NO. 89799-9

SUPREME COURT OF THE STATE OF WASHINGTON

AARON BELL,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Department of Labor and Industries opposes further review of this appeal. *See Bell v. Dep't of Labor & Indus.*, No. 69438-3-I (Dec. 16, 2013) (slip op.). This is a routine workers' compensation case involving substantial evidence review. This case does not present an issue of substantial public interest under RAP 13.4(b)(4). Nor does the Court of Appeals' opinion in this case conflict with prior opinions of this Court.

Mr. Bell has worked as a drywaller for over 24 years and has had low back problems since 1991, including three back injuries at work and multiple back surgeries. Three doctors offered varying medical opinions about whether Mr. Bell's return to work as a drywaller from 2006 to 2009 aggravated his preexisting back condition, resulting in an occupational disease. The Board of Industrial Insurance Appeals weighed this evidence and concluded that Mr. Bell did not have an occupational disease. The superior court similarly weighed the evidence and entered appropriate findings and conclusions to support its decision of no occupational disease. In an unpublished opinion, the Court of Appeals affirmed.

Mr. Bell claims that this case presents an issue of substantial public interest, pointing to evidence in the record in his favor. He implicitly asks this Court to accept review in order to re-weigh the evidence. But this presents no ground for review. He also suggests that the Court of Appeals'

opinion here somehow conflicts with this Court's prior opinions, but he fails to articulate how this is so.

Similarly, contrary to Mr. Bell's claims, the superior court entered appropriate findings of fact and conclusions of law sufficient for appellate review, and the wording of such findings does not conflict with this Court's decision in *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964), and therefore presents no ground for review.

II. COUNTERSTATEMENT OF THE ISSUES

Discretionary review is not warranted in this case. But if this Court were to grant review, the following issues would be presented:

1. Does substantial evidence support the superior court's finding that Mr. Bell's return to drywall work did not aggravate his preexisting low back condition, where a board-certified neurologist testified that any worsening of Mr. Bell's low back over this period was a result of the natural progression of his preexisting low back condition, caused by his genetics, prior low back injuries, and prior low back surgeries, rather than a result of his return to work?

2. Under *Groff*, were the superior court's findings sufficient to indicate the factual basis for its conclusion that the distinctive conditions of Mr. Bell's drywall work from 2006 to 2009 did not proximately cause an aggravation of his preexisting low back condition, where the Board provided a detailed analysis of the evidence in support of its findings and conclusions, and where the superior court entered findings that were the same as the Board's findings?

III. COUNTERSTATEMENT OF THE CASE

A. Mr. Bell Has An Extensive History Of Prior Low Back Industrial Injuries, And He Had Low Back Surgeries In 1999 And 2004

Mr. Bell has worked as a drywaller for over 24 years. CP 116. He has a long history of low back problems. CP 115-16, 126-27, 144-45, 195-96, 247-49. He filed workers' compensation claims for low back injuries in 1991 and 1998, which the Department allowed. CP 144-45, 147-48, 195, 247-48, 324-26. He had low back surgery in 1999. CP 275, 328. In 2001, he was rated with a Category 3 lumbar spine impairment. CP 329; *see also* CP 249; WAC 296-20-280(3).

In November 2002, Mr. Bell filed a third claim for a low back injury, which the Department allowed. CP 150, 196, 329-30. From November 2002 through September 2006, Mr. Bell did not perform drywalling work. CP 119-21, 131.

In August 2004, Mr. Bell began receiving treatment for his low back from Dr. Jeff Summe's clinic. CP 249. A magnetic resonance image (MRI) scan of Mr. Bell's low back in August 2004 showed a disc protrusion at the L5-S1 level. CP 335. In October 2004, Dr. Sanford Wright operated on Mr. Bell's lumbar spine at that level. CP 152, 276, 337.

B. Mr. Bell's Low Back Symptoms Never Completely Resolved After The 2004 Surgery, And Despite Having Been Retrained As A Loan Officer, He Returned To Drywall Work

During visits to Dr. Summe's clinic between 2004 and 2006, Mr. Bell consistently complained of back pain. CP 252. His physical tests corroborated this pain. *See* CP 250.

In 2005, a physical capacities evaluation determined that Mr. Bell could not return to work as a drywall applicator. CP 338. He was retrained as a loan officer. CP 115, 120. In July 2006, he worked briefly at a mortgage company but quit for financial reasons. CP 120.

In September 2006, Mr. Bell returned to drywall work for financial reasons. CP 120-21. He performed drywall work, with occasional layoffs, until June 2009. CP 121-22, 136-37, 139-41. He continued to have back pain. CP 139, 241, 348-49. He has not been pain free since the 2002 work injury. CP 225.

C. In May 2009, Mr. Bell Returned To Dr. Summe To Seek Medical Treatment For His Low Back Under the 2002 Injury Claim, And, In August 2009, He Filed A New Claim Alleging An Occupational Disease Of The Low Back

In May 2009, Mr. Bell returned to Dr. Summe for low back pain. CP 141-42, 239, 254-55. Dr. Summe believed that Mr. Bell's condition in May and June of 2009 was related to his November 2002 injury, and he treated Mr. Bell under that claim, which remained open. CP 66, 255-56.

On May 29, 2009, Mr. Bell had a lumbar MRI that showed a disc protrusion. CP 263. Dr. Summe agreed with the radiologist that the disc protrusion was "similar" to what had been seen in the August 2004 MRI. CP 228, 263.

In June 2009, Mr. Bell was laid off. CP 128. Dr. Summe testified that objective findings in Mr. Bell's low back in June 2009 were "fairly close" to his objective findings between 2004 and 2006, when he was not performing drywall work. CP 250-51. Dr. Summe noted that the only difference was Mr. Bell's inability to stand on his toes or his right heel and, possibly—though he could not confirm this—an increase in the intensity of muscle spasm from moderate to moderate-severe. CP 250-52.

In July 2009, Dr. Summe signed a new workers' compensation claim that alleged an occupational disease of the low back as a result of drywall work from 2006 to 2009. *See* CP 197, 217, 259. Dr. Summe testified that Mr. Bell's condition "was definitely an ongoing aggravation of his prior L&I claim." CP 261. Ultimately, Dr. Summe opined that Mr. Bell's return to drywall work from 2006 to 2009 "accelerated his low back condition." CP 265.

D. Objective Medical Evidence Supported That Any Worsening In Mr. Bell's Low Back Resulted From The Natural Progression Of The Preexisting Disease Rather Than From His Return To Work As A Drywaller

On August 5, 2009, Dr. William Stump, a board certified neurologist, performed an independent medical examination. CP 315, 318. He opined that Mr. Bell had developed degenerative disease in the lumbar spine as a result of his genetics and three prior work injuries. CP 324.

Genetics is a significant factor in the development of lumbar degenerative disc disease. CP 356. Patients with a certain genetic makeup will tend to have the degenerative process in the spine progress independently of any specific event. CP 356. Mr. Bell was born with a small central spinal canal, which would contribute to the natural worsening and breakdown of his lumbar discs and lumbar spine over time. CP 294-95.

Dr. Stump observed that Mr. Bell had a recurrent disc herniation at L5-S1. CP 322. He identified multiple causes for the low back condition, including Mr. Bell's genetics, prior industrial injuries that had changed the lumbar spine, and previous surgeries. *See* CP 322-23.

Dr. Stump opined that the objective medical data did not indicate that any significant worsening of Mr. Bell's low back condition occurred

during Mr. Bell's return to work. *See* CP 360, 362, 372. A comparison of the 2004 and 2009 MRIs showed "little change in that degenerative process during that five-year period of time." CP 360; *see also* CP 358.

Although Dr. Stump testified that returning to heavy duty work, such as drywall work, *could* potentially aggravate a low back condition, the lack of objective changes on Mr. Bell's imaging studies did not support that conclusion in this case. CP 360, 362, 372. Rather, Dr. Stump concluded that Mr. Bell's condition was the result of his preexisting low back disease, proximately caused by a combination of Mr. Bell's genetics, prior low back injuries, and prior low back surgeries. CP 322.

On November 5, 2009, Mr. Bell returned to Dr. Wright for evaluation. CP 276. Dr. Wright agreed that any worsening between the August 2004 and May 2009 MRIs could have occurred as the natural progression of the preexisting damage in Mr. Bell's low back. CP 290. In his opinion, the disc herniation on the May 2009 MRI was likely the result of natural progression of the preexisting back condition. CP 292. Mr. Bell's reduced range in motion in 2009 was "[p]robably" caused by a natural progression of his low back condition regardless of Mr. Bell's daily or work activities. CP 291. Ultimately, however, Dr. Wright testified that Mr. Bell's drywall work from 2006 to 2009 more probably

than not aggravated his low back condition. CP 302-03. Dr. Wright performed a "redo" surgery in 2010. CP 297.

E. The Board And Superior Court Found That The Distinctive Conditions Of Mr. Bell's Drywall Work Between 2006 And 2009 Did Not Proximately Cause An Aggravation Of His Preexisting Back Condition

The Department rejected Mr. Bell's August 2009 workers' compensation claim, and Mr. Bell appealed to the Board. CP 70-75. After considering the testimony, the industrial appeals judge found that the distinctive conditions of Mr. Bell's drywall work between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition or any new low back condition. CP 66.

The judge's proposed decision and order explains the basis for his decision. *See* CP 61-67. The judge noted that a worker is entitled to benefits for an occupational disease under RCW 51.08.140 only "if the employment either *causes* a disabling disease, or *aggravates* a preexisting disease so as to result in a new disability." CP 65 (quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 7, 977 P.2d 570 (1999)). The judge stated that Mr. Bell's disability "was caused by the 2002 industrial injury which acted upon Mr. Bell's prior injuries and genetic makeup" and that "[h]is return to work did not create a new disability." CP 65. Instead, Mr. Bell had "both the preexisting disease and disability and it probably would

have naturally progressed even without his return to drywalling." CP 65-66. Therefore, he did not sustain an occupational disease. CP 67.

Mr. Bell petitioned for review to the three-member Board, which denied his petition. CP 37. Mr. Bell appealed to superior court. *See* CP 7-10. Following a bench trial, the court affirmed the Board. CP 9. The superior court entered findings of fact, including the same findings as the Board with the addition of a finding related to procedure at the Board. *Compare* CP 8-9 *with* CP 66.

F. The Court Of Appeals Affirmed In An Unpublished Decision

The Court of Appeals, Division One, affirmed in an unpublished opinion, concluding that substantial evidence supported the superior court's finding that Mr. Bell's return to work did not cause an aggravation of his preexisting injury. *Bell,* slip op. at 1, 8-9. As the court explained, although Dr. Summe and Dr. Wright ultimately opined that Mr. Bell's return to drywalling work aggravated his condition, their other testimony supported the Board's findings and conclusions. *Bell*, slip op. at 7. The Court of Appeals also rejected Mr. Bell's argument that the superior court's findings were inadequate under *Groff*. *Bell*, slip op. at 8-9.

IV. ARGUMENT

This Court should decline review because this case does not involve a matter of substantial public interest, nor does it conflict with

prior opinions of this Court. Rather, it is a case in which the Court of Appeals correctly applied the substantial evidence standard of review. Mr. Bell essentially asks this Court to re-weigh the evidence in his favor, but that is not the role of appellate courts on substantial evidence review. Furthermore, as the Court of Appeals concluded, it is unnecessary to remand to the superior court for the entry of additional findings under *Groff* because the record here is adequate for appellate review.

A. The Court of Appeals' Decision Does Not Involve An Issue of Substantial Public Interest Because The Court Correctly Applied Well-Established Standards Of Substantial Evidence Review To Conclude That Mr. Bell Did Not Have An Occupational Disease

No issue of substantial public interest is raised by the Court of Appeals' correct application of the substantial evidence standard of review when it determined that Mr. Bell's return to drywall work did not proximately cause an aggravation of his preexisting low back condition. *See Bell*, slip op. at 8-9. This Court should decline review.

A worker who has an occupational disease is entitled to workers' compensation benefits. RCW 51.32.180. An occupational disease "arises naturally and proximately out of employment." RCW 51.08.140. The occupational disease must "[come] about as a matter of course as a natural consequence or incident of distinctive conditions" of his or her employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481,

745 P.2d 1295 (1987). The causal connection between the work and the disability must be established by medical evidence that "*but for* the aggravating condition of the job, the claimed disability would not have arisen." *Ruse*, 138 Wn.2d at 7; *see also Dennis*, 109 Wn.2d at 477. Coverage requires a new disability: "[a] worker is entitled to benefits if the employment either causes a disabling disease or aggravates a preexisting disease so as to result in a *new* disability." *Ruse*, 138 Wn.2d at 7 (emphasis added) (emphasis omitted).

In this case, the Court of Appeals correctly applied the substantial evidence standard of review. As the court noted, although Dr. Summe and Dr. Wright ultimately opined that Mr. Bell's return to work aggravated his condition, their other testimony supported the Board's findings and conclusions of no occupational disease. *Bell*, slip op. at 7.

Neither Dr. Summe nor Dr. Wright identified any *new* disability that resulted from Mr. Bell's return to work, as *Ruse* requires, as opposed to the natural progression the preexisting disease. *See Ruse*, 138 Wn.2d at 7. Thus, Dr. Summe testified that the objective findings in Mr. Bell's low back from 2004 to 2006 were "fairly close" to the objective findings in June 2009. CP 250-51. Dr. Wright believed that Mr. Bell's disc protrusion on the 2009 MRI likely resulted from natural progression. *See* CP 292. He agreed that it was "[p]robably true" that Mr. Bell's low-back

condition was going to worsen over time following the 2004 surgery regardless of his daily living or work activities because Mr. Bell had had three back injuries, a category 3 permanent impairment, and ongoing pain after the 2004 surgery. CP 293.

Dr. Stump's testimony provided further substantial evidence to support the superior court's findings. He agreed that the objective medical data did not indicate any significant worsening of Mr. Bell's low back condition during Mr. Bell's return to work. *See* CP 360, 362, 372. A comparison of the 2004 and 2009 MRIs showed "little change in the degenerative process," and EMG data confirmed no significant progression of the underlying degeneration. CP 358, 360, 362-63.

As the Court of Appeals correctly recognized, the medical evidence constitutes substantial evidence to support the finding that there was no aggravation of the preexisting condition so as to result in an occupational disease. *See Bell*, slip op. at 1, 8-9. Mr. Bell even appears to concede this point when he notes that, "Dr. Stump, the one time examiner, opined that Mr. Bell's degenerative condition would have progressed with or without the drywall work between 2006 and 2009." Pet. 6.

Despite Mr. Bell's acknowledgment that medical evidence exists to support the finding of no occupational disease, he asks this Court to accept review because portions of Dr. Summe's and Dr. Wright's

testimony support his theory of the case. *See* Pet. 7-9. In essence, he asks this Court to re-weigh the medical evidence in his favor and substitute its judgment for that of the factfinder. *See* Pet. 5-9. But this Court, like the Court of Appeals, does not reweigh the evidence or substitute its own judgment on substantial evidence review. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

Likewise, Mr. Bell is incorrect that the Board and the courts in this case "forged ahead contrary to decisions by this Court" by rejecting his occupational disease claim. *See* Pet. at 5. Mr. Bell had to demonstrate that his return to drywall work resulted in a new disability. *Ruse*, 138 Wn.2d at 7. As described above, substantial evidence supports that preexisting injuries, surgeries, and genetics caused Mr. Bell's disability and that his return to drywall work did not cause a new disability. No issue of substantial public interest is presented by the Court of Appeals' correct application of substantial evidence review in this case.

B. The Court Of Appeals Properly Distinguished *Groff* To Conclude That It Could Adequately Review The Superior Court's Decision

The Court of Appeals correctly distinguished this Court's decision in *Groff* to conclude that remand for additional findings was unnecessary. The Board provided a through analysis of the evidence in this case, and

the superior court similarly weighed the evidence and entered appropriate findings and conclusions to support its decision of no occupational disease. *See* CP 8-9; CP 61-67. Substantial evidence supports the superior court's specific findings on preexisting injuries, causation, and the conditions of employment, which in turn support the superior court's conclusion of no occupational disease. *See* CP 8-9; *see also Bell*, slip. op. at 8-9. Remand is not necessary.

Mr. Bell argues that the Court of Appeals did not follow *Groff* and that the superior court "rubber stamped" the Board without an independent appraisal of the evidence. Pet. 9-10. He is incorrect.

Groff does not apply here and presents no reason for this Court to take review. In *Groff*, the superior court entered a finding that the Board had correctly construed the law and found the facts and that the worker failed to produce sufficient evidence to preponderate against the Board's findings. *Groff*, 65 Wn.2d at 37-39. This conclusory finding made appellate review difficult because the Board in that case likewise did not analyze the evidence and instead issued a five-line summary of the critical issue. *Groff*, 65 Wn.2d at 37. Because the factual basis for the superior court's decision was unclear, remand was necessary for entry of adequate findings. *See Groff*, 65 Wn.2d at 39, 47.

That is not the case here. Unlike in *Groff*, the superior court in this case entered factual findings about the worker's past medical conditions, conditions of employment, and causation. CP 8-9. It found that the distinctive conditions of his drywall work between 2006 and 2009 did not cause an aggravation of his preexisting low back condition. CP 9. These findings supported the superior court's conclusion of no occupational disease and therefore complied with *Groff*'s requirement that findings be "sufficient to indicate the factual base for the ultimate conclusion." *Groff*, 65 Wn.2d at 40.

Moreover, as the Court of Appeals recognized, the Board in this case entered findings, conclusions, and a detailed analysis of the evidence, unlike the Board in *Groff*. *See Bell*, slip op. at 8; CP 61-67. Accordingly, the superior court's conclusions could be adequately reviewed by reviewing the Board's findings and analysis. *Bell*, slip op. at 8. As such, remand is unnecessary. *Bell*, slip op. at 8-9.

Mr. Bell suggests that the superior court did not engage in de novo review or an independent appraisal of the evidence because it entered findings that were identical to the Board. *See* Pet. 10. But Mr. Bell cites no authority for this proposition that a superior court on de novo review cannot agree with the agency and enter the same findings. Here, the

superior court reached the same conclusion after reviewing the facts and the law. Mr. Bell's arguments in this regard present no reason for review.

Mr. Bell also suggests that remand is necessary because "it is unknown" whether the Board and superior court applied the principle that an attending physician's opinion is entitled to special consideration. Pet. 9; *see Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). He cites language from *Groff* that a superior court "should, in its findings, indicate that it recognizes that we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician." Pet. 11 (quoting *Groff*, 65 Wn.2d at 45).

This does not present an issue for review. As the Court of Appeals noted, the Board thoroughly considered Dr. Summe's testimony and relied on it in part to support its ruling. *Bell*, slip op. at 7-8. Though *Groff* urges the superior court to enter findings that reflect the conflicting allegations and evidence, recognize the rule of special consideration, and indicate why the testimony of the examining physician is preferable, these are not requirements. *See Groff*, 65 Wn.2d at 40, 45. *Groff* itself recognizes this, noting that "the degree of particularly required in findings of fact must necessarily be gauged by the case at hand." *Id.* at 40.

Further, a superior court judge, acting as the trier-of-fact, is presumed to know and apply the law. *See In re Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975). The law on special consideration was briefed in Mr. Bell's trial brief, which the superior court reviewed in addition to the record. CP 4, 20. Without some indication that the superior court chose to ignore this provision of law, this Court should not delve into whether the superior court deviated from the law simply because the findings of fact do not identify the attending physician. Mr. Bell's argument does not warrant review by this Court.

V. CONCLUSION

For the foregoing reasons, the Department asks this Court to deny Mr. Bell's petition for review. There is no issue of substantial public interest. Supreme Court review would not be appropriate to reweigh the evidence. The Court of Appeals' decision here is consistent with this Court's decisions, including *Groff*. Review is not warranted.

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RESPECTFULLY SUBMITTED this 17th day of March, 2014.

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RE: *Aaron Bell v. Department of Labor and Industries for the State of Washington*
Supreme Court No. 89799-9

Dear Mr. Ronald Carpenter:

Attached please find the Department's Answer to Petition for Review and Certificate of Service.

Respectfully,

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