. Yes.

Q. What is your opinion, Doctor?

A. I believe that his melanoma was a result of predisposing genetic factors and ultraviolet light exposure.

RP 608. Dr. Chien further testified that Larson would have contracted melanoma had he never worked as a firefighter. RP 609.

Dr. Sarah Dick, Larson's treating dermatologist, testified:

Q. With the information that we have today and with the knowledge you have of Mr. Larson through treating him as his dermatologist, what is your medical opinion as to the probable cause of his melanoma?

A. To the best of my recollection of his history, it would be my highest suspicion that the most contributing factor would be sun exposure.

Q. If he used tanning beds over the years, would that be a contributing factor?

A. Let me rephrase that. UV exposure.

RP 730. Dr. Dick also testified that, more probably than not, Larson would have gotten melanoma had he never worked as a firefighter. RP 732.

Finally, Noel Weiss, M.D., Dr. PH., an epidemiologist and biostatistician in public health, testified that the medical literature which explored a possible relationship between occupational exposures and the development of melanoma did not show that firefighters were subject to an increased incidence over the general population. RP 666-667.

The testimony which the City presented to rebut the prima facie presumption of occupational disease came from these three witnesses. The City presented substantial evidence that Larson's melanoma was caused by UV exposure and genetic factors. There is no conclusion or inference that can be derived from the evidence presented by the City to support the jury's verdict.

Larson erroneously asserts that to rebut the presumption, the City had to prove exactly when Larson developed his melanoma, the quantity of UV exposure necessary to contract melanoma, and the carcinogenic agents to which Larson was exposed. Larson also erroneously asserts that the City had to "disprove firefighting as a cause." RP 18. However, Larson cites no authority for his assertions, and a clear reading of the

statute mandates only that the City present a preponderance of evidence rebutting the presumption of firefighting as the cause by putting forth evidence as to an alternate cause.

There is no substantial evidence or reasonable inferences to sustain the jury's verdict that the City failed to rebut the presumption. Accordingly, this court, as a matter of law, should set aside the jury's verdict. *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

**E. The Testimony Of Dr. Kenneth Coleman Should Have Been Excluded Or Limited.**

All, or at least portions of the testimony of Dr. Kenneth Coleman, should have been stricken by the superior court.

1. Dr. Coleman Was Not A Qualified Medical Expert.

At the heart of this case is the cause and origin of melanoma. That information and expertise would reside with medical researchers of melanoma, dermatologists and oncologists who treat melanoma, and epidemiologists who look for causal relationships. Dr. Coleman is simply a family practice physician with none of that expertise:

Q. Are you board certified in oncology?

A. No, I'm not.

Q. Dermatology?

A. No.

Q. Have you – do you have any specialized training in the diagnosis or treatment of malignant melanoma?

A. No. Other than my – other than my basic training. I'm not.

Q. And I take it you have done no independent medical research of melanoma and its cause and stuff. I mean, you've reviewed the literature you testified about, but you've not – you have not undertaken any studies or research on your own.

A. I have not been a malignant melanoma researcher other than reading the literature. That's correct.

RP 516.

Furthermore, Dr. Coleman admits he is not an expert in melanoma:

Q. Would it be fair to say you would not consider yourself an expert in the diagnosis of malignant melanoma?

A. Well, I'm an expert at it in terms of a family physician in terms of skin diseases, doing biopsies, recognizing changes in skin lesions and that sort of thing, but I'm not a dermatologist.

RP 517.

Dr. Coleman is just a family practice physician who read 12 articles and offered his opinions as to possible conclusions that could be drawn from them related to the increased incidence of melanoma in firefighters. He “acquired” his expertise as to the alleged increased incidence of melanoma in firefighters by reading these 12 articles. By that definition, anyone could have been an expert.

The Court should have excluded the testimony of Dr. Coleman. Not only was he not a qualified expert, but his testimony was speculative, at best.

2. Portions Of Dr. Coleman's Testimony Did Not Comply With ER 803(a)(18) And Should Have Been Stricken.

Assuming the superior court did not err in allowing Dr. Coleman's testimony, at least portions of his testimony should have been stricken by the superior court as inadmissible hearsay. Information contained in medical articles is inadmissible hearsay unless it falls within one of the exceptions to the hearsay rule. ER 803 provides those various exceptions. Specifically, ER 803(a)(18) – Learned Treatises provides:

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross examination or **relied upon by the expert witness in direct examination**, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. (Emphasis added.)

ER 803(a)(18) provides for the use statements contained in learned treatises in different ways, depending on whether the statements are being used in the cross examination or direct examination of an expert. It states that during direct examination, an expert witness **may rely on statements** contained in learned treatises in direct examination. ER

803(a)(18) does not state that statements contained in learned treatises may be called to the attention of an expert witness during direct examination.

In this instance, Larson did not ask Dr. Coleman if there were any statements contained in these learned treatises which supported his opinions. Instead, Larson called out statements from the medical articles and read them to Dr. Coleman. That may have been appropriate if Larson had been cross examining Dr. Coleman, but Dr. Coleman was Larson's witness.

By allowing Larson to read statements from these articles and then asking Dr. Coleman if he agreed with the statement, Larson was basically testifying as his own expert witness. Such an approach is clearly not consistent with ER 803(a)(18), and it was error for the superior court to permit this type of testimony. Furthermore, Larson cites no authority for his unique interpretation as to the use of learned treatises.

**F. The Superior Court Erred In Awarding Attorney's Fees To Larson.**

The trial court incorrectly awarded Larson attorney's fees and costs for the appeal before the Board. Larson's position is that because he was successful in his appeal to the superior court he is also entitled to his attorney's fees and costs for the proceeding before the Board where he

was unsuccessful. His position is contrary to the language and construction of RCW 51.32.185(7).

Larson relies, in part, on RCW 51.52.130 for his claim that he is entitled to attorney's fees through all proceedings related to this matter. However, RCW 51.52.130(2) clearly states that "in an appeal to the superior or appellate court involving the presumption of RCW 51.32.185, the attorney's fees shall be payable as set forth under RCW 51.32.185." Therefore, it is only RCW 51.32.185 which governs Larson's application of attorney's fees in this instance.

RCW 51.32.185(7)(a) and (b) differentiate between attorney's fees available following an appeal to the Board verses an appeal to any court. Under RCW 51.32.185(7)(a) attorney's fees are awarded only if the claim for benefits is granted by the Board.<sup>3</sup> The condition precedent to an award of attorney's fees is therefore successfully obtaining benefits from the Board. Here, the final decision of the Board denied Larson's claim for benefits thereby precluding any award of attorney fees for the appeal.

In contrast, RCW 51.32.185(7)(b) governs an award of attorney's fees if the Board's decision is appealed to any court. Here, Larson was

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<sup>3</sup> Notably, attorney fees are only available to a successful claimant/employee. An employer does not have a right to attorney fees even if they are successful in opposing a claim for benefits.

successful before the superior court and thus entitled to reasonable costs and fees. What Larson is not entitled to is to conflate the two separate sections of RCW 51.32.185(7)(a) and (b) into a claim for all of his attorney's fees and costs. Such a strained interpretation ignores the very construction of the statute and its wording.

Larson suggests that because RCW 51.32.185(7)(b) contains the phrase "of the appeal" he is entitled to fees and costs throughout the litigation. In essence he argues the entire history of his claim following the Department's decision is one appeal. His logic however is flawed because there are several stages in pursuing a claim for benefits where a final decision must be issued before a right to appeal arises. Thus, there are potentially multiple stages to the litigation, with separate and differing appeals arising at each stage. For example, here the City appealed the Department of Labor and Industry's final decision to allow Larson's claim. The Department's decision was then reviewed by the Board of Industrial Insurance Appeals. This would constitute the first appeal within this matter. At this stage, a final decision was issued by the Board denying Larson's claim for benefits. As such, under RCW 51.32.185(7)(a) Larson was not entitled to fees and costs because he was not the prevailing party "of the appeal" and did not obtain industrial insurance benefits.

Larson then appealed to superior court for review of the Board's decision. This was the second appeal within this matter. Here at superior court, Larson was successful in obtaining benefits and therefore entitled to fees and costs for his appeal before the superior court under RCW 51.32.185(7)(b). Importantly, the decision that was appealed by Larson was the Board's decision not the earlier final decision of the Department. Thus, "the appeal" as contemplated in RCW 51.32.185(7)(b) is the review of Board's final decision by the superior court.

In sum, the Legislature created two separate provisions within RCW 51.32.185 to address when a claimant, if successful in obtaining benefits, may be awarded fees and costs. Larson simply ignores the wording and construction of RCW 51.32.185 in an attempt to reach back in time and obtain fees and costs for an unsuccessful result before the Board. Should this court not remand this matter back to the superior court for the reasons set forth above, this case should be remanded with instructions that Larson is only entitled to attorney's fees and cost for his appeal from the Board's decision to superior court.

### **III. CONCLUSION**

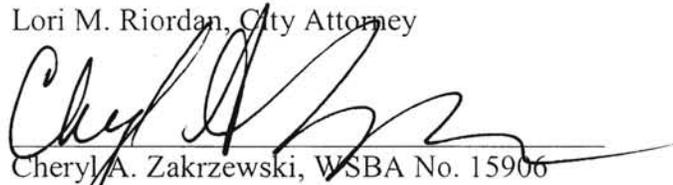
The superior court's instructions to the jury were not a correct statement of the law. They were prejudicial to the City as a matter of law.

The superior court's errors directed the jury to apply an incorrect burden of proof, and the prejudice to the City can be only be remedied by remanding this matter for a new trial.

Dated this 27<sup>th</sup> day of May, 2014.

Respectfully submitted,

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

A handwritten signature in black ink, appearing to read "Cheryl A. Zakrzewski", written over a horizontal line.

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

**CERTIFICATE OF SERVICE**

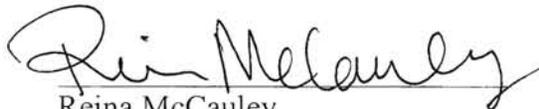
I am a citizen of the United States and employed in King County, Washington. I am over the age of 18 years and not a party to the within-entitled action. My business address is 450 110<sup>th</sup> Avenue NE, Bellevue, WA 98004. On May 27, 2014, I served via ABC Legal Messenger and E-mail a copy of the foregoing *Reply Brief of Appellant City of Bellevue* on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 27<sup>th</sup> day of May, 2014.

  
Reina McCauley  
Legal Secretary

2014 MAY 27 PM 2:52  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON