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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

BRIEF OF APPELLANT CITY OF BELLEVUE

CITY OF BELLEVUE
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I. INTRODUCTION

This is a worker's compensation case governed by the Industrial Insurance Act, Title 51 RCW. Under RCW 51.32.185, firefighters who develop certain medical conditions are entitled to a rebuttable evidentiary presumption that the condition is an occupational disease. If the presumption applies, the burden shifts to the firefighter's employer to present evidence that the condition was caused by factors unrelated to the firefighter's employment. If the employer rebuts the presumption, the burden shifts back to the firefighter to prove by a preponderance of the evidence that the medical condition is an occupational disease.

Wilfred Larson (Larson), a firefighter, developed malignant melanoma on his lower back. Larson claimed that he was entitled to the rebuttable evidentiary presumption under RCW 51.32.185 that his melanoma was an occupational disease. The Department of Labor and Industries (Department) allowed his claim. Larson's employer, the City of Bellevue (City), appealed the Department's decision to the Board of Industrial Insurance Appeals (Board). The Board concluded as a matter of law that the City had rebutted the evidentiary presumption under RCW 51.32.185. The Board also found that Larson had failed to prove that his melanoma was an occupational disease. Accordingly, the Board reversed the Department's allowance of the claim. Larson appealed the Board's

denial of his claim to King County Superior Court (superior court) where a jury found that the City had not rebutted the presumption that Larson's melanoma was an occupational disease. The City appealed the superior court verdict and judgment.

The superior court erred in instructing the jury on the burden of proof and the issues to be reviewed. The superior court also erred in not allowing Larson to submit certain expert testimony, in excluding a medical witness offered by the City, and in awarding Larson attorney fees and costs. The City respectfully requests that this Court reverse the superior court judgment and enter judgment in its favor as a matter of law. Alternatively, the City requests that this Court reverse the jury's verdict and remand this matter for a new trial.

II. ASSIGNMENTS OF ERROR

The City assigns error to the following decisions of the superior court:

A. The superior court erred in allowing the jury to review a legal conclusion by the Board.

B. The superior court erred in its instruction on the rebuttable evidentiary presumption contained in RCW 51.32.185.

C. The jury's verdict is not supported by substantial evidence.

D. The superior court erred in allowing Larson to present the testimony of Dr. Kenneth Coleman.

E. The superior court erred in excluding the testimony of Dr. John Hackett offered by the City.

F. The superior court erred in failing to give pattern jury instructions regarding the testimony of a treating provider, Dr. Sarah Dick.

G. The superior court erred in awarding Larson attorney fees and costs.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Where the Board found as a matter of law that the City had rebutted the presumption of RCW 51.32.185, did the superior court err when it allowed the jury to determine whether the Board had correctly decided that the City had rebutted the presumption?

B. Where an occupational disease is one that is defined as a disease which "arises naturally and proximately out of employment," did the superior court err in instructing the jury that the City had the burden of proving both (1) that the disease did not arise naturally out of the claimant's employment <u>and</u> (2) that the disease did not arise proximately out of the claimant's employment in order to rebut the presumption of occupational disease contained in RCW 51.32.185?

C. Where the City presented substantial evidence showing that Larson's melanoma arose solely as a result of his exposures to ultraviolet light and genetic factors and thus rebutted the evidentiary presumption, should the jury's verdict to the contrary be set aside?

D. Did the superior court err in allowing Larson to present the testimony of Dr. Kenneth Coleman who was not a qualified expert and whose testimony was hearsay?

E. Did the superior court err in not allowing the City to present the testimony of the physician, Dr. John Hackett, who undertook an independent medical examination of Larson and whose testimony was not cumulative of other medical witnesses?

F. Did the superior court err in not giving a pattern worker's compensation jury instruction which addressed the testimony of treating medical providers where the City offered the testimony of Dr. Sara Dick who was one of Larson's treating medical providers?

G. In a case involving the presumption established under RCW 51.32.185, a prevailing claimant is entitled to recover reasonable attorney fees and costs associated with a successful appeal. If this Court reverses the superior court verdict, should this Court also reverse the superior court award of attorney fees and costs? Alternatively, if this Court does not reverse the superior court verdict, should this Court still reverse the superior court's award of attorney fees and costs and remand the matter to the superior court with instructions to calculate the award based on attorney fees and costs incurred only in connection with the superior court appeal as provided by RCW 51.32.185(7)(b)?

IV. STATEMENT OF FACTS

A. Proceedings Before The Department And Board

Larson was diagnosed with malignant melanoma on his low back in 2009. CP 29, 281.[1] Larson filed a claim with the Department alleging that his malignant melanoma was an occupational disease. Larson's claim for worker's compensation benefits was initially denied by the Department but later allowed. CP 45, 43. The City appealed the Department's

[1] CP refers the Clerk's Papers.

allowance to the Board. CP 40-41. The City moved for summary judgment before the Board, and the Industrial Appeals Judge (IAJ) granted the City's motion, dismissing Larson's claim. CP 51-517. Larson sought review of the IAJ's dismissal. CIP 519-520. The Board reversed the IAJ's dismissal and remanded the case for hearing. CP 550-552.

A Board hearing was conducted on June 14 - 15, 2012, and upon completion of the hearing, the IAJ issued a Proposed Decision and Order on September 17, 2012 denying Larson's claim as an occupational disease. CP 26-35. In the Proposed Decision and Order, the IAJ concluded:

> Wilfred Larson's condition, diagnosed as melanoma, did not arise naturally and proximately out of the distinctive conditions of his employment with the City of Bellevue Fire Department.

CP 29. The IAJ found that the Larson's condition of melanoma was not an occupational disease. CP 29.

Larson filed a Petition for Review of the IAJ's decision which was denied on October 11, 2012. CP 8-15; 4. Accordingly, the Proposed Decision and Order of September 17, 2012 became the final Decision and Order of the Board. CP 4. The final Decision and Order of the Board reversed the Order of the Department and concluded that the City had rebutted, by a preponderance of evidence, the statutory presumption embodied in RCW 51.32.185 that Larson's melanoma was an

occupational disease and found that Larson's melanoma was not an occupational disease within the meaning of RCW 51.08.140. CP 26-35.

B. Proceedings Before The Superior Court

Larson timely appealed the final Decision and Order of the Board to King County Superior Court. CP 1-2. The City moved for summary judgment, arguing that it had presented sufficient evidence to rebut the evidentiary presumption in RCW 51.32.185 and that Larson had failed to present evidence that his melanoma was an occupational disease. CP 1905-1922.[2] The superior court denied the motion. CP 1564-1565. The matter proceeded to trial on August 7, 2013. RP 4.[3] Pursuant to RCW 51.32.115, the entire Board record was read to the jury except for testimony the superior court ordered stricken.

C. Testimony Offered By The City

The evidence read to the jury at trial included the testimony of three medical witnesses offered by the City – Dr. Sarah Dick, Dr. Andy Chien, and Dr. Noel Weiss. These witnesses testified that Larson's melanoma was caused by factors unrelated to his work as a firefighter, specifically his exposure to ultraviolet light (through sunlight and tanning beds) and his genetic risk factors (fair skin color, light colored hair, green eyes, freckles, and Scandinavian heritage).

[2] *See* Supplemental Designation of Clerk's Papers.
[3] RP refers to the Report of Proceedings before the superior court.

Dr. Sarah Dick, Larson's treating dermatologist, testified that, more probably than not, Larson's malignant melanoma was caused by his exposure to ultraviolet (UV) from the sun. RP 730. Dr. Dick testified that both blistering sunburns and intermittent intense exposures to the sun increase the risk for development of melanoma. RP 727. She also testified that the risk of developing melanoma increases with age and that fair-skinned redheads and blonds are at higher risk of developing melanoma. RP 723; 729. Dr. Dick described Larson as in his 50s, fair-skinned and with reddish hair. RP 719.

Dr. Dick testified that Larson would have gotten melanoma had he never worked as a firefighter. RP 732. Additionally, Dr. Dick never advised Larson to cease working as a firefighter, and she testified that she would have so advised if she actually thought that working as a firefighter would increase his risk of redeveloping melanoma. RP 721.

The testimony of Dr. Andy Chien, a board certified dermatologist with a Ph.D. in molecular pharmacology and biological chemistry, was also read to the jury. RP 571-572. Dr. Chien is a leading researcher in the origin and treatment of melanoma and is a published author of articles and medical textbook chapters on cancer biology and melanoma. RP 573-574. Dr. Chien, an expert in the field of melanoma, maintains his expertise by staying abreast of the research related to understanding

the causes of melanoma, by conducting and leading his own research into the causes of melanoma, and by treating patients in his clinical practice. RP 576-577.

Dr. Chien testified that it is widely accepted that melanoma is caused by exposure to ultraviolet (UV) light as well by a variety of complex genetic predisposing factors. RP 590-591. He testified that hair color, complexion, and light colored eyes have all been found to be predictors of melanoma risk. RP 591-592. Persons with red and blond hair are at the highest risk, along with persons with lighter complexions and/or green or blue eyes. RP 592. In fact, a person with blue or green eyes has a two to four fold increased risk of developing melanoma. RP 592. Significant numbers of freckles on the shoulder also increase the risk. RP 593. Dr. Chien further testified that melanoma is also most commonly found on the backs of men and is more prevalent in the Pacific Northwest than most other parts of the country. RP 607; 601.

Dr. Chien testified that research has determined that ultraviolet light, from the sun as well as tanning beds, is a known carcinogen for the skin in terms of developing melanoma. RP 602-603. He testified that intermittent exposure to the sun without sunburn can lead to the development of melanoma, as well as sun exposure on cloudy days. RP 601; 598. Dr. Chien further testified that sunscreen does not block all the

types of ultraviolet light. RP 597.

In light of the knowledge of medical science as it relates to the development of melanoma, Dr. Chien testified that, on a more probable than not basis, melanoma in a firefighter with Larson's background was caused by the firefighter's recreational exposure to ultraviolet radiation (in the form of sunlight and through the use of tanning beds) and the firefighter's genetic risk factors. RP 607-608. He testified that the work conditions of a firefighter like Larson would not have played a role in the development of the firefighter's melanoma and that a firefighter like Larson would have gotten melanoma even if he had never worked as a firefighter. RP 608-609.

The testimony of Noel Weiss, M.D., Dr.PH. was also read to the jury. Dr. Weiss is an epidemiologist at the University of Washington. RP 655. He has a medical degree from Stanford University as well as a doctorate in epidemiology and biostatistics from the Harvard School of Public Health. RP 655. As an epidemiologist, Dr. Weiss is trained in conducting and analyzing the various types of epidemiological studies. RP 656-657. Dr. Weiss has authored more than 500 peer-reviewed articles related to epidemiology. RP 656. He testified there is a wide variety in the types and significance of epidemiologic studies. RP 657-658.

Dr. Weiss testified that epidemiology is the study of the causes of disease. RP 657. Epidemiologic studies in themselves do not prove causation of any disease, but they may lead to inferences of possible causation if the results of numerous epidemiologic studies collectively are strong enough that they have a bearing on medical practice. RP 657, 658-659.

Dr. Weiss testified that he was familiar with the medical literature which explored the possible relationship between occupational exposures as a firefighter and the development of melanoma. RP 660. It was his expert medical opinion, on a more probable than not basis that these studies did not show that firefighters were subject to an increased incidence of melanoma over the general population. RP 666-667.

The City offered the testimony of Dr. John Hackett, one of the physicians which had conducted an independent medical examination of Larson, both at the Board hearing and at superior court. Dr. Hackett's testimony was excluded both at the Board and in superior court. CP 845; RP 34.

D. Testimony Offered By Larson

The perpetuation deposition of Dr. Kenneth Coleman was the only medical testimony offered by Larson. The City moved both at the Board hearing and in superior court to exclude the testimony of Dr.

Coleman. CP 631-642; 1622-1631. The City asserted that Dr. Coleman was not providing expert testimony as defined by ER 702 as he was not qualified as an expert on melanoma nor epidemiology. Additionally, the City asserted that the testimony he offered was speculative in nature. CP 1627-1628. Both the Board and the superior court permitted Dr. Coleman's testimony.

Dr. Coleman is an emergency room and family practice physician who is board certified in family practice only. RP 409. He is not board certified in dermatology, oncology, epidemiology, or biostatistics. RP 516. Dr. Coleman admitted that he had no special training in the diagnosis or treatment of melanoma and has not conducted any research in the area of melanoma. RP 516. He is also an attorney who regularly consults in medical malpractice cases for plaintiffs. RP 515; 408.

Dr. Coleman never examined or even spoke to Larson and had no specific knowledge of Larson's alleged exposures to known carcinogens over the years. RP 519-521. He simply testified as to the contents of twelve (12) medical articles (dated from 1983-2007) regarding the causes of melanoma. RP 412.

During direct examination about these articles, Larson read quotes or select passages from the articles to Dr. Coleman and then asked Dr. Coleman if the quote or passage had been read correctly. RP 414-

415; 417-418; 419-420; 424; 425-426; 498-499; 501; 502-503; 504-505. Upon further questioning about these articles, Dr. Coleman offered generalized testimony as to the cause of Larson's melanoma. For example, Dr. Coleman testified that one of the articles "supports that for Captain Larson his exposure to these agents *would suggest* that as a cause" of his malignant melanoma. RP 425. He agreed that another article provided "*weaker but still plausible* evidence has linked firefighting to increased mortality risk for melanoma." RP 419-420. In discussing yet another article, Dr. Coleman testified that "this finding *suggests* that occupational exposure *may* contribute" to melanoma incidence in firefighters and that "this *may* be an association." RP 529.

Larson himself testified about his work as a firefighter. He became a firefighter/EMT with the City of Bellevue in 1979. RP 242, 267-268. He worked as a firefighter/EMT until 2010 when he was transferred to the training division. RP 263.

Larson testified that more of the calls to which he responded were for medical services (EMT) than fire suppression. RP 268. Anytime he responded as a firefighter, he wore his firefighting gear (pants, jacket, and boots) over his standard uniform. RP 278-279. He never worked without a shirt, and he cleaned his gear and took a shower as soon as possible after responding to a fire. RP 280-281. He testified that he

wore his self-contained breathing apparatus (SCBA) any time he felt he was at risk of exposure to fumes or other substances. RP 274. Larson was not aware of any instance where he was possibly exposed to dangerous chemicals or fumes while he was not using his self-contained breathing apparatus. RP 274-275.

Larson also testified that he had Finnish, British and Italian heritage. RP 241. His wife, Melody Larson, testified that he has greenish eyes and light brown. RP 323. He admitted to being fair skinned and having freckles on his face, head, arms and shoulders. RP 282; 322-323. Larson testified that he has the type of skin where he would turn red if he was out in the sun for a short period of time. RP 282. Because of his fair skin, Larson testified that he always felt he was susceptible to skin cancer and had his wife vigilantly check his skin. RP 300-301.

Larson testified that his melanoma was located on his back and above his pant/belt line in an area that would be exposed when he was wearing shorts or swim trunks and no shirt. RP 281.

He also testified that while growing up, he routinely spent summer weekends at a cabin owned by his grandparents at Lake Kachess, just east of Snoqualmie Pass, and that he also continued to go to Lake Kachess as an adult. RP 284-285. He would swim and engage in

outdoor activities while at Lake Kachess. RP 286. As an adult, he took weeklong summer trips with his wife and children to Lake Chelan in Eastern Washington for a period of over 20 years. RP 287-289; 319-320. At Lake Chelan, Larson also engaged in outdoor activities where he would not wear a shirt. RP 289; 304. Larson admitted to one of his treating physicians that he had sun exposure while at Lake Chelan. RP 300.

To prepare for these yearly trips to Lake Chelan, Larson testified that he used tanning beds to get some color in hopes of avoiding sunburn. RP 289-290. He would only wear shorts and a swimsuit while using the tanning bed and would tan both sides of his body. RP 290. He did not use sunscreen and occasionally got red from his use of the tanning beds. RP 291-292.

Larson admitted that his dermatologist, Dr. Sarah Dick, never told him firefighting was a cause of his melanoma and never told him to cease working as a firefighter. RP 282.

E. Superior Court Rulings

At the end of the testimony at trial, the City moved for a directed verdict asking that the court find, as a matter of law, that the City had presented a preponderance of evidence rebutting the presumption that Larson's melanoma was an occupational disease. RP 753-754. Larson

argued that in order to rebut the evidentiary presumption of RCW 51.32.185(1) the City had the burden to affirmatively prove that firefighting was not a cause of Larson's melanoma. RP 754. The superior court denied the City's motion. RP 754.

The jury returned a verdict finding that the City had not rebutted that Larson's melanoma arose naturally and proximately out of his employment as a firefighter. CP 1775. Larson moved for an award of attorney fees and costs seeking all the attorney fees and costs he had incurred both before the Board and in superior court. CP 1777-1784. The superior court entered judgment in favor of Larson and awarded him attorney fees and costs. CP 1900-1901; 1902-1904. The City timely appealed the judgment entered by the superior court.

V. ARGUMENT

A. Standard Of Review.

In an industrial insurance case, it is the decision of the trial court that the appellate court reviews. RCW 51.52.140 provides that an appeal "shall lie from the judgment of the superior court as in other civil cases." The appellate court reviews whether substantial evidence supports the trial court's factual findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The appellate court conducts a de novo review of

any questions of law that are raised on appeal. *Romo v. Dep't of Labor & Indus.,* 92 Wn. App. 348 , 353, 962 P.2d 844 (1998).

B. The Board's Finding That the City Had Rebutted the Presumption In RCW 51.32.185 Was Not A Finding of Fact To Be Reviewed By The Jury.

This is a workers' compensation appeal under RCW Title 51, the Industrial Insurance Act. Larson claims he developed an occupational disease under the terms of the Act.

RCW 51.08.140 defines "occupational disease" as a disease which arises "naturally and proximately out of employment." A disease arises naturally out of employment if it is "a natural consequence or incident of distinctive conditions of his or her particular employment." *Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). A disease is proximately caused by employment conditions when "there [is] 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." *Raum v. City of Bellevue,* 171 Wn. App. 124, 141, 286 P.3d 695 (2013) (quoting from *Simpson Logging Co. v. Dep't of Labor& Indus.,* 32 Wn.2d 472, 479, 202 P.2d 448 (1949).

Generally, in a worker's compensation claim where the issue is a worker's entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympic Brewing Co. v. Dep't of Labor & Indus.,*

34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds, Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). However, RCW 51.32.185(1) contains an evidentiary burden-shifting provision for firefighters with certain occupational disease claims:

> (1) In the case of firefighters ... there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140.

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 did not dispute that Larson met his initial burden before the Board to show he had a qualifying disease - malignant melanoma - under RCW 51.32.185(1) and thus was entitled to an evidentiary 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. at 147.

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 and thus not an "occupational disease." Once the City produced a preponderance of evidence rebutting the presumption, the burden shifted back to Larson to come forward with competent evidence that he had an occupational disease. *Id.*

In its final Decision and Order, the Board issued only one factual finding related to the cause of Larson's melanoma:

> 4. Wilfred Larson's condition, diagnosed as melanoma, did not arise naturally and proximately out of the distinctive conditions of this employment with the City of Bellevue Fire Department.

CP 29. The Board found that Larson had not proven that his melanoma was an occupational disease. To have reached that factual conclusion, the Board had to have first concluded, as a matter of law, that the City had successfully rebutted the evidentiary presumption contained in RCW 51.32.185.[4]

Issues of law are the responsibility of the judicial branch to resolve. *Franklin Cy. Sheriff's Office v. Sellers,* 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Accordingly, whether the City had successfully rebutted

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[4] The Board's findings of fact were set forth in the superior court's Jury Instruction No. 8. CP 1767.

the evidentiary presumption of RCW 51.32.185 was an issue of law for the superior court to review. The City attempted to address that issue by asking for a directed verdict on the presumption at the conclusion of the case. RP 753-754. While the superior court denied the City's motion, under no circumstances should the jury have been asked to review this issue of law. It was not within the jury's purview.

However, Larson proposed a jury instruction which inappropriately imbedded the Board's legal conclusion into the factual issues to be decided by the jury. Larson proposed an instruction which informed the jury about the City's burden before the Board to rebut the evidentiary presumption of RCW 51.32.185. CP 1669 (Larson's Proposed Jury Instruction No. 11.) The court slightly modified Larson's proposed jury instruction but kept Larson's proposed language discussing the City's burden of proof before the Board to rebut the evidentiary presumption. The superior court's instruction on the burden of proof was Jury Instruction No. 9. It reads as follows:

No. 9

> 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 on the question, that the proposition on which the party has the burden of proof is more probably true than not true. (emphasis added)

CP 1768. The City objected to this instruction. CP 830-831. This instruction was confusing and misleading because it implied that the jury had some role in reviewing whether the City had met its burden of proof to rebut the presumption. It also incorrectly implied that the City had some burden of proof at the superior court. As the appealing party, Larson had the burden to prove that the Board's findings were incorrect.

Since the Board's finding that the City had rebutted the presumption was a legal conclusion reviewable only by the court, there was absolutely no reason to have included the third paragraph of this instruction. The City proposed Washington Pattern Instruction 155.03 which correctly set forth the burden of proof and did not include any

reference to the City's burden of proof to rebut the presumption. CP 1739 (City's proposed Jury Instruction No. 9.)

The superior court compounded the problem by giving Jury Instruction No. 10 which was also proposed by Larson. Jury Instruction No. 10 again implied that the jury was to review the Board's findings as to the presumption:

> No. 10
>
> The plaintiff Wilfred Larson claims that the findings and decision of the Board are incorrect.
>
> 1. Larson claims that the Board incorrectly concluded that the City rebutted the evidentiary presumption that his melanoma was an occupational disease by a preponderance of the evidence.
>
> 2. Larson claims that the Board incorrectly concluded that his melanoma did not arise naturally and proximately from the distinctive conditions of his employment as a firefighter with the City of Bellevue.
>
> The City contends that the Board correctly concluded Mr. Larson's melanoma did not arise naturally and proximately out of the distinctive conditions of his employment but arose solely as a result of factors unrelated to his employment as a firefighters with the City of Bellevue. (emphasis added)

CP 1769. The City also objected to this instruction. RP 831.

The superior court further compounded the problem by giving a Special Verdict Form which specifically asked the jury to decide if the

Board had correctly determined that the City had rebutted the presumption:

> **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.)
>
> **QUESTION 2:** Was the Board of Industrial Insurance Appeals correct in deciding that the Plaintiff did not prove be a preponderance of the evidence that his malignant melanoma was an occupational disease?
>
> **ANSWER**: _____(Write "yes" or "no")

CP 1775-1776. The City proposed a Special Verdict Form that did not present these problems. RP 1578-1579.

The adequacy of jury instructions are reviewed de novo as a question of law. *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61, 995 P.2d 621 (2000). This court reviews a challenged jury instruction to determine whether it permits the parties to argue their theories of the case, whether it is misleading, and whether the instructions when read as a whole accurately inform the jury of the applicable law. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d

921 (1993). An instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Cox v. Spangler,* 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

In this instance, Jury Instructions No. 9 and No. 10, as well as the Special Verdict Form, did not properly inform the jury as to the applicable law, were misleading, and did not allow the City to argue its theory of the case. These instructions did not accurately reflect the issues the jury was to review and improperly allowed the jury to examine a legal conclusion reached by the Board. Furthermore, in allowing the jury to examine the legal conclusion reached by the Board, the superior court, in essence, shifted the burden back to the City. The City was clearly prejudiced since the jury answered "No" to Question No. 1 on the Special Verdict Form and did not proceed further.

The jury's verdict was based on their improper review of the Board's decision that the City had rebutted the evidentiary presumption. Accordingly, the jury verdict should be reversed.

C. The Jury Was Incorrectly Instructed On The Rebuttable Presumption.

In the event that this Court determines that the jury was properly allowed to review the Board's decision as to whether the City had rebutted the evidentiary presumption contained in RCW 51.32.185, the superior

court still failed to properly instruct the jury as to the nature of that presumption.

Larson argued at trial that to rebut the presumption of occupational disease, the City had to both (1) identify a nonoccupational cause of Larson's melanoma, rebutting the "arising naturally" out of employment element; and (2) demonstrate that employment as a firefighter was not a cause of Larson's melanoma, rebutting the "arising proximately" out of employment element. However, Larson cited no case law to support his position that the City had to disprove both elements of "occupational disease." Such a reading of RCW 51.32.185(1) defies logic.

RCW 51.32.185(1) only relieves firefighters of the initial burden of proof to show both the "natural" and "proximate" elements of "occupational disease," whereas a nonfirefighter would have the burden to establish both. RCW 51.32.185(1) provides no further benefit to a firefighter.[5] If either the "arising naturally" element or the "arising proximately" element does not exist, then by definition, there is no occupational disease. Accordingly, the City may rebut the presumption of an occupational disease by showing either of the two necessary elements

[5] *See Raum*, 171 Wn. App. at 144 (explaining that RCW 51.32.185 "does nothing more than create a rebuttable evidentiary presumption" and that it "creates no occupational disease claim different from that defined in RCW 51.08.140.")

of occupational disease is lacking. To find otherwise would mean that a claimant could prove he had an occupational disease by showing either that his condition arose naturally or proximately from his employment. That would directly conflict with the definition of an occupational disease set forth in RCW 51.08.140.

The superior court's Jury Instruction No. 9 is an incorrect statement of the law as to how the presumption may be rebutted. It told the jury that in order to review whether the Board correctly found that the City had rebutted the presumption, it had to determine whether the City had presented evidence to rebut both that Larson's melanoma arose naturally out of his employment and that his employment was a proximate cause of his melanoma in order to rebut the presumption of occupational disease. The City was clearly prejudiced by the language of Jury Instruction No. 9.

Since an occupational disease is defined as a disease with two elements – naturally and proximately – the City only had to provide evidence to rebut one of the elements in order to rebut the existence of an occupational disease. The City only had to present testimony showing that either Larson's melanoma did not arise naturally out of his employment or that Larson's employment was not a proximate cause of his employment. Jury Instruction No. 9 improperly placed an extra burden on the City to

rebut both elements of an occupational disease.

The Special Verdict Form perpetuated the legal errors contained in Jury Instruction No. 9 because the jury had to look back at that instruction to answer the first question. Question 1 even refers to "presumptions" which further highlights Larson's claim that the City had to rebut two different things. However, RCW 51.32.185 contains only one evidentiary presumption – that the claimed disease "arose naturally and proximately out of employment."

The superior court's Jury Instruction No. 9 contained an erroneous statement of the law and prejudiced the City's ability to argue its theory of the case.

D. Substantial Evidence Does Not Support The Jury's Finding That The City Had Not Rebutted the Presumption of Occupational Disease But Substantial Evidence Does Support The Entry of Judgment As A Matter Of Law In Favor Of the City.

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, the jury was asked to determine whether the Board was correct in deciding that the City had rebutted, by a preponderance of evidence, the presumption that Larson's melanoma was an occupational disease. Without waiving the arguments above, the City asserts that it produced substantial evidence that Larson's melanoma arose

solely as a result of specific factors outside of the distinctive conditions of his employment. The City produced substantial evidence rebutting the evidentiary presumption, and there was no rational way that the jury could have concluded to the contrary.

The jury heard medical evidence as the cause of melanoma from three different medical experts, including one of Larson's attending physicians. This medical testimony established that the most prevalent cause of melanoma was exposure to ultraviolet (UV) light and that UV light exposure occurs through both sunlight and the use of tanning beds. It was unrefuted that sunscreen does not block all types of this dangers UV light. Sunlight which causes blistering sunburns, as well as intermittent intense sun exposure, increases the risk of developing melanoma. This medical testimony also established that the risk of developing melanoma increases with age, that with men, it more typically occurs on their backs, and that melanoma is more prevalent in the Pacific Northwest than in most other parts of the country. The medical testimony established that there are a number of genetic factors, including fair skin, light colored hair, green/blue eyes, and freckles which put a person at higher risk of developing melanoma.

The evidence also established that Larson had a variety of UV exposures over the years. He spent summer weekends at a cabin at Lake

Kachess both as a child and adult. For over 20 years, he took weeklong summer trips with his wife and children to Lake Chelan in Eastern Washington. To prepare for his yearly trips to Lake Chelan, Larson used tanning beds to get some color in the hope of avoiding sunburns while at Lake Chelan. His back was unprotected when he used these tanning beds, and the very fact he used them before going to Lake Chelan indicated he planned to expose his body (back) to the sun while at Lake Chelan. Larson recalled getting red from using these tanning beds. The use of these tanning beds and his intermittent intense exposure to the sun during these yearly week long visits to Lake Chelan increased his risk of developing melanoma.

Larson also possessed a number of genetic characteristics which increased his risk of developing melanoma: greenish eyes, light colored hair, fair skin and freckles. Larson had various exposures and risk factors for melanoma that were in no way related to the distinctive conditions of his employment as a firefighter. It was the combination of these various exposures and risk factors that led to the development of his melanoma. Drs. Dick, Chien, and Weiss all testified these factors led to the development of his melanoma and that Larson's work as a firefighter was not a proximate cause in the development of his melanoma.

An appellate court may overturn a jury's verdict if the verdict was not supported by substantial evidence. *Burnside v. Simpson Paper Company*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000).

Larson did not present substantial evidence from which the jury could have concluded that the Board was incorrect in finding that the City had rebutted the presumption. Larson only presented the testimony of Dr. Kenneth Coleman. Dr. Coleman did not offer testimony which refuted the fact that Larson had nonoccupational exposures (ultraviolet light) and genetic risk factors which led to the development of his melanoma. Dr. Coleman only offered testimony that there are some medical articles that "suggest" that Larson's "exposure" as a firefighter "might" be a cause of his melanoma.

Larson did not present sufficient evidence to persuade a rational fair-minded person that the Board was incorrect in finding that the City had rebutted the presumption of occupational disease. Accordingly, that finding of the Board should remain in place and the jury's verdict reversed on that issue.

Furthermore, Larson did not present substantial evidence to rebut the Board's finding that his melanoma did not arise naturally and proximately from the distinctive conditions of his employment. Consequently, that finding of the Board should remain in place, and this Court should exercise its authority to enter judgment as a matter of law and find that Larson's melanoma is not an occupational disease.

E. The Superior Court Erred In Not Striking The Testimony Of Dr. Kenneth Coleman.

The testimony of Dr. Kenneth Coleman should have been stricken. The City properly objected to the testimony of Dr. Coleman both during the perpetuation of his testimony on June 6, 2012 and during the Board and superior court hearings.

1. *The Entire Testimony of Dr. Coleman Should Have Been Stricken.*

The admissibility of expert testimony is governed by ER 702. Washington cases have established a two-step inquiry as to whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact under the provisions of ER 702. *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995). The City moved to exclude the testimony of Dr. Coleman under Evidence Rule 702.

Dr. Coleman did not qualify as an expert as to the cause(s) of melanoma. He is not an expert in dermatology, epidemiology or in the

causation of melanoma. Dr. Coleman is a family practice physician who has no special training in melanoma that would assist the trier of fact. Dr. Coleman was not an expert qualified to testify as to the cause or origin of melanoma. Dr. Coleman simply read a few medical articles and offered his general opinion (both medical and legal) as to their meaning.

In *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983), the court limited a research doctor to his expertise in physiology and would not let him testify regarding diagnosis and treatment because he was not legally licensed in the medical field to perform those functions and it was generally outside his expertise. Similarly here, Dr. Coleman's testimony as to the causation of malignant melanoma, and particularly in firefighters, is outside his expertise as a family practice physician.

Furthermore, Dr. Coleman's testimony was not of assistance to the trier of fact. He offered testimony that there are some medical articles indicating that there are "potential" or "suspected" carcinogens to which firefighters "may" be exposed. This testimony was, at best, speculative, and did not provide the jury with evidence from which they could conclude that there are specific carcinogens to which firefighters are exposed that more probably than not cause melanoma. Additionally, Dr. Coleman offered no competent medical testimony as to Larson even being exposed to these "suspected" carcinogens, and Dr. Coleman's

conclusion was only that the medical articles he cites "suggest" that Larson's "exposure" as a firefighter was a cause of his melanoma. The testimony offered by Dr. Coleman was purely speculative.

Expert medical testimony as to causation is only admissible if it is based upon a reasonable degree of medical certainty. The testimony must rise above speculation, conjecture, or mere possibility. The factual or scientific basis of an expert's testimony must also be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and to give at least minimal assurance that the opinions can assist the trier of fact. *State v. Maule,* 35 Wn. App. 272, 667 P.2d 96 (1993). Dr. Coleman's testimony was neither trustworthy nor reliable and invited the jury to speculate as to medical causation.

The superior court erred in allowing any testimony from Dr. Coleman.

2. *Alternatively, Specific Portions of the Testimony Of Dr. Kenneth Coleman Should Have Been Stricken.*

The testimony of Dr. Kenneth Coleman was offered by perpetuation deposition to the Board. At the time of Dr. Coleman's June 6, 2012 perpetuation deposition, the City interjected repeated objections to the direct examination conducted by Larson. During direct examination, Dr. Coleman was asked about twelve (12) separate medical articles which

Larson identified. Dr. Coleman did not refer to or mention the articles until Larson brought them up. After identifying the article, Larson proceeded to read from each article and then ask Dr. Coleman questions about what had been read to him. The City repeatedly objected to Larson reading from the articles and then asking Dr. Coleman if he had correctly read the information. The City objected to Larson's line of questioning as leading, hearsay and the improper use of learned treatises. The City objected that Larson, and not Dr. Coleman, was actually testifying though this line of questioning. The City moved to strike this testimony. CP 1094, 1096, 1098, 1100, 1101, 1104, 1105, 1108, 1110, 1113, 1116, 1117, 1119.

While the City objected to the use of all twelve articles in this way at the time of the perpetuation deposition, the IAJ did not sustain any of the City's objections. The City properly renewed its objections at the time of trial. The superior court sustained some of the City's objections, striking some of Dr. Coleman's testimony. However, the superior court still allowed Larson to read from numerous medical articles and then ask Dr. Coleman questions about what was read. Examples include the following:

> Q. Doctor, I'd like to now call your attention to article number 3 if I might, and this is from the Journal of Occupational and Environmental Medicine, Volume 48,

which was published in 2006, and this article is entitled Cancer Incidence in Florida Professional Firefighters, 1981 to 1999.

Do you have the article in front of you, Dr. Coleman?

A. Yes, I do.

Q. And this article, Doctor, calling your attention to the phrase in the first paragraph of that article, weaker but still plausible evidence has linked firefighting to increased mortality risk for melanomas and cancer of the rectum, colon, stomach, prostrate and lung. Do you see that?

A. Yes, I do.

Q. And did I read that correctly?

A. Yes, you did.

RP 419-420.[6] Similarly, the following exchange took place between Larson and Dr. Coleman:

Q. That is an article from the British Journal of Industrial Medicine and that also is dated 1993, and it's entitled Melanoma and Occupation, Results of a Case Controlled Study in the Netherlands. And Dr. Coleman, I would like to call to your attention in this article the language at page – the first page of this article, which is 642, on the right-hand side after footnote 20.

Other occupational groups in which more or less consistently increased risk of melanoma have been found in firemen, the armed forces and health care workers, such as veterinarians, dentists, pharmacists and doctors.

Did I ready that correctly, Dr. Coleman?

A. You did.

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[6] The City's objection to this line of questioning can be found at CP 1098-1099.

RP 502-503.[7] Similar lines of questioning occurred at RP 414-415; 477-418; 424; 425-426; 498-499; 501; 502-503; 504-505. (The City properly objected to these questions and answers in Dr. Coleman's perpetuation deposition.)

The content of these medical articles are clearly hearsay under ER 801 as they are out of court statements offered for the truth of the matter asserted. While it is also recognized that statements contained in learned treatises "called to the attention of an expert witness upon cross examination or relied upon by an expert witness in direct examination" are an exception to the hearsay rule under ER 803(a)(18), the statements from the articles read by Larson do not fit that exception as there was no testimony that these statements were relied upon by Dr. Coleman in providing his opinions.

The fact that Larson read passages from the articles to his own witness in direct examination and then asked Dr. Coleman if he had read it correctly does not show the trier of fact that Dr. Coleman used the statements to explain or support his testimony. The repeated interchange between Larson and Dr. Coleman over these articles was more akin to Larson testifying about the content of the articles. If Dr. Coleman had read the passages to endorse or support his opinions, such would have

[7] The City's objection to this line of questioning can be found at CP 1117.

been the proper use of a learned treatise, but that is not what occurred here.

The superior court erred in not striking all of Dr. Coleman's inappropriate hearsay testimony.

F. The Superior Court Erred When It Excluded the Testimony of Dr. John Hackett.

Dr. John Hackett (a dermatologist) and Dr. Robert Levinson, Jr. (an oncologist) were retained by the City to conduct an independent medical examination of Larson and to provide their opinions as to the cause/origin of his melanoma. CP 1423. They jointly examined Larson on October 14, 2009 and both wrote an initial report and a supplemental report. CP 1426; 1437. Dr. Hackett was the primary drafter of the reports. CP 1426. Dr. Hackett was offered by the City to testify as to his physical examination of Larson and as the cause/origin of Larson's melanoma based his examination and knowledge as a dermatologist. CP 674.

The City perpetuated the testimony of Dr. Hackett on August 3, 2011 for the Board hearing. CP 1409. Larson moved to exclude the testimony of Dr. Hackett three days before the June 14, 2012 hearing. CP 565-571 The IAJ granted Larson's motion. CP 845. The City renewed its request to offer the testimony of Dr. Hackett before the superior court. TR

29-34. The superior court also denied the City's request to offer the testimony of Dr. Hackett. TR 34.

Larson argued that the testimony of Dr. Hackett was cumulative of the testimony offered by City's other medical witnesses. The City consistently maintained that it had the right to present evidence in an attempt to rebut the presumption in RCW 51.32.185 and would seek to do so by presenting evidence from several different approaches. The City called one of Larson's medical providers, Dr. Sarah Dick, to describe the location of Larson's melanoma and her treatment of Larson's melanoma. As a treating physician, Dr. Dick was never asked to examine Larson thoroughly to ascertain which risk factors caused or contributed to his melanoma.

Dr. Hackett, on the other hand, conducted an independent examination of Larson for the specific purpose of examining all the various risk factors that may have led to the development of his melanoma and offering an opinion as to the role of those risk factors in the development of Larson's melanoma. For example, Dr. Hackett discussed Larson's use of tanning beds which are a known risk factor in the development of melanoma. CP 1428. However, Larson's treating doctor, Dr. Dick, never even asked him about the use of tanning beds. RP 725.

Dr. Andy Chien never examined Larson and was offered as a melanoma researcher with knowledge as to all known causes of melanoma and to explain when/how/why melanoma may develop in certain persons and not others. Dr. Noel Weiss never examined Larson but had fully examined all the epidemiological studies involving firefighters and was also offered to testify about these studies and to interpret the results for the jury. Dr. Weiss was offered to respond to the testimony of Dr. Kenneth Coleman offered by Larson.

The testimony of each of the City's witnesses was unique and distinctive. The testimony which the City sought to offer from Dr. Hackett was not duplicative of the testimony of the other witnesses offered by the City. Evidence is not cumulative simply because it bears on the same side of a given issue. If the evidence is directed to the same point but is not evidence of the same kind, it is not cumulative. *Roe v. Snyder,* 100 Wash. 311, 170 P.1027 (1918).

The superior court erred in not allowing the testimony of Dr. Hackett be read to the jury.

G. The Superior Court Erred When It Failed To Give The City's Proposed Jury Instruction No. 15.

The City proposed Washington Pattern Instruction 155.13.01 on the testimony of an attending physician:

> You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

The City submitted this jury instruction in its proposed packet of jury instructions as Jury Instruction No. 15. CP 1745. The City also took exception when the superior court refused to give this instruction. RP 831.

The City's proposed Jury Instruction No. 15 states a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician. *Hamilton v. Dep't of Labor & Indus.*,111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964). This rule was adopted because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case. *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 655, 833 P.2d 390 (1992).

In this instance, only one treating physician testified, Dr. Sarah Dick. Dr. Dick was Larson's treating dermatologist since the diagnosis of his melanoma and advised him as to the protections he should undertake to avoid the reccurrence of melanoma. At no time did Dr. Dick suggest that

Larson either forego his work as a firefighter or take additional precautions in order to limit the potential of recurrence of his melanoma. At no time did Dr. Dick relate Larson's melanoma to his work as a firefighter.

The trial court had no justifiable reason not to give the City's proposed Instruction No. 15, and the failure to give this instruction did not allow the City to argue that the testimony of Dr. Dick should be given special consideration. The trial court's failure to give a particular jury instruction is an abuse of discretion when its decision is manifestly unreasonable and the error was prejudicial. *The Boeing Company v. Harker-Lott*, 93 Wn. App. 181, 186, 986 P.3d 12 (1998). In this instance, the superior court's failure to give this instruction was prejudicial to the City because it did not call out for the jury the only testimony which actually involved the examination or treatment of Larson.

H. The Superior Court Erred in Awarding Attorney Fees to Larson.

Larson is entitled to reasonable attorney fees and costs if he prevails in the superior court. *See* RCW 51.32.185(7)(b). As discussed above, this Court should reverse the superior court's judgment and remand this matter for a new trial. Thus, this Court should also reverse the superior court's award of attorney fees and costs to Larson.

In the event this Court does not reverse the superior court's judgment and remand this matter for a new trial, this Court should still remand the matter to the superior court with instructions to calculate the award based only on the attorney fees and costs incurred in connection with the superior court appeal.

The superior court incorrectly awarded Larson $67,470.00 in attorney fees and $12,132.42 in costs. This figure encompasses both the attorney fees and costs incurred for Larson's unsuccessful result before the Board and his later appeal to superior court.

Pursuant to RCW 51.32.185(7)(b), Larson is entitled to attorney fees and costs incurred as part of his appeal to superior court. However, because he was not the prevailing party before the Board, he is not entitled to recover his attorney fees and costs incurred in the Board proceeding. Attorneys fees and costs incurred before, or as part of, the earlier appeal before the Board are not compensable pursuant to RCW 51.32.185(7)(b).

RCW 51.52.130 and RCW 51.32.185 govern when an award of attorney fees and costs can be made in a case involving the presumption established under RCW 51.32.185. Larson sought recovery of attorney fees based on these two statutes.

RCW 51.52.130(2) provides:

> In an appeal to the superior court or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

RCW 51.32.185 contains two separate sections addressing attorney fees and costs – one addressing appeals to the Board and one addressing appeals to any court. RCW 51.32.185 provides:

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

Here, there is no dispute that this case involved the presumption of occupational disease set forth in RCW 51.32.185. However, since Larson's only appeal where the claim was allowed was at the superior court, RCW 51.32.185(7)(b) applies to Larson's request for attorney fees and costs. Notably, it was the City who appealed the Department's allowance of Larson's claim to the Board, and the Board's final decision did not allow Larson's the claim. Consequently, RCW 51.32.185(7)(a)

did not apply and Larson was not awarded attorney fees and costs. However, before the superior court Larson incorrectly argued that the language of RCW 51.32.185(7)(b) entitled him to recover all his attorney fees and costs throughout his entire worker's compensation claim.

Courts do not construe unambiguous statutory language. *Davis v. Dep't of Licensing,* 137 Wn.2d 957, 964, 977 P.2d 54 (1999). Under the unambiguous language of RCW 51.32.185 (7)(b), Larson is entitled to reasonable attorney fees and costs "of the appeal." The only successful appeal at issue is the appeal to superior court. There is no statutory authority allowing a superior court to award attorney fees for services provided by a worker's attorney before the Department or the Board.

Although there is no case specifically applying the provisions of RCW 51.32.185(7)(b), there are cases which address similar language contained in RCW 51.52.130(1) which governs the recovery of attorney and witness fees in worker's compensation matters appealed to superior or appellate court. The last three sentences of RCW 51.52.130(1) state:

> . . . If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the

> court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

Finding the language contained in RCW 51.52.130(1) to be unambiguous, three Washington appellate court decisions squarely hold that an award of attorney fees against the Department/employer under RCW 51.52.130 may not include fees for work at the Board. *See Borenstein v. Dep't of Labor & Indus.*, 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957); *Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 716, 700 P.2d 748 (1985); *Piper v. Dep't of Labor Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004). These decisions make it clear that a superior court is not authorized to award fees against the employer for services provided by a worker's attorney at the Board.

RCW 51.32.185(7)(b) contains no provision for the recovery of attorney fees for services rendered before the Board. As the courts in *Borenstein* and *Piper* noted, "If such fees are to be paid by the department, it is a matter of policy to be determined and directed by the legislature through the enactment of a statute clearly providing for payment of such fees by the department of labor and industries." *Borenstein*, 49 Wn.2d at 676-77; *Piper*, 120 Wn. App. at 90. It is error for a superior court to

award such fees absent such legislative authority. *Rosales*, 40 Wn. App. at 716.

Larson requested, without any supporting authority, recovery of all his attorney fees and costs incurred with respect to his worker's compensation claim, including those attorney fees and costs incurred before the Department and the Board. The unambiguous language of RCW 51.32.185(7)(b) only entitles Larson to recover his attorney fees in connection with his superior court appeal. Therefore, the Superior Court erred in awarding attorneys' fees and costs beyond those incurred in the superior court appeal.

The legislative history of RCW 51.32.185 also supports the conclusion that attorney fees are to be awarded depending upon success at the various levels of appeal. As originally proposed House Bill 1833, 60th Leg., Reg. Sess. (Wash. 2007) sought to award an employee who prevails in a presumptive disease case all this attorney fees and costs from the date of his application to the Department for benefits:

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

HB 1833, 60th Leg., Reg. Sess. (Wash. 2007) Sec. 2., (6)

In other words, this proposed legislation sought to award a prevailing claimant his attorney fees and costs throughout the entire process.

In contrast, Engrossed Substitute House Bill (ESHB) 1833, 60th Leg., Reg. Sess. (Wash. 2007), which ultimately became RCW 51.32.185, modified the original bill to specify the attorney fees and costs potentially available at each level of appeal; dealing with the process in two separate clauses. RCW 51.32.185(7)(a) addresses appeals to the Board, whereas RCW 51.32.185(7)(b) addresses an appeal of the Board decision to superior court. The practical difference is illustrated in this case. Here, Mr. Larson was unsuccessful before the Board and thus is not awarded attorney fees as part of that appeal process. However, Larson overturned the Board's decision on appeal to the superior court and thus as the prevailing party would be entitled to attorney fees and costs under RCW 51.32.185(7)(b). However, to award Larson attorney fees for both separate appeals, as the superior court did in this case, ignored both the construction for RCW 51.32.185(7)(a) and (b) and the wording of the statute. *Leasing, Inc. v. City of Tacoma Fin. Dep't*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999) (Meaning is given to every word and a statute is interpreted as written).

Accepting Larson's construction of the statue also creates a situation where an employer, although successful before the Board, is

subjected to increased attorney fees and costs if the claimant decides to appeal the Board's decision to superior court and prevails. In such a situation, which is what occurred here, the employer does not have any control over the claimant's decision to appeal, yet bears the potential costs of being liable for all of the claimant's attorney fees and costs incurred throughout the litigation. In other words, a claimant is incentivized to appeal a loss before the Board in order to recover attorney fees and costs he or she was not awarded earlier driving up costs to employers. This result is what the Legislature addressed in creating the two clauses in RCW 51.32.185(7) treating each appeal, whether before the Board or a court, separately for the calculation of attorney fees and costs.

In the event this Court does not set aside the superior court judgment in its entirety, this Court should then remand the superior court's award of attorney fees and costs with instructions to calculate the award based only upon the attorney fees and costs incurred as part of the appeal of the Board's decision to the superior court.

VI. CONCLUSION

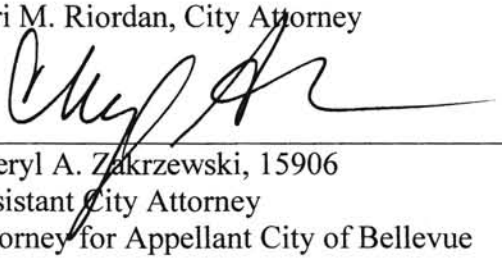
For the reasons cited above, the City respectfully requests this Court reverse the verdict of the jury and enter judgment in its favor as a matter of law. Alternatively, this Court should reverse the verdict of the

jury and the judgment of the superior court and remand this matter for a new trial.

Dated this 20th day of February, 2014.

Respectfully submitted,

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



Cheryl A. Zakrzewski, 15906
Assistant City Attorney
Attorney 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 110th Avenue NE, Bellevue, WA 98004. On February 20th, 2014, I served via ABC Legal Messenger a copy of the foregoing ***Brief of Appellant City of Bellevue*** on the following:

Mr. Ron Meyers
Ron Meyers & Associates
8765 Tallon Lane NE, Suite A
Lacey, WA 98104-3188
Attorney for Respondent Larson

Beverly N. Goetz
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Attorney for Appellant Department of Labor & Industries

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

Dated this 20th day of February, 2014.

Reina McCauley
Legal Secretary

APPENDIX “A”

H-1424.1

HOUSE BILL 1833

State of Washington 60th Legislature 2007 Regular Session

By Representatives Conway, Pettigrew, Seaquist, Upthegrove, Morrell, Kessler, P. Sullivan, Williams, Kenney, Haler, Ericksen, Moeller, Sells, Dunn, Rolfes, Lantz, McCoy, Lovick, Jarrett, Strow, Hurst, Springer, Campbell, Goodman, Simpson, Pearson, Curtis, Rodne, Schual-Berke, McDermott and Ormsby

Read first time 01/30/2007. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to occupational diseases affecting firefighters;
2 amending RCW 51.32.185; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** (1) The legislature finds and declares:
5 (a) By reason of their employment, firefighters are required to
6 work in the midst of, and are subject to, smoke, fumes, infectious
7 diseases, and toxic substances;
8 (b) Firefighters are continually exposed to a vast and expanding
9 field of hazardous substances;
10 (c) Firefighters enter uncontrolled environments to save lives,
11 provide emergency medical services, and reduce property damage and are
12 frequently not aware or informed of the potential toxic and
13 carcinogenic substances, and infectious diseases that they may be
14 exposed to;
15 (d) Firefighters are often exposed simultaneously to multiple
16 carcinogens;
17 (e) Firefighters so exposed can potentially and unwittingly expose
18 coworkers, families, and members of the public to infectious diseases;

(f) Harmful effects caused by firefighters' exposure to hazardous substances, whether cancer, infectious disease, a heart injury, or respiratory disease, develop very slowly, usually manifesting themselves years after exposure;

(g) Cardiovascular disease is exacerbated by firefighting duties and firefighting increases the incidence of cardiovascular disease and heart injuries in firefighters;

(h) Firefighters frequently and at unpredictable intervals perform job duties under strenuous physical conditions when engaged in firefighting activities and routinely are unable to meet normal definitions of "unusual exertion" standards; and

(i) Firefighters who experience heart injuries during firefighting activities shall be assumed to meet current "unusual exertion" standards during strenuous physical exertion.

(2) The legislature further finds and declares that all the conditions listed under subsection (1) of this section exist and arise out of or in the course of firefighting employment.

Sec. 2. RCW 51.32.185 and 2002 c 337 s 2 are each amended to read as follows:

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

(2) The presumptions established in subsection (1) of this section shall be extended to an applicable member following termination of

service for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment.

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

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

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

(6) In any case where the presumption is upheld, or the employee prevails on the basis of a presumption, whether at the board of industrial insurance appeals or in any court, the employee must be awarded full benefits, attorney fees, expert witness costs, and all other costs from the date of the employee's initial application for benefits.

--- END ---

APPENDIX “B”

ENGROSSED SUBSTITUTE HOUSE BILL 1833

State of Washington 60th Legislature 2007 Regular Session

By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Pettigrew, Seaquist, Upthegrove, Morrell, Kessler, P. Sullivan, Williams, Kenney, Haler, Ericksen, Moeller, Sells, Dunn, Rolfes, Lantz, McCoy, Lovick, Jarrett, Strow, Hurst, Springer, Campbell, Goodman, Simpson, Pearson, Curtis, Rodne, Schual-Berke, McDermott, Ormsby and Chase)

READ FIRST TIME 2/28/07.

AN ACT Relating to occupational diseases affecting firefighters; amending RCW 51.32.185, 51.52.120, and 51.52.130; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds and declares:

(1) By reason of their employment, firefighters are required to work in the midst of, and are subject to, smoke, fumes, infectious diseases, and toxic and hazardous substances;

(2) Firefighters enter uncontrolled environments to save lives, provide emergency medical services, and reduce property damage and are frequently not aware of the potential toxic and carcinogenic substances, and infectious diseases that they may be exposed to;

(3) Harmful effects caused by firefighters' exposure to hazardous substances, whether cancer, infectious disease, heart or respiratory disease, may develop very slowly, manifesting themselves years after exposure;

(4) Firefighters frequently and at unpredictable intervals perform job duties under strenuous physical conditions unique to their employment when engaged in firefighting activities; and

(5) Cardiovascular disease is exacerbated by firefighting duties and firefighting increases the incidence of cardiovascular disease and heart injuries in firefighters.

Sec. 2. RCW 51.32.185 and 2002 c 337 s 2 are each amended to read as follows:

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

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

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

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

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

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

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

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

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

(8)(a) If an employer requests reconsideration of a department order allowing benefits under this section and the firefighter's medical provider has made a determination that the firefighter is terminally ill, temporary total disability compensation or medical aid benefits granted to the firefighter by the order under reconsideration must continue while the reconsideration is pending, subject to the requirements of RCW 51.32.240(4).

(b) If an employer appeals to the board of industrial insurance appeals a department order allowing benefits under this section and the

firefighter's medical provider has made a determination that the firefighter is terminally ill, temporary total disability compensation or medical aid benefits granted to the firefighter by the order under appeal must continue while the appeal is pending, subject to the requirements of RCW 51.32.240(4).

Sec. 3. RCW 51.52.120 and 2003 c 53 s 285 are each amended to read as follows:

(1) It shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director or the director's designee for services performed by an attorney for such worker or beneficiary, if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the department is communicated to the party making the application.

(2) If, on appeal to the board, the order, decision, or award of the department is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his or her attorney in proceedings before the board if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the board is communicated to the party making the application. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by the director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney, worker, or beneficiary. The department or self-insured employer, as the case may be, shall be served a copy of the application and shall be entitled to appear and take part in the proceedings. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or

receive any fee for services before the board in excess of that fee fixed by the board.

(3) In an appeal to the board involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

(4) Any person who violates this section is guilty of a misdemeanor.

Sec. 4. RCW 51.52.130 and 1993 c 122 s 1 are each amended to read as follows:

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other

witnesses and the costs shall be payable directly by the self-insured employer.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

--- END ---