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No. 69438-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Aaron Bell,

Appellant,

v.

Department of Labor & Industries,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Assignment of Error

The superior court, in an administrative law review capacity, erred in entering Findings of Fact, Conclusions of Law, and Judgment on October 15, 2012 in favor of the Department.

B. Issue Pertaining to Assignment of Error

Whether the superior court erred in entering its' Findings of Fact, Conclusions of Law, and Judgment by way of order on October 15, 2012 when: in doing so failed to construe the Industrial Insurance Act (Act) in favor of the worker as set forth by case law; in doing so failed to give special consideration and weight to Mr. Bell's attending physician, Dr. Summe, as required by case law, when pondering the evidence in the record; in doing so failed to consider Mr. Bell's conditions and occupation exclusively, pursuant to case law, as opposed to considering the condition and occupation in general to the population at large; in doing so failed to deviate from the Board's Findings of Fact and Conclusions of Law and set forth its own unique reasoning and justification on *de novo* review for ruling against Mr. Bell; and in doing so failed to recognize that the preponderance of the evidence presented clearly indicates that Mr. Bell's occupation as a drywaller between 2006 and 2009 aggravated, accelerated, and hastened the progression of Mr. Bell's low back condition.

II. STATEMENT OF THE CASE

A. Factual Background

On July 21, 2009, Mr. Bell completed the form titled "Report of Industrial Injury or Occupational Disease," which was given claim number AK79707. *See* Clerk's Papers (CP) 197. Mr. Bell stated that his date of last occupational exposure and time of injury were "progressive" and that his "low back and leg pain has gotten worse from doing ... [his] job" over time. CP 122, 197.

Mr. Bell had returned to drywalling in August of 2006 and last worked as a drywaller on June 5, 2009 for Brent Smith Drywall in Woodinville, Washington. *See* CP 66, 197, 342. He had been in the drywall industry for over 24 years. CP 66, 116. The requirements of the job were very taxing on Mr. Bell's body. The work of a drywaller is very physical, in that he is constantly lifting weight upwards of 125 pounds, not to mention the 40 pound tool belt already around his waist. CP 66, 232, 280, 305. His job was far from stationary and, all while carrying this heavy weight, Mr. Bell's job as a drywaller required him to "frequently bend, kneel, stretch and twist." CP 66. This very physically demanding job took a toll on Mr. Bell's body and had caused him to have work related back injuries and related surgeries in the past. Id. When he returned to drywalling in 2006 he was lifting and bending more than he

had ever done in the past because he wanted to impress his employers as jobs were hard to come by. CP 125.

Between July 2006 and August 2006, and after being retrained, Mr. Bell tried his hand at a commission based job and even resorted to delivering pizza. CP 66, 120, 342. Unfortunately, this new line of work was not bringing in enough income to sustain his families basic economic needs. Id. Financially, his family was not surviving. Mr. Bell was forced to look to other means to provide for his family. Having been in the business for over 24 years and knowing that his earnings could support his family, Mr. Bell returned to work as a drywaller in August of 2006. Id.

B. Procedural Background

Mr. Bell filed an application for benefits with the Department of Labor & Industries (Department) on July 21, 2009 due to his occupation. CP 101, 197. On August 25, 2009, the Department issued an order rejecting Mr. Bell's claim for benefits. CP 70, 101. Mr. Bell filed a timely protest of the August 25, 2009 order with the Department on September 3, 2009. CP 101. In response, the Department issued an order on September 14, 2009 which affirmed the August 25, 2009 rejection order. CP 69, 101. Mr. Bell filed a timely appeal to the September 14, 2009 affirm order on September 22, 2009, which was granted for consideration by the Board of Industrial Insurance Appeals (Board) on

October 21, 2009. CP 72-76. Following depositions and hearings at the Board, the Industrial Appeals Judge issued a Proposed Decision and Order (PD&O) on November 23, 2010 which affirmed the Department's rejection order of August 25, 2009. CP 61-68. Mr. Bell filed a timely Petition for Review (PFR) of the PD&O on January 4, 2011. CP 41-54. Mr. Bell's PFR was subsequently denied by the Board on January 18, 2011 which in turn made the PD&O a final decision and order of the Board. CP 37-40. In response, Mr. Bell filed a timely appeal to Snohomish County Superior Court[1]. Trial briefs were submitted by both Mr. Bell as well as the Department on August 31, 2012. CP 11-33. The bench trial/oral argument was held at Snohomish County Superior Court on the morning of September 10, 2012[2]. CP 7-10. On October 15, 2012, the superior court affirmed the Board's order of January 18, 2011 which ultimately affirmed the Department's rejection order of August 25, 2009. *Id.* Mr. Bell filed a timely Notice of Appeal to Court of Appeals on October 17, 2012. CP 1-2. Mr. Bell filed the Designation of Clerk's Papers by the required deadline and further notified the Court that no

[1] Mr. Bell's Notice of Appeal to Superior Court appears to be absent from the Clerk's Papers.

[2] The Superior Court's Findings of Fact and Conclusions of Law and Judgment incorrectly states the bench trial/oral argument date as September 11, 2012. *See* CP 8:1-2.

Statement of Arrangements was filed as there was no transcription or recording of the relevant proceedings at the trial court level.

III. SUMMARY OF ARGUMENT

The superior court erred when it entered the Findings of Fact, Conclusions of Law, and Judgment of October 15, 2012 which affirmed the Board's determination that Mr. Bell's lumbar spine/low back condition isn't an occupational disease per RCW § 51.08.140. The evidence on record before the Board preponderates in favor of Mr. Bell's claim and therefore the superior court must be reversed.

The preponderance of evidence, provided by the testimony of three medical witnesses one of which is his attending physician, along with the liberal construction of Title 51 in his favor, indicates that Mr. Bell's lumbar spine/low back condition became aggravated and accelerated due to his occupation as a drywaller between 2006 and 2009. Further, the superior court's Findings of Fact, Conclusions of Law, and Judgment are lacking and not in accordance with Groff.

IV. ARGUMENT

A. Standard for Review.

A party may appeal as a matter of right any Superior Court order of "final judgment entered in any action or proceeding ...." *See* Wash. R. App. P. 2.2.

Judicial review of matters arising under the Act are governed by RCW 51.52.110 and RCW 51.52.115. *See* Wash. Rev. Code Ann. §§ 51.52.110, 51.52.115 (West 2012). Judicial review at the superior court level is *de novo* and is based solely on the evidence that was on the record before the Board. *See* id. § 51.52.115. In reviewing the matter at hand, this Court is tasked with the same standard of review as the superior court. Id.; Gary Merlino Const. Co., Inc. v. City of Seattle, 167 Wash. App. 609, 615, 273 P.3d 1049 (Div. I 2012) (*citing* Brighton v. Dep't of Transp., 109 Wash. App. 855, 861–62, 38 P.3d 344 (Div. I 2001). The judicial review of this matter is limited to the record of the Board. Id.

"The Board's decision is considered *prima facie* correct under RCW 51.52.115...." *See* § 51.52.115; *see* Gary Merlino Const. Co., Inc., 167 Wash. App. at 615 (*citing* Ruse v. Dep't of Labor & Indus., 138 Wash.2d 1, 5, 977 P.2d 570 (1999)). When the superior court has affirmed the Board's decision, this Court reviews the Board record to verify whether substantial evidence is present to support the superior

court's findings and whether the superior court's conclusions of law flow from the findings. Id.; *see also* Young v. Dep't of Labor & Indus., 81 Wash. App. 123, 128, 913 P.2d 402 (Div. III 1996).

To successfully reverse a Board decision, the challenging party must support their position with a preponderance of the evidence. *See* Gary Merlino Const. Co., Inc., 167 Wash. App. at 615 (*citing* Ruse, 138 Wash.2d at 5).

B. The Preponderance of the Evidence Clearly Indicates that Mr. Bell's Lumbar Spine/Low Back Condition Should be Considered an Occupational Disease as Defined by the Revised Code of Washington § 51.08.140 and Subsequent Case Law and Therefore Reversal of the Snohomish County Superior Court is Warranted.

The Snohomish County Superior Court failed to recognize, among other things, the preponderance of the evidence in the Board's record undeniably favored a finding for Mr. Bell. The medical evidence and facts of this case, in combination with the inferences required by law, make it plainly apparent that Mr. Bell's lumbar spine/low back condition is an occupational disease pursuant to RCW 51.08.140.

According to RCW 51.08.140, an occupational disease is defined as "such disease or infection as arises naturally and proximately out of employment...." *See* § 51.08.140. A worker who has suffered disability due to occupational disease shall receive benefits pursuant to the Act. *See*

§ 51.32.180. Title 51 covers all persons engaged in covered employment regardless of age or previous health condition, and, when determining the effect of working conditions on a worker, such effect must always be determined exclusively with reference to the particular worker involved and not some other individual or benchmark. Groff v. Dep't of Labor & Indus., 65 Wash.2d 35, 43-44, 395 P.2d 633 (1964); Jacobson v. Dep't of Labor & Indus., 37 Wash.2d 444, 448, 224 P.2d 338 (1950). The Courts of this State, to include the Washington State Supreme Court, have delved deeper into the definition contained in RCW 51.08.140 and have determined that an occupational disease is one that comes about as a matter of course as a natural consequence or incident of distinctive conditions of a worker's employment. *See* Dennis v. Dep't of Labor & Indus., 109 Wash.2d 467, 481, 745 P.2d 1295 (1987); *see* Ruse, 138 Wash.2d at 1. The worker's condition does not need to be peculiar to, nor unique to, the worker's particular employment, but, instead, the focus is on whether the worker's employment was a cause from which the worker's condition arose. Id. (emphasis added).

The Washington State Supreme Court has determined that a worker is entitled to benefits under Title 51 for any condition or disability that the occupational exposure lit up, aggravated, accelerated, or in combination with the condition caused the disability or condition. Harbor

Plywood Corp. v. Dep't of Labor & Indus., 48 Wash.2d 553, 556, 295 P.2d 310 (1956) ("Preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirements if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought."); Towne v. Dep't of Labor & Indus., 51 Wash.2d 644, 647, 320 P.2d 1094 (1958) ("The test is not whether the injury occasioned by the workman's exertion in the course of his employment was the sole cause of his death, but whether it contributed in any material degree. Guiles v. Dep't of Labor & Indus., 13 Wash.2d 605, 613, 126 P.2d 195 (1942)"); Ruse, 138 Wash.2d at 6-7; *see* Dennis, 109 Wash.2d at 467. If the occupational exposure complained of is a proximate cause of the condition for which benefits are sought, then the previous physical condition of the worker is immaterial, and recovery may be received for the resulting condition, independent of any pre existing or congenital weakness. Miller v. Dep't of Labor & Indus., 200 Wash. 674, 94 P.2d 764 (1939); Jacobson, 37 Wash.2d at 448; Snyder v. Dep't of Labor & Indus., 40 Wash. App. 566, 573-76, 699 P.2d 256 (Div. II 1985); *see* Wendt v. Dep't of Labor & Indus., 18 Wash. App. 674, 571 P.2d 229 (Div. II 1977). In Ruse, the Court stated that "[i]n an aggravation case, the employment does not cause the disease, but it *causes the disability* because the employment conditions

accelerate the preexisting disease to result in the disability." Ruse, 138 Wash.2d at 7 (emphasis in original).

A case that is similar to Mr. Bell's situation yet distinguishable and instructive is the Washington State Supreme Court case of Ruse v. Dep't of Labor & Industries. *See generally* Ruse, 138 Wash.2d at 1. In Ruse, the claimant suffered from degenerative disc disease as well as arthritis but nevertheless worked for almost 30 years doing heavy labor in the cement industry. *See* id. at 3-4; Ruse v. Dep't of Labor & Indus., 90 Wash. App. 448, 450-52, 966 P.2d 909 (Div. III 1998)[3]. Mr. Ruse filed an occupational disease claim with the Department in November 1990. Id. Mr. Ruse's claim was subsequently denied by the Department and eventually by the Board on Mr. Ruse's appeal. Id. The Board determined that Mr. Ruse's degenerative condition was related to the "natural progression of unrelated pre-existing conditions or disease processes." Id. (*quoting* Ruse Proposed Decision and Order at 8). The trial court affirmed the Board order and found in part that "Mr. Ruse suffered from a degenerative arthritis which would have appeared and progressed despite his employment." Id. (*quoting* Clerks Papers at 5-6). The Board and the trial court made their findings and conclusions based on the testimony of

[3] Washington State Supreme Court instructed that the Court of Appeals decision regarding Ruse be used for a complete discussion of the facts, hence the citation to the Court of Appeals.

two medical doctors, Drs. Gilman and Shanks, who provided negative and inconsistent testimony at best. Id. The Department and Mr. Ruse could not agree, and argued, about which of these doctors should be considered Mr. Ruse's attending physician. Id. Dr. Gilman testified on behalf of the Department and Dr. Shanks testified on behalf of Mr. Ruse, and ultimately it was determined that Dr. Gilman would be considered the attending physician. Id. As fleshed out during his testimony, Dr. Gilman was Mr. Ruse's primary care doctor from mid 1981 to 1989, the diagnostic x-rays conducted in 1986 didn't show any problems in Mr. Ruse's low back, Dr. Gilman's diagnosis of Mr. Ruse's back pain was "muscoskeletal effects of his age" and there was not a medical condition present that would respond to treatment, and Dr. Gilman disagreed with Mr. Ruse's decision to stop working. Id. (*quoting* Dep. of David C. Gilman, D.O. at 8). Dr. Shanks, on the other hand, appeared to be an advocate for Mr. Ruse's claim with the Department. Id. Dr. Shanks only saw Mr. Ruse once and, based on this one examination, diagnosed Mr. Ruse with "moderate degenerative arthritis and degenerative disc disease in the lumbar spine most prominent in the L3-4 region." Ruse, 90 Wash. App. at 452. Dr. Shanks testified that Mr. Ruse's low back condition "was aggravated by his 'long term heavy labor work' on a 'more probable than not' basis." Ruse, 138 Wash.2d at 5 (*quoting* Dep. of William Shanks, M.D. at 21).

Unfortunately for Mr. Ruse, this testimony was a contradiction of Dr. Shanks' earlier opinion in which he stated in a letter to the Department that he didn't see Mr. Ruse's arthritis as an industrial or occupational disease. Id. During his deposition, Dr. Shanks stated that the letter he penned to the Department more accurately reflected his opinion of Mr. Ruse's situation. Id. After Mr. Ruse's appeal process ran its' course, the Washington State Supreme Court affirmed the rulings of the lower courts that Mr. Ruse did not suffer from an occupational disease due to an aggravation of a pre existing condition. Id.

Mr. Bell doesn't have the evidentiary problems and issues that Mr. Ruse had. In the matter at hand, the preponderance of the evidence clearly indicates that Mr. Bell suffered an occupational disease due to his work related aggravation and acceleration of his prior low back conditions. Three medical doctors testified in this matter; two on behalf of Mr. Bell and one at the request of the Department. *See generally* CP 209-393. Unlike Mr. Ruse, and most likely unintentional on the part of Dr. Stump, all three doctors who testified in Mr. Bell's case provided testimony that supports Mr. Bell's occupational disease claim due to his occupation as a drywaller causing an aggravation and acceleration of a pre existing condition. Id. The Department's medical witness, Dr. Stump, conducted only one examination of Mr. Bell on August 5, 2009. *See generally* CP

310-93. Dr. Stump was called to testify against Mr. Bell on August 4, 2010. Id. When called to testify in this matter, Dr. Stump stated that he "was concerned that [Mr. Bell] had had a recurrent disk herniation at the ... L5-S1 level on the right and that that was accounting for the findings that [he] observed on his examination." CP 322. Additionally, Dr. Stump testified that it was his opinion that Mr. Bell's genetics and prior back injuries contributed to his lumbar spine/low back condition. CP 323-24. Dr. Stump elaborated even further and stated that Mr. Bell's physical work played a significant role and accelerated and caused rapid progression of Mr. Bell's condition:

> patients that have degenerative disease are more susceptible to have that disease progress depending on the type of physical activity they did. That activity can obviously be work or nonwork related. But this gentleman does have an occupation in which there's a significant amount of heavy type of bending, lifting-type activity, so one would believe that his work activities was a significant factor in the development of his degenerative disk disease.

CP 324 (emphasis added). Dr. Stump continued,

> [s]o one could state that because of his genetic aspect, because of his prior injuries and the surgeries that have been carried out, by returning to the heavy-duty-type work, he was more likely to experience progression of his degenerative process and more likely to have problems in the future.

CP 369 (emphasis added). While Dr. Stump stated that he believed a degenerative condition such as the one Mr. Bell possessed would progress

naturally, he did not testify that Mr. Bell's lumbar spine/low back condition would have progressed to the level it did or at the pace it did absent Mr. Bell's occupation as a drywaller between 2006 and 2009. *See generally* CP 310-93.

Drs. Summe and Wright testified on behalf of Mr. Bell. *See generally* CP 209-309. Mr. Bell's attending physician, Dr. Summe, is an osteopathic physician who is board certified in family medicine and sports medicine, and has treated Mr. Bell for a significant period of time. CP 211-12, 217-18, 237, 254. Dr. Summe testified that there were significant differences in objective findings from when Mr. Bell went back to drywalling in August 2006 and July 2009, when Mr. Bell submitted his application for benefits due to an occupational disease following his three years back in the drywalling profession. *See generally* CP 209-69. Before returning to drywalling in August 2006, Mr. Bell's objective findings consisted of muscle spasm and he had a lifting restriction but was still able to work. *See* CP 298. At that point Mr. Bell had no other objective findings. Id. Following his three years of drywalling, in July 2009 Mr. Bell's objective findings as related to his low back consisted of decreased range of motion, moderate to severe muscle spasm, a positive straight leg raise test in regards to his right leg, and Dr. Summe observed that "he was [now] unable to stand on his toes or heels of right foot." *See* CP 238. Dr.

Summe also had the opportunity to review an MRI that Mr. Bell underwent on May 29, 2009. CP 228. Dr. Summe noted that his findings on examination of Mr. Bell following his work as a drywaller between 2006 and 2009 were consistent with the MRI findings, which were "a progressive narrowing of the L5-S1 intervertebral disc space, with continued right foraminal disc protrusion, which [was] similar to that seen previously, causing flattening of the proximal right S1 root." CP 228, 234. Mr. Bell's subjective complaints were consistent with Dr. Summe's objective findings on examination and the MRI findings. CP 219-26. In July 2009, due to the condition of his low back, Dr. Summe determined that Mr. Bell was unable to work. CP 240, 267. Being fully aware of Mr. Bell's prior back problems and knowing the specifics of the type of work Mr. Bell did as a drywaller, Dr. Summe determined, on a more probable than not basis, that Mr. Bell's occupation aggravated his prior conditions and surgery locations and accelerated any degenerative conditions that may have been present, and therefore was suffering from an occupational disease. CP 228, 265. According to the testimony of Dr. Summe, Mr. Bell's attending physician, but for his occupation as a drywaller between August 2006 and July 2009, Mr. Bell's back condition would not have progressed to the degree that it did. CP 265, 267.

Dr. Wright, a board certified neurosurgeon, performed numerous examinations and surgeries on Mr. Bell's low back condition. *See generally* CP 270-309. Like Dr. Summe, Dr. Wright was fully aware of Mr. Bell's work requirements and demands as a drywaller. CP 280-81. Dr. Wright, too, had the opportunity to review the MRI of May 29, 2009, which he acknowledged showed abnormalities at L5-S1 on the right side, and compared it to Mr. Bell's previous MRI of August 4, 2004. CP 283, 288. After comparing the two MRIs from 2004 and 2009, Dr. Wright was able to determine that Mr. Bell had progressive narrowing of the L5-S1 intervertebral disc space, he was suffering from a recurrent herniation, and, considering his complaints, it was probable that it was due to his work as a drywaller during the period of 2006 to 2009. CP 284, 288. Testimony further elicited from Dr. Wright that aside from his work as a drywaller from 2006 to 2009, there is no indication that Mr. Bell's low back condition would have progressively gotten worse if he was doing other activities in another occupation. CP 305. Dr. Wright concluded, on a more probable than not basis, that Mr. Bell's work activities as a drywaller between 2006 and 2009 aggravated his low back condition. CP 281, 302-03.

All three of the medical witnesses called to testify in this matter are in agreement that the type of work Mr. Bell did as a drywaller accelerated

the progression of his lumbar spine/low back condition and aggravated said condition. The substantial evidence needed to uphold the Snohomish County Superior Court's decision does not exist. The preponderance of evidence in Mr. Bell's favor is apparent and the Snohomish County Superior Court must be reversed.

C. The Snohomish County Superior Court Failed to Recognize that Title 51 is to be Liberally Construed in Favor of the Injured Worker and Did Not Give Special Weight and Consideration to the Testimony and Opinion's of Mr. Bell's Attending Physician.

The Snohomish County Superior Court did not recognize the longstanding principals that Title 51 is to be liberally construed in favor of Mr. Bell and that the testimony and opinions of Dr. Summe, Mr. Bell's attending physician, are to be given greater weight and consideration than the other testifying medical witnesses.

The Washington State Supreme Court has repeatedly and consistently stressed that the intended beneficiary of the Act is the worker and the provisions of the Act should be "liberally construed in favor of the worker." *See* Dennis, 109 Wash.2d at 467. In Wilber v. Dep't of Labor & Indus., the Court held, "[t]he Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries." Wilber v. Dep't of Labor & Indus., 61 Wash.2d 439, 446, 378 P.2d 684 (1963); *see also* Dep't of Labor & Indus. v. Estate of

MacMillan, 117 Wash.2d 222, 814 P.2d 194 (1991); Grimes v. Lakeside Indus., 78 Wash. App. 554, 566, 897 P.2d 431 (Div. II 1995). Any ambiguity or doubtful question should be resolved in favor of the beneficiary of the Act, the worker. Clark v. Pacific Corp., 118 Wash.2d 167, 179, 822 P.2d 162 (1991); *see also* Gallo v. Dep't of Labor & Indus., 119 Wash. App. 49, 56, 81 P.2d 869 (Div. III 2003) ("In other words, where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." *Citing* Cockle v. Dep't of Labor & Indus., 142 Wash.2d 801, 811 (2001)).

Special weight and consideration should be given to the testimony and opinion of an attending physician. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 155.13.01 (6th ed.). An attending physician has had the benefit of treating the injured worker over a period of time and with the intent of treating the worker, unlike a one time examiner who is paid by a party and only saw the worker for administration or litigation purposes.

Giving special consideration to the attending physician is a long standing and fundamental principle in our Workers' Compensation system. In the case of Hamilton v. Dep't of Labor & Indus., the

Washington State Supreme Court allowed a jury instruction that read as follows:

> In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiffs attending physician.

Hamilton v. Dep't of Labor & Indus., 111 Wash.2d 569, 570, 761 P.2d 618 (1988). In sustaining the lower court verdict, the Court stated:

> Instruction 11 is not a comment on the evidence as prescribed under Const. Art. 4, Sec. 16, of the State Constitution. The instruction does not give the personal opinion of the judge. Rather, it states a long-standing rule of law in worker's compensation cases that special consideration should be given to the claimant's attending physician. As we observed in Chalmers v. Dep't of Labor & Indus., 72 Wash.2d 595, 599, 434 P.2d 720 (1967): "It is settled in this state that, in this type of case, special consideration should be given to the opinion of the attending physician."

Hamilton, 111 Wash.2d at 571 (*citing* Groff, 65 Wash.2d at 45; Spalding v. Dep't of Labor & Indus., 29 Wash.2d 115, 129, 186 P.2d 76 (1947)). In Ruse, the case compared above, the Court reiterated the special consideration rule, stating as follows: "An attending physician who has cared for and treated a patient over a period of time 'is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once' ". Ruse, 138 Wash.2d at 6 (*citing* Spalding, 29 Wash.2d at 128-29).

Dr. Summe is Mr. Bell's attending physician and he has had a longstanding treating doctor-patient relationship with Mr. Bell. Dr. Wright has treated Mr. Bell for a significant amount of time as well, to include multiple examinations and surgeries. In referencing Ruse once again, Mr. Ruse had an issue regarding which doctor should have been considered his attending physician, Dr. Shanks or Dr. Gilman. That problem doesn't present itself in this case. It is well recognized that Dr. Summe is Mr. Bell's attending physician. Both Dr. Summe and Dr. Wright have made it clear, as addressed above, that it is their opinion, on a more probable not basis, that Mr. Bell's pre existing lumbar spine/low back condition became aggravated and accelerated due to his occupation as a drywaller between 2006 and 2009.

It also needs to be mentioned that there is nothing to indicate that the Snohomish County Superior Court recognized that Title 51 is to be liberally construed in favor of the injured work nor is there any indication that the Snohomish County Superior Court recognized Dr. Summe as Mr. Bell's attending physician and gave his testimony and opinions special weight in reaching the decision entered on October 15, 2012. *See* CP 3-6[4]. In fact, the pertinent parts of the Snohomish County Superior Court's

[4] The Snohomish County Superior Court's Findings of Fact and Conclusions of Law and Judgment contains the incorrect docket number. The correct docket number is 11-2-03156-8.

Findings of Fact and Conclusions of Law and Judgment are almost identical to those entered by the Industrial Appeals Judge in his PD&O on November 23, 2010. *See* CP 3-6, 66-67. There is no indication that the Snohomish County Superior Court made an independent decision based on the evidence in the record before the Board or how they came to the conclusion that it did. Id. In Groff, the Court recognized that

> [f]or an adequate appellate review in cases such as the one now before us, this court should have, from the trial court which has tried the case do [sic] novo, findings of fact (supplemented, if need be, by a memorandum decision or oral opinion) which show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts.

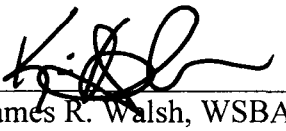
Groff, 65 Wash.2d at 40. In Groff, as in this case, "[i]t is impossible to tell upon what underlying facts the court relied and whether the proper standards were applied." Id. The Groff Court determined that this type of situation is frowned upon by the higher courts of this State and alone is grounds to send this matter back down to the superior court. *See* id. at 46-47. While the preponderance of the evidence warrants a reversal of the Snohomish County Superior Court decision to be replaced by a decision favorable to Mr. Bell, a remand to the superior court is also necessary to

enter Findings of Fact, Conclusions of Law, and Judgment that complies with Groff.

V. CONCLUSION

For the foregoing reasons, Mr. Bell respectfully requests that this Court reverse the superior court's Findings of Fact, Conclusions of Law, and Judgment entered on October 15, 2012 as Mr. Bell has presented sufficient evidence that clearly indicates Mr. Bell's occupation as a drywaller between 2006 and 2009 aggravated, accelerated, and hastened the progression of Mr. Bell's lumbar spine/low back condition.

RESPECTFULLY SUBMITTED this 22nd day of January, 2013.



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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AARON BELL, Appellant, vs. **DEPARTMENT OF LABOR & INDUSTRIES,** Respondent.	**COA No. 69438-3-I** **AFFIDAVIT OF ABC**

Documents: **BRIEF OF APPELLANT**

The undersigned being first duly sworn on oath deposes and says: that he/she is now, and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to or interested in the above entitled action, and competent to be a witness therein.

On January 22nd, 2013, at approximately 1:40 p.m., ABC Legal Services duly delivered the above described document(s) to the office of Erica Kosher, Attorney General of Washington – Labor and Industries Divsion, at the address of 800 5th Avenue, Suite 2000, Seattle, WA 98104, by leaving a true and correct copy of the same with the receptionist

Affiant: _____
Edward M. Silvetti Jr, Supervisor
Seattle Messenger, ABC Legal Services

Subscribed and sworn before me, a notary public in the state of Washington residing at Seattle, done this 24th day of December, 2012.

MARK LEE GOCKLEY NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 2-28-13

Notary: _____
Mark Lee Gockley