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**SUPREME COURT OF THE STATE OF WASHINGTON**

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DELMIS SPIVEY,

Petitioner,

v.

CITY OF BELLEVUE AND DEPARTMENT OF  
LABOR & INDUSTRIES,

Respondents.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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## I. INTRODUCTION

Under the Industrial Insurance Act, the appealing party carries the burden of proof “in all court proceedings” at superior court. RCW 51.52.115. The Legislature did not change this standard when it enacted RCW 51.32.185, which benefits firefighters by establishing a rebuttable prima facie presumption that certain cancers, including melanoma, are occupational diseases. In an appeal to superior court, both the firefighter presumption and the superior court burden of proof exist: they operate harmoniously when the judge decides whether the employer or the Department of Labor & Industries met its burden of production at the Board of Industrial Appeals to rebut the firefighting presumption. If not rebutted, the firefighter prevails. If rebutted, the firefighter retains the burden of proving an occupational disease to the jury.

After an evidentiary hearing, the Board determined that Delmis Spivey’s employer, the City of Bellevue, successfully rebutted the presumption that Spivey’s melanoma was an occupational disease. Several medical experts established that non-work related sun exposure more probably than not caused Spivey’s melanoma, which appeared on his back, below his collar line, and in an area of sun-damaged skin. The Board then concluded that Spivey had not proven that he had an occupational

disease because his sun exposure was not a distinctive condition of his employment. It was caused by ultraviolet radiation and not by firefighting.

On appeal, the superior court also determined that the City rebutted the presumption. Accordingly, the sole issue for the jury was whether the Board correctly found that Spivey's melanoma did not arise naturally and proximately out of his employment. Spivey claims this was error, but he is wrong. Whether the burden of production created by the firefighter presumption has been rebutted presents a question of law. The superior court properly determined the City had rebutted the presumption based on the evidence presented. The jury must decide whether the Board was incorrect and Spivey had in fact proved that he had an occupational disease. This Court should affirm.

## **II. STATEMENT OF THE ISSUES**

1. Is the question of whether the City rebutted the firefighter presumption a question of law when this furthers RCW 51.52.115 and when judges routinely decide burdens of production?
2. Does treating the firefighter presumption as a question of law implicate any due process issue or right to jury trial concern when Spivey will receive a trial on whether he proved he had an occupational disease?

3. Did the City rebut the presumption by producing competent medical evidence that ultraviolet radiation caused Spivey's melanoma?

### **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 51.32.010, .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) ("persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act"), *overruled on other grounds, Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). The worker, therefore, 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). Instead, if the firefighter meets the requirements of RCW 51.32.185 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 employer may rebut the firefighter presumption. RCW 51.32.185. The employer may rebut the presumption by establishing among other factors that the firefighter's lifestyle, hereditary factors, or exposure from non-employment 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 that the disease arose naturally and proximately from employment. *See 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.)).

A worker or employer may appeal the Department's decision to the Board. *See* RCW 51.52.060. At the Board, through an evidentiary hearing, the Board conducts a de novo review to determine if the presumption applies and if the Department or employer has rebutted it, considering the same factors the Department considered about the presumption. *See* RCW 51.32.185; RCW 51.52.102; *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (the Act provides for a de novo hearing at the Board in worker's compensation cases).

Any party aggrieved by the Board's decision may appeal to the superior court. RCW 51.52.110. The superior court hears the case 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. The appealing party carries the burden of proof: "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."). In this context, the appealing party must prove the Board decision incorrect by a preponderance of the evidence;

*'[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).

**B. The Superior Court Ultimately Concluded That the City Rebutted the Firefighter Presumption**

**1. A Pathology Report Found That Spivey Had "Sun Damaged Skin" with a Melanoma**

In January 2011, Spivey sought medical treatment for a spot on his chest from dermatologist Jane Leonhardt, MD. CP at 9 (Certified Appeal Board Record (BR) at 1246, 1266).<sup>1</sup> At that time, Dr. Leonhardt found many lentigines, increased pigment production caused by chronic sun exposure over the course of a person's life, on Spivey's head, neck, trunk, and upper extremities. BR at 1267-69. She also noted that Spivey did not use daily sun protection. BR at 1267.

Just under one year later, in December 2011, Dr. Leonhardt again saw Spivey for multiple spots over his body. BR at 1270. Her examination revealed an abnormal, irregularly shaped spot on Spivey's upper central

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<sup>1</sup> The Department provided a numbered copy of the Certified Appeal Board Record consisting of 1342 pages (see CP at 9). The brief will cite all references to the administrative record as BR at \_\_.

back below the level of his collar. BR at 1272. Dr. Leonhardt again noted that Spivey did not use daily sun protection. BR at 1271. Dr. Leonhardt excised the spot and sent a biopsy for a pathology report. BR at 1281-82, 1284. The report revealed that Spivey had “sun damaged skin with an atypical proliferation of melanocytes at the dermal-epidermal junction.” BR at 904, 1281-82. The spot was a melanoma. BR at 901.

**2. Medical Testimony Established That Sun Exposure, Not Firefighting, Caused Spivey’s Melanoma**

Spivey filed an industrial insurance claim with the Department seeking coverage for his melanoma as an occupational disease. BR at 360. When the Department denied the claim, Spivey sought a hearing at the Board. BR at 76-83, 86-87. At the Board, both Spivey and the City presented evidence as to the cause of Spivey’s melanoma. *See generally* BR at 213-1342.

The City of Bellevue Fire Department employed Spivey since 1995. BR at 345. During his time as a firefighter with the City, over 80 percent of his response calls were for emergency medical service. BR at 375. If on a fire call, he never responded without wearing personal protective equipment covering his entire body. BR at 375, 377. In fact, the City required him to wear his equipment, including his self-contained breathing apparatus, when exposed to any suspected combustion.

BR at 375. Spivey also served on Bellevue's surface water rescue team, but his gear included full body coverage unless practicing indoors. BR at 381-82. At no time in his career had Spivey ever filed a complaint or report with the City about suffering from sunburns, smoke inhalation, or toxic exposure while on the job. BR at 1105, 1110, 1149.

On a personal level, Spivey had been exposed to sun as a child and suffered occasional sunburns. BR at 368. He used a tanning bed occasionally for a total of approximately 90 minutes. BR at 375, 390. Active outdoors, Spivey hunted, fished, biked, and coached a high school football team. BR at 371-74. Spivey had no family history of melanoma. BR at 389, 897. He had freckles and moles all over his body. BR at 366-67. He also had a history of actinic keratosis, pre-cancerous squamous cell carcinomas caused by cumulative ultraviolet radiation. BR at 1286.

John Hackett, MD, a board-certified dermatologist, performed an independent medical exam of Spivey. BR at 967, 969, 988. He found that, on a more probable than not basis, ultraviolet light exposure caused Spivey's melanoma and that his work did not cause it. BR at 990. Based on Spivey's history of actinic keratosis, sun-damaged skin, and the melanoma itself, Dr. Hackett believed that Spivey's occupation likely did not play a role in the development of melanoma. BR at 988, 991. Dr. Hackett was aware of no relationship between chemical exposures and

melanoma. BR at 1005. Instead, melanoma development is most strongly associated with ultraviolet light, with the principal sources being exposure to sunlight and tanning beds. BR at 972-73.

Dr. Leonhardt, Spivey's treating physician, said that the medical literature supported the following factors as increasing the risk of developing melanoma: history of blistering sunburns, red/blonde hair, marked freckling on upper back, family history of melanoma, and history of actinic keratosis. BR at 1252. She also verified that the medical literature supports the relationship between ultraviolet radiation exposure and the development of melanoma. BR at 1293. Dr. Leonhardt was not aware of any evidence that would support a causal link between the development of melanoma and the inhalation of a substance or the presence of a substance, including ash or soot, on a person's skin. BR at 1287-88. She testified that while she could not give a cause or explanation for Spivey's melanoma, he had certain risk factors, including marked freckling on his upper back that showed excessive sun exposure. BR at 1305, 1317.

Noel Weiss, MD, an epidemiologist specializing in cancer, testified that medical science did not link firefighting with an increased risk of any form of malignancy, including melanoma. BR at 426-27. Any studies suggesting otherwise were based on incomplete data or had similar

rates to the general population. BR at 435-37, 440. Instead, Dr. Weiss testified that the most common, accepted risk factors for melanoma are age, hair color, skin tone, and tanning. BR at 429-30. He believed on a more likely than not basis that firefighting did not cause Spivey's melanoma. BR at 488.

Andy Chien, MD, a board-certified dermatologist, testified that the two most strongly accepted causes of melanoma are genetics and exposure to ultraviolet light. BR at 490, 493, 497, 510. Dr. Chien was aware of no medical research that indicated inhalation of smoke or exposure to diesel fumes, soot, or ash led to melanoma. BR at 516-17. He testified that, while some studies have suggested that melanoma is diagnosed at a higher rate in firefighters than the general population, no causal link could be made to occupational exposure. BR at 517-18. Instead, the studies have shown that melanoma is primarily due to episodic, high-intensity sun exposure. BR at 535.

Kenneth Coleman, MD, testified on behalf of Spivey. BR at 916. Dr. Coleman is an on-call family practice and emergency medicine doctor who primarily works as a medical malpractice attorney. BR at 916-17, 937-38. He was asked to review 12 medical articles provided by Spivey's counsel, read Spivey's discovery deposition, and to consider potential causes of Spivey's melanoma. BR at 918. Based on the articles and

without actually examining Spivey, Dr. Coleman concluded that exposure from firefighting contributed to Spivey's melanoma. BR at 924-25, 944, 953.<sup>2</sup> Dr. Coleman reached this conclusion because the articles indicated that firefighters experience an increase in certain types of cancers, including melanoma, and Spivey was a firefighter who had melanoma. BR at 954. He also thought it significant that three other City of Bellevue firefighters had melanoma. BR at 935.<sup>3</sup>

**3. The Board Decided That the City Rebutted the Firefighter Presumption and the Superior Court Agreed**

After considering all of the testimony and evidence, the Board determined that the City had rebutted the presumption with a preponderance of evidence that sun exposure caused Spivey's melanoma, not his work activities. BR at 6, 8. It then found that Spivey did not have an occupational disease because the weight of the evidence showed that his melanoma did not arise naturally and proximately out of distinctive conditions of his employment. BR at 11-12. The Board affirmed the Department order rejecting Spivey's claim. BR at 6, 12.

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<sup>2</sup> Drs. Weiss and Chein reviewed the same articles and other literature and testified they only spoke to rates of incidence of disease in firefighters, not to causation. See BR at 426-27, 517-18, 521-22.

<sup>3</sup> Dr. Hackett testified that this theory was invalid because the incidence rate of one percent per year for the City of Bellevue Fire Department is consistent with the incidence rate of the general population. BR at 994-95.

Spivey appealed the Board's decision to superior court. CP at 1-2. During pre-trial proceedings, the City moved to have the superior court determine the issue of whether it is a question of law that the presumption is rebutted. CP at 17-125.

It is the City's position that it has met its burden of production under RCW 51.32.185 by introducing evidence through both Spivey's own doctors and the City's experts that Spivey's melanoma was the result of ultraviolet exposure from the sun and genetic factors. Thus, any presumption in RCW 51.32.185 is negated, and the burden of proof to establish that this melanoma is an occupation disease rests with Spivey.

CP at 19. The City attached excerpts of the Board record supporting that position. CP at 34-122. Spivey responded, arguing specifically that the City did not rebut the presumption. CP at 128-48. According to Spivey:

The medical literature establishing causation between firefighting and malignant melanoma, the lay witness testimony, the attending physicians' testimony, and the testimony of the medical experts provide substantial evidence that a cause of Del Spivey's malignant melanoma is his career work as a City of Bellevue firefighter. There is no preponderance of rebutting evidence to the contrary.

CP at 129. Like the City, Spivey attached a declaration with excerpts of the Board record for the superior court's consideration. *See* CP at 147-48. At the conclusion of its briefing, the City asked the superior court to determine as a question of law that the City met its burden of production to rebut the evidentiary presumption "by introducing competent medical testimony that the cause of [Spivey's] melanoma is UV (solar) radiation."

CP at 153. The superior court granted the City's motion and held that the City "met its burden to rebut the presumption of occupational disease within the meaning of RCW 51.32.185." CP at 174-176. Spivey moved for reconsideration, which the superior court denied. CP at 215-22, 240.<sup>4</sup>

The jury trial to review the Board's decision that Spivey had not proven that he had an occupational disease is pending this appeal.

#### IV. STANDARD OF REVIEW

In a workers' compensation case, the superior court reviews the decision of the Board de novo on the certified appeal board record. RCW 51.52.115; *Gorre*, 184 Wn.2d at 36. On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *Gorre*, 184 Wn.2d at 36.

The appellate court reviews the superior court's decision under the ordinary civil standard of review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 10, 931 P.2d 907 (1996). The court does not review the Board's decision, nor apply the Administrative Procedure Act. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The court reviews any findings of fact for

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<sup>4</sup> Spivey contends that the superior court did not give him notice and opportunity to be heard on this issue. *See* Spivey Br. at 26-29. The facts do not support his argument. The City will brief this issue.

substantial evidence, while it considers any issues of law de novo. *Jenkins*, 85 Wn. App. at 10.

## V. ARGUMENT

### A. **The Industrial Insurance Act Places the Burden of Persuasion on the Appealing Party at Superior Court**

The Court should view Spivey's arguments in the proper procedural context under the Industrial Insurance Act. Spivey lost at the Board. On appeal to the superior court, he has the burden to show that the Board incorrectly decided that he did not have an occupational disease. RCW 51.52.115; *Gorre*, 184 Wn.2d at 36. On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *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."); *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."). Spivey, however, ignores this and seeks to place the burden of persuasion on the City at the superior court to prove that the Board's decision was correct, i.e., that Spivey's melanoma did not result from an occupational exposure. *See Spivey Br.* at 12-13, 29-30. This is not a correct view of the law.

The presumption in RCW 51.32.185 does not take precedence over the appellate procedure set forth in RCW 51.52.115. RCW 51.52.115 places the burden of proof “in *all* court proceedings” on the party challenging the Board’s decision. Accordingly, “RCW 51.52.115 and the applicable cases plainly allocate the *burden of persuasion* in superior court to whoever is attacking the findings and decision of the board.” *Harrison Mem’l Hosp.*, 110 Wn. App. at 484 (emphasis added); *see also 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 either RCW 51.32.185, RCW 51.52.115, or the Act in general suggests that the firefighter presumption changes the burden on appeal. Further, nothing in these statutes suggest that Spivey should not be “held to strict proof of [his] right to receive benefits provided by the Act.” *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 12, 163 P.2d 142 (1945).<sup>5</sup> Although the trial at superior court is *de novo*, it is still an appeal and, as an appeal, the Legislature holds Spivey to his burden to prove the Board incorrect. Spivey effectively asks the Court to reach back and have the jury consider the presumption at the Board. But *La Vera* already rejected this proposition. *La Vera v. Dep’t of Labor & Indus.*, 45 Wn.2d 413, 415, 275

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<sup>5</sup> *Olympia Brewing Co.* reinforces this where the court held that the Act places the ultimate burden on the claimant to show eligibility for benefits, regardless of whether the Act places the initial burden on another party. *Olympia Brewing Co.*, 34 Wn.2d at 505 (in employer appeal, the burden is still on claimant to ultimately show entitlement).

P.2d 426 (1954) (court warned against unnecessarily adding “complexity and confusion” to the jury’s task by conflating which party had the burden of proof at each stage in the proceedings and that it was error to instruct jury about standard at Board).

As the appealing party at superior court, Spivey carries the burden under RCW 51.52.115 to show that insufficient evidence exists to support the Board’s decision that the City rebutted the presumption and that he did not prove occupational exposure. *Kaiser Alum. & Chem. Corp. v. Dep’t of Labor & Indus.*, 43 Wn.2d 584, 587, 262 P.2d 536 (1953) (“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.”). To the extent he claims that the City has the burden of persuasion in the superior court, Spivey is wrong.

**B. The Courts May Decide the Question of Law of Whether the City Rebutted the Presumption**

The superior court appropriately decided, as a matter of law, that the City overcame the prima facie presumption that Spivey’s melanoma was occupationally related.<sup>6</sup> RCW 51.32.185 does not affect the ultimate burden of persuasion in workers’ compensation appeals like Spivey suggests. *See Spivey Br.* at 24. Instead, by its plain text, the statute creates

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<sup>6</sup> The more appropriate question on appeal should have been whether the Board correctly determined that the City rebutted the presumption. But, because it is de novo, the analysis is the same.

only a burden of production because it addresses what constitutes a prima facie case and how that prima facie case may be rebutted.

In the case of firefighters . . . *there shall exist a prima facie presumption* that . . . cancer . . . [is an] occupational disease[] under RCW 51.08.140. *This presumption . . . 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) (emphases added). When used to describe other matters, the term “prima facie presumption” generally describes a burden of production. *See, e.g., State v. Creech*, 57 Wn.2d 589, 595, 358 P.2d 805 (1961) (prima facie presumption of prejudice by jury separation can be overcome to shift the burden of proving actual prejudice to appellant); *Von Saxe v. Barnett*, 125 Wash. 639, 644, 217 P. 62 (1923) (prima facie presumption that child under six incapable of negligence may be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like); *see also Black’s Law Dictionary* 1378, 1383 (10th ed. 2014) (“prima facie presumption” refers to a “rebuttable presumption . . . [a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence”).<sup>7,8</sup>

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<sup>7</sup> “A rebuttable presumption of law being contested by proof of facts showing otherwise, which are denied, the presumptions loses its value, unless the evidence is

To support his argument that the jury must decide whether the City rebutted the presumption, Spivey cites *Allison* to argue that “prima facie” must be something that is “correct until the trier of fact finds from a fair preponderance of the evidence” that it is incorrect. Spivey Br. at 16 (citing *Allison*, 66 Wn.2d at 268). His reliance on this case is misplaced. The *Allison* Court defined the term for purposes of deciding whether a Board decision was “prima facie correct” under RCW 51.52.115. *Allison*, 66 Wn.2d at 268. The court was concerned with what it takes to satisfy the ultimate burden of proof in a superior court appeal—an issue that the Department agrees is for the trier of fact. But simply because RCW 51.32.185 also uses the term “prima facie” does not mean that it is an issue of fact for the jury, as Spivey contends. Instead, this Court should apply the term in the context of the statute in which it is found, RCW 51.32.185, which establishes a presumption that “at first sight” is believed to be correct, but loses its value upon the presentation of further evidence. *See Black’s Law Dictionary* 1378, 1382 (definition of “prima facie” and “prima facie presumption”).

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equal on both sides, in which case it should turn the scale.” John D. Lawson, *The Law of Presumption Evidence* 660 (2d ed. 1889), quoted in *Black’s Law Dictionary* 1378 (10th ed. 2014) (under “rebuttable presumption”).

<sup>8</sup> *See also* “prima facie case” defined as “[t]he establishment of a legally required rebuttable presumption” and “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” *Black’s Law Dictionary* 1382 (10th ed. 2014).

“The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.” *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983)). “When the presumption is overcome by proper evidence, it ceases to exist and cannot be further considered by the court or jury, or used by counsel in argument.” *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 42, 123 P.2d 780 (1942). As *Bradley* noted, presumptions by themselves are not evidence, they

relate[ ] only to a rule of law as to which party shall first go forward and produce evidence to sustain the matter in issue; that it will serve in the place of evidence only until *prima facie* evidence has been adduced by the opposite party; and that the presumption should never be placed in the scale of evidence.

*Bradley*, 13 Wn.2d at 42, (quoting *Sullivan v. Associated Dealers*, 4 Wn.2d 352, 103 P.2d 489 (1942)).

Spivey treats the question of the presumption in RCW 51.32.185 as dispositive of the case. Spivey Br. at 12-13. But Spivey’s argument mixes the proper inquiries and combines the burden of production with the burden of persuasion. A burden of production identifies whether the court should submit an issue to the fact finder, and a judge determines this question. *In re Dependency of C.B.*, 61 Wn. App. 280, 283, 810 P.2d 518

(1991); Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 24:5 (2d ed. 2009) (“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 the fact finder determines this. *In re Dependency of C.B.*, 61 Wn. App. at 282.

If Spivey were correct that the presumption controls the burden of persuasion, the firefighter would lose as soon as the employer rebutted the presumption because, by definition, the fact finder would already have been persuaded that the disease was not occupationally related. This does not benefit firefighters. By properly treating it as only a burden of production, the firefighter may still obtain benefits even if the presumption has been rebutted so long as he or she proves by a preponderance of the evidence that the disease arises naturally and proximately from the firefighter’s employment.

Spivey also notes that proximate cause is a question of fact; therefore, the jury must decide whether the City rebutted the presumption. Spivey Br. at 12. But burdens of production by their very nature address issues that could ultimately be an issue of fact for the jury. For example, in *Grimwood*, the court discusses elements of age discrimination that touch on factual matters, but under the burden-shifting scheme “[t]he employer’s

burden at this stage is not one of persuasion, but rather a burden of production.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 364, 753 P.2d 517 (1988).

Likewise, Spivey relies on a series of cases where the jury decided whether a presumption had been overcome. Spivey Br. at 13-14.<sup>9</sup> By citing these cases, Spivey ignores RCW 51.52.115, which controls who has the burden of persuasion in this case, and how instructing the jury on the presumption conflicts with this statutory mandate. Here, whether the employer has rebutted the firefighter presumption to allow the case to go forward differs from the entirely separate question whether the evidence supports that the disease was occupationally related. *See Bradley*, 13 Wn.2d at 42 (“The duty of going forward with the argument or the evidence is a duty wholly separable from that of finally establishing.”).

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<sup>9</sup> In *Larson*, the court of appeals spoke in terms of the Morgan and Thayer theories of presumptions. *Larson v. City of Bellevue*, 188 Wn. App. 857, 868, 355 P.3d 331 (2015), *review granted*, 184 Wn.2d 1033 (2016), *overruled by Clark County v. McMamus*, 185 Wn.2d 466, 372 P.3d 764 (2016). But the Morgan theory does not apply at superior court in workers’ compensation cases because the burden of persuasion at superior court is on the appealing party, here Spivey, 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, in this case 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.

It does not make sense to have the jury decide the preliminary question of whether the City rebutted the presumption and then decide whether sufficient evidence supports the Board's decision that the firefighting did not cause the disease. Instead, the judge should decide the question of whether the employer met its burden in overcoming the presumption. *See Jackson v. Dep't of Labor & Indus.*, 54 Wn.2d 643, 649, 343 P.2d 1033, (1959) ("It is the function of the trial court to determine the legal sufficiency of the evidence to take the case to the jury."). If the judge rules that the employer has rebutted the presumption as a matter of law then it disappears from the proceedings and the jury may weigh the evidence to determine whether the facts support the disease is, in fact, naturally and proximately related to employment. *Jackson*, 54 Wn.2d at 649. ("It is the function of the jury, under proper instructions, to determine whether they have been persuaded by the evidence."). In contrast, if the judge rules that the employer has not rebutted the presumption, then the presumption stands and the firefighter will have successfully won his or her appeal.

Spivey also asserts that because RCW 51.32.185 provides a quality of proof to rebut the presumption that this creates a question of fact. Spivey Br. at 12-13. But the fact that the statute allows the Department or employer to satisfy the applicable burden of production by a

preponderance of the evidence does not transform the question of whether the party met the burden of production into a jury question. Instead, it merely provides guidance to the trial judge as to what standard to use in determining whether the employer met its burden of production. Ordinarily the standard on a burden of production would be “sufficient” or “substantial” evidence. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992). The Legislature here chose to create a higher standard than the court normally uses to satisfy a burden of production. *Cf. Taufen*, 155 Wn. App. at 602 (Legislature provided statutory presumption to be rebutted by clear and convincing evidence.) It is nonetheless a burden of production appropriately decided by the judge, not the jury.

Treating RCW 51.32.185 as establishing a burden of production gives meaning to both it and RCW 51.52.115.<sup>10</sup> RCW 51.52.115 establishes the burden of persuasion on appeal to superior court. Accordingly, the firefighter presumption would be seemingly irrelevant if the firefighter loses at the Board. But this cannot be true. To give meaning to the firefighter presumption during appeal, the judge should first decide

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<sup>10</sup> Some courts have suggested that when there are conflicting statutes that the later enacted statute would control (here RCW 51.32.185). *E.g., Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210-11, 118 P.3d 311 (2005). But as *Gorman* recognizes, the court reconciles statutes to give meaning to them and to not leave language superfluous. *Id.* at 210. Concluding that the RCW 51.32.185 firefighter presumption obviates the challenging party’s burden of proof would read language out of RCW 51.52.115. The Court may give meaning to both statutes by allowing the judge to decide the firefighter presumption, while leaving RCW 51.52.115 intact before the jury.

whether the Board was correct in determining that the employer or the Department rebutted it. If it is not rebutted, the firefighter prevails. If it is rebutted, the firefighter must prove to the jury that he or she does, in fact, have an occupational disease. This is consistent with the quality of the statutes involved, gives effect to both statutes, and creates a harmonious statutory scheme.

**C. Determining Whether the City Rebutted the Presumption As a Question of Law Does Not Impede Spivey's Jury Trial or Due Process Rights**

Spivey attempts to elevate the application of the presumption in RCW 51.32.185 to one of constitutional magnitude, asserting that the superior court deprived him of his right to trial by jury and liberty interests. *See Spivey Br.* at 14, 29-34. This Court need not reach those constitutional issues because the Court may decide the case on statutory grounds. *See State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992). However, even if this Court does consider Spivey's constitutional claims, deciding whether the Board correctly determined that the City rebutted the presumption in RCW 51.32.185 as a matter of law does not impede any of Spivey's rights.

As an initial matter, all of Spivey's constitutional arguments presuppose that RCW 51.32.185 alters the burden of persuasion in an appeal and that it involves a question of fact. *See Spivey Br.* at 14, 29-34.

But, as already shown in the previous sections, neither postulation is accurate. RCW 51.32.185's rebuttable presumption does not alter the burden of persuasion on appeal; the burden remains with the party challenging the Board's decision. RCW 51.52.115.

Further, this Court has held that article I, section 21 of the Washington Constitution guarantees jury trials where the right to a jury trial "existed at the time of the constitution's adoption in 1889." *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 768, 287 P.3d 551 (2012). Appeals from administrative hearings, such as workers' compensation Board hearings, did not exist at the time of the adoption of the constitution. Instead, they are a creature of statute established by the Legislature. *See* Laws of 1911, ch. 74, § 20 (providing for a jury trial at court's discretion or on demand for specific cases). Therefore, there is no constitutional right to jury trial here.<sup>11</sup>

Moreover, contrary to Spivey's repeated assertions, his statutory right to a jury trial remains unimpeded because a jury will decide the material question of whether his melanoma is, in fact, an occupational disease that entitles him to coverage. RCW 51.52.115 entitles any party to request a jury trial to resolve factual disputes on appeal. *Romo v. Dep't of*

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<sup>11</sup> The court of appeals case *Spring* mentions article I, section 21, but provided no analysis about it. *Spring v. Dep't of Labor & Indus.*, 39 Wn. App. 751, 695 P.2d 612 (1985). The court's statement was dicta given that RCW 51.52.115 provides for a jury trial in workers' compensation cases. *Id.*

*Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1988); *see also Hastings*, 24 Wn.2d at 5 (the weight of evidence and credibility of witnesses are for the jury). Here, the jury will receive the Board's evidence de novo, weigh it, and decide whether the Board correctly found that Spivey's melanoma did not arise naturally and proximately out of distinctive conditions of his employment. The law grants Spivey only this—not a right to place a burden of production issue before the jury.<sup>12</sup>

Spivey also argues that he has a due process “right” to the presumption in RCW 51.32.185. Spivey Br. at 29. Specifically, he asserts the superior court deprived him of a liberty interest created from the “burden-shifting protection of RCW 51.32.185(1).” Spivey Br. at 29-30, 32-33. Spivey's constitutional claim lacks merit. State statutes can create due process liberty interests if they give substantive direction to official decisionmaking such that a particular outcome must follow. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994). It is well accepted, however, that only substantive laws can create such interests, procedural rules do not. *Id.* at 145 (citing *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983)). “[S]tate regulations

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<sup>12</sup> Spivey cites no authority for the proposition that any right to a jury trial is violated when the Legislature removes one issue from the jury but allows others. A court may generally assume that where a party cites no authority, counsel has found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). In the absence of authority, the Court should not consider the issue. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

that establish only . . . the procedures for official decisionmaking, such as those creating a particular type of hearing, do not by themselves create liberty interests.” *In re Pers. Restraint of Cashaw*, 123 Wn.2d at 144.

Nothing in RCW 51.32.185 suggests that firefighters have a liberty interest in application of the presumption. Yet Spivey asserts that RCW 51.32.185 creates a liberty interest by establishing “specific directive to the decisionmaker” regarding who has the burden of proof, what must be rebutted, and to what level the evidence must support the rebuttal. Spivey Br. at 30. Even if Spivey were correct on the substance of these issues, which he is not, RCW 51.32.185 only establishes the procedures by which the decision is made, it does not specify the substantive outcome for the decisionmaker. That is up to the discretion of the Department and Board, and in turn the judge or the jury who must evaluate the evidence to determine whether the Board’s decision was correct. While RCW 51.32.185 certainly provides a benefit to firefighters in the form of a prima facie presumption of certain occupational diseases, the presumption does not rise to the level of a substantive constitutional right. Spivey fails to prove otherwise.

**D. The City of Bellevue Rebutted the Presumption with Competent Evidence that Firefighting Did Not Cause the Melanoma**

The City submitted a preponderance of evidence that non-work, ultraviolet radiation exposure more probably than not caused the melanoma. *See* CP at 34-122. Spivey, however, argues that this did not rebut the presumption because the City was purportedly unable to “establish a non-occupational cause *and* also eliminate firefighting as a cause.” Spivey Br. at 17. He is incorrect, both as a matter of law and of fact.

**1. The Employer or Department May Rebut the Firefighter Presumption by Evidence That the Disease Did Not Arise Naturally or Proximately From the Occupation**

Almost thirty years ago, this Court confirmed that in order to obtain compensation for an occupational disease, a claim must prove two distinct prongs. *Dennis v. Dep't of Labor & Indust.*, 109 Wn.2d 467, 481-82, 745 P.2d 1295 (1987). First, the disease must “arise naturally” such that it “come[s] about as a matter of course as a natural consequence or incident of distinctive conditions” of employment. *Dennis*, 109 Wn.2d at 481. The work conditions must more probably cause the disease than conditions of everyday life or all employment in general. *Id.* Second, the disease must “arise proximately” such that “there exist[s] no intervening independent and sufficient cause for the disease, so that the disease would

not have been contracted but for the condition existing” in the employment. *Dennis*, 109 Wn.2d at 477 (quoting *Simpson Logging Co. v. Dep’t of Labor & Indus.*, 32 Wn.2d 472, 479, 202 P.2d 448 (1949)). This prong requires a causal connection between the disease and the employment established “by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment.” *Id.* Only when both prongs are established may a claimant satisfy the requirements of RCW 51.08.140 and obtain coverage under RCW 51.32.180.

Spivey argues that the presumption in RCW 51.32.185 eliminates these requirements and that a “normal” occupational disease claim differs substantially from a claim involving RCW 51.32.185. *See Spivey Br.* at 17-19, 25. Spivey is wrong. *Raum*, 171 Wn. App. at 143 (“RCW 51.32.185(1) creates no new cause of action—it establishes a ‘presumption’ that applies to certain firefighter occupational disease claims.”). While RCW 51.32.185 benefits firefighters by eliminating the requirement that the firefighter come forward with initial evidence to establish an occupational disease, the statute does not eliminate the fact that both prongs of the occupational disease definition are necessary for the disease to qualify. Accordingly, to rebut the presumption in RCW 51.32.185 that a particular disease is occupationally related to

firefighting an employer (or the Department) need only provide a preponderance of evidence that one (or both) of the prongs is lacking. Specifically, the employer may rebut the presumption by presenting competent medical testimony that shows that the disease *either* did not arise “naturally” out of the worker’s employment as a firefighter *or* that it was not “proximately” caused by firefighting.

Spivey also contends that the employer must present more than just a general disagreement that firefighting is a cause of the disease. Spivey Br. at 19-20. He also asserts that to rebut the presumption the employer must prove an actual cause for the disease. Spivey Br. at 19-20. The Department generally agrees with the first statement, but the second conflicts with the plain text of RCW 51.32.185 and compensation claims in general.

Spivey cites portions of the medical testimony that reveal that medical science does not know 100 percent the causes of cancer. Spivey Br. at 8-10, 23. Nothing in the Act or the case law has ever suggested that a party must prove the cause of an occupational disease with absolute certainty. Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606-07, 260 P.3d 857 (2011). This does not require 100 percent certainty. Further, the law requires only

testimony from which a fact finder could find on a more probable than not basis that the causation proposition is true. *See Dennis*, 109 Wn.2d at 477 (medical testimony showed that more probably than not that osteoarthritis was exacerbated by continued use of tin snips in employment); *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 637, 600 P.2d 1015 (1979) (medical testimony showed there was generally a greater probability that a person in the nursing field would contract hepatitis than someone in another employment).

Likewise, the Legislature did not require that the employer or Department rebut the presumption in RCW 51.32.185 with evidence of absolute certainty. *Raum*, 171 Wn. App. at 144 (Legislature did not provide for strict liability but rather provided for a rebuttable presumption). Instead, the Legislature allowed the employer or Department to rebut the presumption by a preponderance of the evidence. RCW 51.32.185(1). Thus, all that is required is competent medical evidence that suggests that something other than firefighting is more probably than not the cause of the disease. *See Dennis*, 109 Wn.2d at 477; *Raum*, 171 Wn. App. at 153. The City presented that here.

**2. The City Presented Competent Medical Testimony That Spivey's Melanoma Arose From Non-Occupational Ultraviolet Radiation**

The superior court correctly decided that the City rebutted the presumption that Spivey's melanoma was occupationally related. While Spivey suggests that the City relied on a lack of etiology theory to rebut the presumption (Spivey Br. at 19-22), this simply is not true. The City presented competent medical testimony that non-occupational ultraviolet radiation was the probable cause of Spivey's melanoma, as well as testimony that firefighting was likely not a cause. *See, e.g.*, CP at 55-58 (Dr. Leonhardt), 61-63 (Dr. Hackett, 65-70 (Dr. Weiss), 72-80 (Dr. Chien). Specifically Dr. Hackett found that, on a more probable than not basis, ultraviolet light exposure caused Spivey's melanoma and that his work did not cause it. BR at 990.<sup>13</sup> While none of the doctors could testify with 100 percent certainty about the exact cause of Spivey's melanoma, all agreed that there was likely no causal connection between his firefighting and the disease. *See, e.g.*, CP at 55-58 (Dr. Leonhardt), 61-63 (Dr. Hackett, 65-70 (Dr. Weiss), 72-80 (Dr. Chien). Only Spivey's expert was willing to draw that conclusion based on his review of limited medical literature and a discredited cluster theory. *See* BR at 935, 954,

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<sup>13</sup> Spivey seems to suggest that the sun exposure could have happened at work. Spivey Br. at 23. However, he always wore a shirt at work, and the melanoma was below the collar level. BR at 370, 375, 377, 381-82, 1273.

994-95. The City thus presented a preponderance of evidence sufficient for the superior court to conclude that it had met its burden of production to rebut the presumption. RCW 51.32.185 requires only this. This Court should affirm the superior court.

**E. Spivey Asks for Relief Not Possible in This Appeal**

Overreaching, Spivey asks this Court to allow his claim as a matter of law. Spivey Br. at 36. But this ignores the procedural posture of this case, where the superior court ruled that the City rebutted the presumption and held the case over for trial. If Spivey prevails here, the Court may only grant him the relief of a jury trial because he did not ask for judgment as a matter of law at the superior court or in any assignments of error. RAP 2.5; RAP 10.3. He also cannot claim fees in this matter at the Board or superior court because the superior court has not ruled on this matter. He also may not receive fees at the Supreme Court because the statute he cites, RCW 51.32.185(7), provides fees only if a claim is allowed, which has not yet happened here. RCW 51.32.185(7)(b); Spivey Br. at 33.

**VI. CONCLUSION**

The firefighter presumption does not alter who carries the burden of persuasion in an appeal to superior court. Instead, it establishes only a

burden of production, which the superior court correctly determined the City met here. This Court should affirm.

RESPECTFULLY SUBMITTED this 10th day of August 2016.

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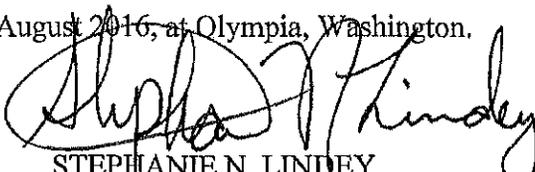
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