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**SUPREME COURT OF THE STATE OF WASHINGTON**

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WILFRED A. LARSON,

Respondent,

v.

CITY OF BELLEVUE,

Petitioner,

and

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**SUPPLEMENTAL BRIEF**  
**DEPARTMENT OF LABOR & INDUSTRIES**

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 **ORIGINAL**

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## I. INTRODUCTION

The burden of persuasion in an appeal of a Board of Industrial Insurance Appeals decision to superior court is on the appealing party. This bedrock principle applies regardless of whether the appellant is the claimant, the employer, or the Department of Labor and Industries. RCW 51.52.115. The Court of Appeals erred in concluding that the firefighter presumption found in RCW 51.32.185 somehow takes precedence over this appellate procedure. It does not.

When the Legislature enacted RCW 51.32.185 to create a rebuttable presumption for firefighter occupational diseases, it did not alter the ultimate burden of persuasion for workers' compensation claims. Instead, it merely created a "prima facie presumption," which by the definition of "prima facie," places the burden of production on employers or the Department to come forward with evidence to rebut the statutory presumption. If the presumption is successfully rebutted, it disappears from the analysis. The burden then shifts back to the firefighter to prove that his or her disease is, in fact, naturally and proximately caused by the employment.

Whether the burden of production has been satisfied is a question of law that only a judge can decide. The trier of fact has no place deciding such questions of law, and it was error for the superior court to submit the question to the jury here. The Court of Appeals erred in concluding otherwise.

This Court should reverse in order to reinstate these long standing principles.

## II. STATEMENT OF THE ISSUES

1. Does a special burden of proof apply in firefighter-presumption cases under RCW 51.32.185 at the superior court, or does RCW 51.52.115's application to "all" court proceedings control to place the burden of proof on the appealing party?

2. Is the burden of persuasion on the non-appealing party at superior court when case law has placed it on the appealing party?

3. Did the trial court err in instructing the jury about the burden of proof at the Board when *La Vera v. Department of Labor & Industries* specifically prohibits instructing the jury about the burden at the Board?

## III. STATEMENT OF THE CASE

### A. Statutory Background

The Industrial Insurance Act, RCW Title 51, provides benefits to workers suffering disability from occupational diseases in the course of their employment. RCW 51.32.180. Like with all workers' compensation claims, if challenged, the burden of proving entitlement to benefits for an occupational disease ultimately falls on the worker. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015); *see also Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958) ("persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act"). Accordingly, the worker must show that his

or her disease arose naturally and proximately out of the specific employment. *Gorre*, 184 Wn.2d at 33; RCW 51.08.140 (definition of occupational disease).

For firefighters, however, the law provides a “prima facie presumption” that certain diseases are occupationally related. RCW 51.32.185(1). In other words, the firefighter does not have to come forward with evidence that establishes that the disease arises naturally and proximately from his or her employment. *Raum v. City of Bellevue*, 171 Wn. App. 124, 141, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024, 301 P.3d. 1047 (2013). Instead, if the worker meets the four-corner requirements of RCW 51.32.185 (e.g., a firefighter, working full-time, diagnosed with specified cancer, etc.) and otherwise qualifies, the Department presumes that the worker is entitled to benefits. RCW 51.32.010, .180, .185.

The law however also specifies that the firefighter presumption is rebuttable. RCW 51.32.185. Accordingly, an employer may challenge application of the presumption by presenting evidence to the Department that rebuts the presumption or by appealing to the Board of Industrial Insurance Appeals (Board). RCW 51.52.050(2). At the Board, through an evidentiary hearing, the employer may rebut the presumption by establishing among other factors that the firefighter’s lifestyle, hereditary factors, or exposure from nonemployment activities caused the disease. RCW 51.32.185(1). If the employer provides a preponderance of evidence to rebut the presumption, the firefighter may still receive benefits by

proving to the Board that the disease arose naturally and proximately from employment. *Gorre*, 184 Wn.2d at 33 (“A firefighter who does not qualify for RCW 51.32.185(1)’s presumption may still receive benefits, but he or she *retains the burden of proof.*” (emphasis added)); *Raum*, 171 Wn. App. at 141 (“If RCW 51.32.185’s rebuttable evidentiary presumption applies, [the] burden shifts to the employer *unless and until the employer rebuts the presumption.*” (emphasis added)).

Any party aggrieved by the Board’s decision may appeal to the superior court. RCW 51.52.110. The hearing is de novo, but the superior court may not receive evidence or testimony other than that contained in the Board’s record. RCW 51.52.115. “In all court proceedings . . . 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.*” RCW 51.52.115 (emphasis added); *see also Harrison Mem’l Hosp. v. Gagnon*, 110 Wn. App. 475, 477, 40 P.3d 1221 (2002) (“Under RCW 51.52.115, that burden [of persuasion] rests on whoever is attacking the findings and decision of the Board of Industrial Insurance Appeals.”).

*[P]rima facie’ means that there is a presumption on appeal that the findings and decision of the board, based upon the facts presented to it, are correct until the trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand.*

*Allison v. Dep’t of Labor & Indus.*, 66 Wn.2d 263, 268, 401 P.2d 982

(1965) (emphasis added). “If the trier of facts, be it jury or judge, reaches a different conclusion from the Board *on the facts*, then the prima facie presumption of correctness has been overcome.” *Groff v. Dep’t of Labor & Indus.*, 65 Wn.2d 35, 43, 395 P.2d 633 (1964) (emphasis added).

It was against this statutory backdrop that Larson’s occupational disease claim proceeded.

**B. Larson’s Melanoma Was Presumed To Be an Occupational Disease, and the City Was Required To Rebut This Presumption**

Wilfred Larson, who works as both a firefighter and an EMT for the City of Bellevue (the City), filed a workers’ compensation claim alleging that a malignant melanoma on his back was an occupational disease. The Department ordered Larson’s claim allowed based on the statutory presumption in RCW 51.32.185. CP 37. The City appealed the Department order to the Board. CP 40.

At the Board, the City rebutted the presumption that Larson’s malignant melanoma was caused by his occupation through three expert witnesses.

Andy Chien, MD, a board-certified dermatologist specializing in melanoma, testified that melanoma is caused by a variety of complex genetic predisposing factors and by exposure to ultraviolet light, both from the sun and from tanning beds. RP 573-77, 589-603, 608-09. Larson was exposed to ultraviolet light through outdoor recreation and in tanning beds. RP 284-92. Dr. Chien also testified that melanoma is not a systemic

disease and does not arise from inhalation of chemicals or exposure to chemicals. RP 604, 644-45. Dr. Chien concluded that Larson's melanoma was caused by his occasional exposures to ultraviolet radiation and genetic risk factors. RP 608. Thus, Larson's working conditions did not play a role in the development of his melanoma. RP 608-09.

Sarah Dick, MD, Larson's treating dermatologist, testified that Larson had a number of risk factors that were not occupationally related and that predisposed him to develop melanoma, including exposure to ultraviolet light, genetic risk factors, a decreased immune system, being fair-skinned, and use of tanning beds. RP 714, 718, 722, 724, 726-31. Dr. Dick testified that there is no exposure unique to working as a firefighter that constitutes a risk factor in the development of melanoma and that Larson probably would have had melanoma regardless of what work he did. RP 732.

Noel Weiss, MD, an epidemiologist specializing in cancer, testified that the medical literature did not show an increased incidence of malignant melanoma in the firefighting population. RP 656, 662, 664-65. Dr. Weiss further testified that there was no scientific proof that firefighters were at an increased risk of any form of cancer. RP 664.

**C. The Board Decided That the City Had Rebutted the Presumption**

Based on the City's evidence, the Board decided that the City introduced "credible medical evidence demonstrating that Captain Larson's melanoma was proximately caused by specific factors unrelated

to his work as a firefighter.” CP 33. The Board ruled that the City had met its burden of rebutting the presumption in RCW 51.32.185 by a preponderance of evidence and Larson was thus required to prove that his malignant melanoma was in fact an occupational disease. CP 32-33.

Larson presented the testimony of one medical doctor, Kenneth Coleman, M.D. Dr. Coleman is a family practice and emergency medicine doctor who obtained a law degree in 1993 and, since 1989, has worked as a medical legal consultant. RP 408-09. Dr. Coleman testified about 12 articles that he believed indicated that firefighting is an occupation that results in increased melanoma. RP 412-30, 498-506. Based on those articles, he testified that Larson’s occupation is probably one cause of his melanoma. RP 508.<sup>1</sup>

The Board, after concluding that the City rebutted the presumption, weighed the evidence presented by both parties and found the City’s evidence to be more persuasive. CP 33. The Board reversed the Department order, directing that Larson’s claim be rejected. CP 35.

**D. The Superior Court Did Not Rule on Whether the City Rebutted the Firefighter Presumption, but Instead Gave This Question to the Jury**

Larson appealed the Board’s decision to superior court. CP 1-2. The City, at the conclusion of the testimony, asked the trial court to rule *as a matter of law* that the City met its burden of rebutting the firefighter

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<sup>1</sup> Drs. Chien and Weiss both reviewed the same 12 articles and testified that they only spoke to the incidence of disease, and not to causation, and that the studies were otherwise unreliable with respect to both incidence of melanoma and causation. RP 651-52, 662-87.

presumption under RCW 51.32.185 and that the only issue before the jury was whether Larson proved that his melanoma *was in fact* an occupational disease. RP 753-54. The trial court denied the City's motion. RP 754. The trial court then turned to a discussion of the jury instructions and verdict form. RP 758.

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

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable, and it is for you to determine whether it is rebutted by the evidence.

The burden of proof is on the firefighter to establish by a preponderance of the evidence that the decision is incorrect.

*At the hearing before the Board of Industrial Insurance Appeals, the burden of proof is on the employer to rebut the presumption that 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.

CP 1768 (emphasis added). The City took exception to this instruction. RP 835. The City argued that the instruction was confusing and that it misstated RCW 51.32.185. The City stated that the trial judge was confusing a burden of production with a burden of proof. RP 777, 785-92. It is clear from the context that by “burden of proof” the City meant the burden of persuasion. RP 777, 785-92. The City further argued that the City had met the burden of production at the Board, that on appeal at superior court it no longer bore a burden of production, and that the burden of proof was on Larson at superior court. RP 777, 785-92.

The parties offered different verdict forms. CP 1703, 1748-50. The trial judge adopted Larson’s verdict form. RP 823-25. It read:

Question 1: Was the Board of Industrial Insurance Appeals correct in deciding that the employer rebutted by a preponderance of the evidence the presumption that plaintiff’s malignant melanoma was an occupational disease?

Yes or No?

If you answered “No” to question one, do not answer any further questions.

Question 2: Was the Board of Industrial Insurance Appeals correct in deciding that the plaintiff did not prove by a preponderance of the evidence that his malignant melanoma was an occupational disease?

Yes or No?

CP 1775-76.

After taking exceptions to individual instructions, and before the jury was instructed, the City further took exception to the trial judge’s

approach to RCW 51.32.185's prima facie firefighter presumption. It stated that the instructions erroneously created a presumption that occupational disease had been proved and placed the burden on the City at superior court to disprove that Larson's melanoma was an occupational disease. RP 835. The trial court did not revise its rulings regarding the instructions or verdict form in response to the City's exceptions.

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

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

RP 912.

The jury found for Larson, answering "no" to the first question of whether the Board was correct in deciding that the City had rebutted the presumption by a preponderance of the evidence. CP 1775-76, 1900. The trial court entered judgment for Larson. CP 1900-01.

**E. The Court of Appeals Affirmed the Trial Court by Placing the Burden of Proof on the City**

The City appealed and the Court of Appeals affirmed. *Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015), *overruled on*

*other grounds, Clark County v. McManus*, \_\_ P.3d \_\_, 2016 WL 1696759 (April 28, 2016). The Court of Appeals suggested the burden of proof was on the City at superior court:

The text of RCW 51.32.185(1) supports the conclusion that this statute shifts both the burden of persuasion and production.

*Id.* at 871.

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.

*Id.* at 875. The Court of Appeals did not discuss or cite to RCW 51.52.115 regarding the appealing party's burden of proof at superior court. The City moved for reconsideration, arguing that the decision conflicts with RCW 51.52.115. The Court of Appeals denied the motion. The City petitioned for review, which this Court granted.

#### **IV. ARGUMENT**

Firefighters benefit from a presumption of occupational disease at the Board under RCW 51.32.185. Under this statute, there is a prima facie presumption that certain conditions are occupational diseases unless the employer rebuts the presumption. RCW 51.32.185. Here, Larson's melanoma was presumed to be an occupational disease at the Board hearings, but the City presented evidence that the Board determined rebutted that presumption. As the presumption had been rebutted, it

disappeared from the analysis and the Board next had to determine if Larson proved that he had an occupational disease. *Raum*, 171 Wn. App. at 141.

When Larson lost at the Board, the applicable presumption changed at superior court. If the firefighter loses at the Board, the burden does not shift to the employer under RCW 51.32.185. Instead, RCW 51.52.115 places the burden on the firefighter to prove that the Board's order is incorrect.<sup>2</sup> That the appealing party has the burden of proof is well accepted in workers' compensation law.

The question before this Court then is how RCW 51.32.185 and RCW 51.52.115 interact. If the appealing party is the claimant, it is error to say that the employer has the burden of proof under RCW 51.52.115. But the Court of Appeals effectively held that RCW 51.32.185 trumps RCW 51.52.115 by placing both the burden of production and the burden of persuasion on the employer regardless of whether the employer was the appealing party. This was incorrect. To the extent that the firefighter presumption is relevant at the superior court, then it is a question of law for the judge to decide, not a question of fact. This approach harmonizes the statutes applicable at the Board and on appeal.

**A. The Burden of Persuasion Is on the Appealing Party at the Superior Court**

As noted previously, under the Industrial Insurance Act, “[i]n *all*

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<sup>2</sup> Conversely, the employer would have the burden if it lost at the Board and subsequently appealed.

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.*” RCW 51.52.115 (emphasis added); *Gorre*, 184 Wn.2d at 36 (“The Board’s decision and order is presumed correct, and the party challenging that decision carries the burden on appeal to the superior court.”). The Court of Appeals, however, overlooked this statutory principle to hold that, regardless of who appeals the Board’s decision, the employer or the Department has the burden of persuasion in superior court if RCW 51.32.185 applies. *Larson*, 188 Wn. App. at 875.

But the Legislature designed the statutory appeal procedure such that the party challenging the Board’s decision has the burden of persuading the trier of fact that the Board’s decision is incorrect. RCW 51.52.115. As this Court recognized over sixty years ago, “[c]ases citing this statute and reiterating the rule stated (i.e., the decision of the department is to be taken by the court as being *prima facie* correct, and the burden is upon the party attacking the decision) are almost legion.” *Olympia Brewing Co.*, 34 Wn.2d at 504.<sup>3</sup> Accordingly, “RCW 51.52.115

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<sup>3</sup> See also *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (“The Board’s decision is prima facie correct under RCW 51.52.115, and a party attacking the decision must support its challenge by a preponderance of the evidence.”); *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (under RCW 51.52.115, the burden of proof is on party attacking the Board’s decision); *Scott Paper Co. v. Dep’t of Labor & Indus.*, 73 Wn.2d 840, 843, 440 P.2d 818 (1968) (burden is on party attacking findings and decision of Board to establish incorrectness by preponderance of the evidence); *Chalmers v. Dep’t of Labor & Indus.*, 72 Wn.2d 595, 603, 434 P.2d 720 (1967) (findings and decision of Board are correct until trier of fact finds from fair preponderance of evidence that such findings and decision are incorrect);

and the applicable cases plainly allocate the *burden of persuasion* in superior court to whoever is attacking the findings and decision of the board.” *Harrison Mem’l Hosp.*, 110 Wn. App. at 484 (emphases added); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008) (appealing party has burden of persuasion at superior court).

Nothing in the plain text of the statutes or the case law suggests that the presumption in RCW 51.32.185 should take precedence over RCW 51.52.115. RCW 51.52.115 specifically addresses the burden of persuasion in “*all* court proceedings” involving an appeal from a Board decision. In contrast, RCW 51.32.185 does not specify how to approach appeals in superior court and instead, as will be explained below, creates a rebuttable presumption affecting the burden of production. Accordingly, RCW 51.52.115 is a more specific statute that should control in superior court over the general presumption in RCW 51.32.185. *See In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (specific controls general); *see also* Karl B. Tegland, 5 *Washington Practice: Evidence Law and Practice* § 301.17 (5th ed. WL) (“if a choice is necessary the ‘stronger’ presumption should be applied”).

In this case, Larson lost at the Board (CP 33-36); therefore, he had the ultimate burden at superior court of proving by a preponderance of the

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*La Vera v. Dep’t of Labor & Indus.*, 45 Wn.2d 413, 415, 275 P.2d 426 (1954); *Goehring v. Dep’t of Labor & Indus.*, 40 Wn.2d 701, 707, 246 P.2d 462 (1952); *Ferguson v. Dep’t of Labor & Indus.*, 197 Wash. 524, 531, 85 P.2d 1072, 90 P.2d 280 (1938); *Eklund v. Dep’t of Labor & Indus.*, 187 Wash. 65, 67, 59 P.2d 1109 (1936); *Grub v. Dep’t of Labor & Indus.*, 175 Wash. 70, 72, 26 P.2d 1039 (1933); *McArthur v. Dep’t of Labor & Indus.*, 173 Wash. 701, 702, 23 P.2d 417 (1933); *Knipple v. Dep’t of Labor & Indus.*, 149 Wash. 594, 600, 271 P. 880 (1928).

evidence that the Board was wrong and that he was entitled to benefits. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The Court of Appeals was wrong to have suggested otherwise.

**B. RCW 51.32.185 Creates a Rebuttable Presumption That Allocates Only a Burden of Production**

Whether the employer met its burden of production for purposes of rebutting the presumption in RCW 51.32.185 is an entirely separate question from whether the claimant satisfied its burden of persuading the trier of fact that the Board was incorrect. *See Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 42, 123 P.2d 780 (1942) (“The duty of going forward with the argument or the evidence is a duty wholly separable from that of finally establishing.” (internal quotation marks omitted) (quoting *Caswell v. Maplewood Garage*, 84 N.H. 241, 149 A. 746 (1930))). The Court of Appeals was wrong to conclude that a jury may decide as a matter of fact whether an employer has rebutted the presumption in RCW 51.32.185 when that question should be left to the judge to decide as a matter of law.

“In every case, there is both a burden of persuasion and a burden production.” *In re Dependency of C.B.*, 61 Wn. App. 280, 282, 810 P.2d 518 (1991) (citing E. Cleary, *McCormick on Evidence* 946-52 (3d ed. 1984)). The burden of production identifies whether an issue of fact is to be submitted to the trier of fact and is determined by the judge. *Id.* at 283; Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 24:5 (2d ed. WL) (“sufficiency of the evidence to take the case to the jury is a pure

question of law”). In contrast, the burden of persuasion defines how certain the trier of fact must be before resolving an issue of fact in favor of the appealing party and is determined by the trier of fact, be it the judge or the jury. *In re Dependency of C.B.*, 61 Wn. App. at 282.

By its application, RCW 51.32.185 does not affect the ultimate burden of persuasion in workers’ compensation appeals; that burden lies with the claimant who must have “strict proof of their right to receive the benefits provided by” the Act. *Olympia Brewing Co.*, 34 Wn.2d at 505; *see also, e.g., Kirk v. Dep’t of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Robinson v. Dep’t of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014).<sup>4</sup> Instead, RCW 51.32.185 creates a rebuttable presumption that establishes “which party has the burden of going forward with evidence on an issue” and disappears if the employer has met its burden. *See Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d (1983)).<sup>5</sup>

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<sup>4</sup> The reason for this strict proof is that workers benefit from a liberal construction of the Industrial Insurance Act, and in exchange they are held to strict proof of benefits, which ensures that employers are not unduly taxed for the cost of an injury. *See Kirk*, 192 Wash. at 674; RCW 51.04.040. This is consistent with the compromise between employers and employees in the Act. RCW 51.04.010. The Court of Appeals did not consider this “strict proof” requirement and its holding that RCW 51.32.185 creates a burden of persuasion would also apply to Board proceedings, which would conflict with *Olympia Brewing Co.* where the Court held that the claimant had the ultimate burden to show the Department order incorrect even in an employer appeal. *Olympia Brewing Co.*, 34 Wn.2d at 505; *In re Stevenson*, No. 11 13592, 2012 WL 5838717, at \*1 (Wash. Bd. of Indus. Ins. Appeals Aug. 3, 2012); *see also In re Watson*, No. 14 17238, 2016 WL 1534827, at \*1 (Wash. Bd. of Indus. Ins. Appeals Mar. 14, 2016); *In re Bae*, No. 13 24611, 2015 WL 5758219, at \*2 (Wash. Bd. of Indus. Ins. Appeals Aug. 6, 2015).

<sup>5</sup> As noted by the *Indian Trail* court, “[a] presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary.

The statute uses the term “prima facie presumption.” RCW 51.32.185. A prima facie presumption relates to the burden of production. *See Black’s Law Dictionary* 1382 (10th ed. 2014) (“prima facie case: 1. The establishment of a legally required rebuttable presumption. 2. A party’s production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party’s favor.”). By using this term, the Legislature evidenced intent only to allocate the burden of production and not the ultimate burden of persuasion.

That the presumption affects only the burden of production makes sense in the statutory scheme for firefighter occupational disease claims. If the judge finds that the employer has rebutted the presumption as a matter of law, the firefighter has an opportunity to go forward to prove that the disease is naturally and proximately related to employment. *Gorre*, 184 Wn.2d at 33; *Raum*, 171 Wn. App. at 141. Similarly, if the judge finds that the employer has not rebutted the presumption, then the presumption stands and the firefighter will have successfully won his or her claim. In contrast, if the presumption in RCW 51.32.185 were also to control the burden of persuasion as the Court of Appeals found below, the firefighter would lose as soon as the employer rebutted the presumption. This is because, if the burden of persuasion was on the employer, it would satisfy

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

it by presenting evidence that rebuts the presumption and no further proceedings would be necessary.

The Court of Appeals spoke in terms of the Morgan and Thayer presumptions, applying the Morgan theory. But the Morgan theory does not apply at superior court in workers' compensation cases because the burden of persuasion at superior court is on Larson as the appealing party, instead of the City. The Court of Appeals' analysis proposing the Morgan theory rested on its incorrect placement of the burden of persuasion on the non-appealing party at superior court, here the City. *Larson*, 188 Wn. App. at 871. But this is contradictory to myriad cases recognizing the burden of persuasion on the appealing party. *See, e.g., Harrison Mem'l Hosp.*, 110 Wn. App. at 477. In contrast, 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. *In re Estate of Langeland*, 177 Wn. App. 315, 321 n.7, 312 P.3d 657 (2013), *review denied*, 180 Wn.2d 1009 (2014). This theory plainly applies here.

Larson argues RCW 51.32.185 is a burden of persuasion, relying on a cite from Professor Karl Tegland's *Washington Practice* series on civil procedure that indicates that if a presumption is rebutted by the preponderance of the evidence it addresses a burden of persuasion. Answer at 15 (citing Karl B. Tegland, 14 *Washington Practice Civil Procedure* § 31.14 (2d ed. WL)). He also appears to rely on WPI 24.05 that instructs the jury about some presumptions rebutted by a preponderance of the evidence. But Larson's argument presupposes his

conclusion: the authorities he cites do not apply if the presumption relates to the burden of production.

The fact that RCW 51.32.185 allows the applicable burden of production to be satisfied by a preponderance of the evidence does not transform the question of whether the burden of production was met into a jury question. It merely provides guidance to the trial judge as to what standard to use in determining whether the employer has met the burden of production. Ordinarily the standard on a burden of production would be whether the evidence is “sufficient” or “substantial.” *Carle v. McChord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992). The Legislature, however, created a higher standard for RCW 51.32.185 than is ordinarily used to satisfy a burden of production. But it is nonetheless a burden of production and, therefore, is decided by a judge, not a jury. The Court of Appeals was wrong to conclude otherwise.

**C. The Jury Must Decide Whether the Board’s Findings Are Correct**

Over sixty years ago, this Court held that the question of the burden of proof at the board level is immaterial in an appeal to the superior court from an order of the Board. *La Vera v. Dep’t of Labor & Indus.*, 45 Wn.2d 413, 415, 275 P.2d 426 (1954). This is because the jury’s sole fact-finding role in workers’ compensation appeals is to determine whether the Board’s findings were supported by sufficient evidence, or alternatively whether the evidence preponderates against them. *La Vera*, 45 Wn.2d at 415; *Raum*, 171 Wn. App. at 139; *Harrison*

*Mem'l Hosp.*, 110 Wn. App. at 482-83. Yet, the Court of Appeals inexplicably affirmed a jury instruction in this case that informed the jury that the City had the burden of proof to rebut the presumption. *Larson*, 188 Wn. App. at 876-77. Not only was this a clear misstatement of the law, as explained above, it also unnecessarily added “complexity and confusion” to the jury’s task by conflating which party had the burden of proof at each stage in the proceedings. *La Vera*, 45 Wn.2d at 415. Because the jury instruction contains an erroneous statement of the applicable law, it is presumed to be prejudicial and must be reversed. *Lewis*, 145 Wn. App. at 318.

#### V. CONCLUSION

In all cases before the superior court, the appealing party has the burden of proving that the Board decision is incorrect. The Court of Appeals erred in concluding that the presumption in RCW 51.32.185 alters this clear statutory scheme. This Court must reverse.

RESPECTFULLY SUBMITTED this 11th day of May 2016.

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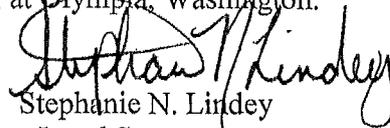
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