No. 331229

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

NEIL HORNSBY, *Appellant*,

v.

ALCOA INC., *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR CHELAN COUNTY
THE HONORABLE T.W. SMALL

BRIEF OF RESPONDENT

WALLACE, KLOR & MANN, P.C.
LAWRENCE E. MANN
REBECCA WAREHAM PORTLOCK
Attorneys for Respondent Alcoa Inc.

By Rebecca Wareham Portlock, WSBA#45939
Attorney at Law
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949
rportlock@wallaceklormann.com

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I.

RESTATEMENT OF THE CASE

Neil Hornsby is 50-years-old and worked as a Utility Laborer for Alcoa Inc. from July 31, 2000 through July 2, 2001, and July 21, 2003 through May 20, 2008. On September 9, 2011 Mr. Hornsby completed an application for benefits stating he sustained structural damage to his lungs in the course of his employment at Alcoa Inc.

The Department of Labor and Industries (Department) issued an order on December 7, 2011 denying the claim because there was no evidence Mr. Hornsby's medical condition was due to injurious exposure in the course of his employment. Mr. Hornsby filed a protest and request for reconsideration on February 6, 2012. The Department affirmed the denial order on February 22, 2012.

Mr. Hornsby filed an appeal with the Board of Industrial Insurance Appeals (Board) on April 23, 2012. The Board issued an order granting the appeal on May 15, 2012. Following the presentation of evidence from Mr. Hornsby and the employer, the Board issued a Proposed Decision and Order on December 16, 2013, affirming the Department's February 22, 2012 order. Mr. Hornsby filed a Petition for Review of the December 16, 2013 Proposed Decision and Order on January 6, 2014 that was denied by the Board. The Board issued an order on January 23, 2014 that adopted

the December 16, 2013 Proposed Decision and Order. Mr. Hornsby then filed an appeal in Superior Court of the Board's decision to uphold the Department order that denied his occupational disease claim.

The Board record was reviewed and considered in superior court by Judge T.W. Small. After careful consideration of the evidence contained in the Board record, Judge Small affirmed the Board's decision to uphold the Department's denial of Mr. Hornsby's workers' compensation claim. The judgment was filed on October 27, 2014. On November 3, 2014 Mr. Hornsby requested reconsideration of the October 27, 2014 judgment.

On December 10, 2014, a hearing was held on Mr. Hornsby's Motion for Reconsideration of the October 27, 2014 judgment. Following oral arguments, Judge Small denied Mr. Hornsby's Motion for Reconsideration in an order dated January 7, 2015. On February 5, 2015 Mr. Hornsby filed this appeal.

II.

SUMMARY OF EVIDENCE

Dr. Robert Cox

Dr. Cox is Board-certified in internal medicine with a subspecialty in pulmonary disease. He maintains an active pulmonary practice with hospital privileges in which more than 80% of his time is spent treating patients with respiratory abnormalities. [CP--Cox, pp. 6-7].

Dr. Cox performed an independent medical examination of Mr. Hornsby on October 24, 2011. Dr. Cox obtained a historical background directly from Mr. Hornsby, which included a description of his employment history at Alcoa Inc. and his history of using personal protective equipment. Mr. Hornsby also provided information regarding his smoking history. Mr. Hornsby informed Dr. Cox he had smoked cigarettes for most of his adult life, and he continued to smoke as of the date of the October 24, 2011 examination. [CP--Cox, pp. 18-20; 22].

Dr. Cox testified Mr. Hornsby indicated he began experiencing respiratory symptoms in 2010, including coughing with sputum and shortness of breath. [CP--Cox, p. 21]. Dr. Cox performed diagnostic spirometry of Mr. Hornsby which showed a suggestion of restricted ventilatory defect. Based on his examination of Mr. Hornsby and his

interpretation of the diagnostic test results, Dr. Cox assessed Mr. Hornsby with desquamative interstitial pneumonia. [CP--Cox, pp. 24-25].

Dr. Cox testified the major cause of desquamative interstitial pneumonia is cigarette smoking. He stated cigarettes contain thousands of different chemicals, including aluminum and cadmium, which cause inflammation in the lungs, ultimately leading to desquamative interstitial pneumonia. [CP--Cox, pp. 28-31]. Dr. Cox confirmed he had reviewed Mr. Hornsby's lung x-rays and CT scans, taken before and after his independent examination. Dr. Cox stated Mr. Hornsby underwent a chest x-ray on July 13, 2000, prior to his employment at Alcoa Inc. He stated the x-ray showed abnormal nodule densities in Mr. Hornsby's lungs. Dr. Cox stated the abnormal nodules in Mr. Hornsby's lungs were seen to increase in size and number in subsequent radiological imaging studies. [CP--Cox, pp. 34-35].

Dr. Cox confirmed he had reviewed the November 12, 2012 pathology report generated by Dr. Abraham, following his testing of Mr. Hornsby's lung biopsy. Dr. Cox also reviewed a transcript of the deposition testimony provided by Dr. Abraham. Dr. Cox testified Dr. Abraham's pathology report showed the presence of various metallic particles. Dr. Cox testified the mere presence of such particles in Mr. Hornsby's lungs would not explain how the metals were introduced. [CP--

Cox, pp. 38-40]. Furthermore, Dr. Cox confirmed the presence of aluminum particles in Mr. Hornsby's lung biopsy was not sufficient to prove his work exposure was a proximate cause of his desquamative interstitial pneumonia. Dr. Cox confirmed the association does not amount to causation, and Mr. Hornsby's condition cannot be diagnosed on the basis of a biopsy alone. It is necessary to look at the context of Mr. Hornsby's social and employment history. [CP--Cox, pp. 40-43].

Dr. Cox stated pulmonary fibrosis would develop in a person with chronic smoking-related desquamative interstitial pneumonia. Dr. Cox also dismissed the possibility Mr. Hornsby's condition could have resulted from exposure to asbestos or bird proteins. He noted Mr. Hornsby's biopsy showed no evidence of asbestos changes or hypersensitivity pneumonitis, and Mr. Hornsby's clinical picture was not consistent with those conditions. [CP--Cox, pp. 42-44].

Dr. Cox concluded by reiterating his opinion, Mr. Hornsby's desquamative interstitial pneumonia and pulmonary fibrosis resulted from his extensive smoking history. Dr. Cox affirmed the conditions are not related to any exposure in the course of Mr. Hornsby's employment with Alcoa Inc. on a more probable than not basis. [CP--Cox, pp. 47-49]. He stated the conditions were caused by Mr. Hornsby's extensive smoking history, on a more probable than not basis. Dr. Cox noted Mr. Hornsby's

condition had manifested and continued to worsen after his employment at Alcoa Inc. ended, which led him to believe Mr. Hornsby's smoking was the cause of his condition.

Dr. Steven Simons

Dr. Simons is a pulmonary physician, Board-certified in internal medicine and pulmonary diseases. [CP--Simons, p. 7]. Dr. Simons performed a review of Mr. Hornsby's complete medical file and diagnostic imaging studies, as well as the Board transcript and expert witness perpetuation depositions generated in Mr. Hornsby's appeal. Dr. Simons testified Mr. Hornsby's primary medical diagnosis is desquamative interstitial pneumonia. He also noted Mr. Hornsby's medical records and diagnostic studies show interstitial fibrosis and respiratory bronchiolitis. [CP--Simons, pp. 21-22].

Dr. Simons noted Dr. Abraham observed the presence of aluminum metals in Mr. Hornsby's lung biopsy. Dr. Simons testified such particulates could be deposited as a result of cigarette smoking. [CP--Simons, p. 24]. Dr. Simons also testified there was no way to know when the aluminum particles in Mr. Hornsby's lungs were introduced. [CP--Simons, p. 26]. He confirmed the presence of aluminum particles in the lung tissue does not mean the particles proximately caused any pathological disease. [CP--Simons, p. 24].

Dr. Simons concluded Mr. Hornsby's desquamative interstitial pneumonia and pulmonary fibrosis were proximately caused by his cigarette smoking. [CP--Simons, p. 20].

Dr. Ganesh Raghu

Dr. Raghu is Board-certified in internal medicine with a subspecialty in pulmonary disease and critical care medicine. [CP--Raghu, p. 5]. Dr. Raghu first saw Mr. Hornsby on September 21, 2012 for evaluation and management of his interstitial lung disease. [CP--Raghu, p. 6]. Dr. Raghu's testimony focused on the various lung function tests he administered to Mr. Hornsby, which showed a steady decline in his pulmonary condition over time. In his testimony, Dr. Raghu stated surgery is not currently being recommended to treat Mr. Hornsby's lung condition. Dr. Raghu noted Mr. Hornsby's condition is being monitored for further deterioration and he may be considered a candidate for a lung transplant if further deterioration occurs. Dr. Raghu stated Mr. Hornsby would have to stop smoking cigarettes for at least six months to be considered a candidate for a lung transplant. [CP--Raghu, pp. 6-13].

Dr. Raghu did not offer any opinion regarding the cause of Mr. Hornsby's desquamative interstitial pneumonia, though he did note chronic cigarette smoking is associated with the condition. [CP--Raghu, p. 17].

Dr. Raghu confirmed he had not reviewed any of Mr. Hornsby's diagnostic imaging studies performed prior to 2011. [CP--Raghu, pp. 14-15; 18].

Dr. Jerrold Abraham

Dr. Abraham is an anatomic pathologist who specializes in research, teaching, and diagnosis of occupational lung disease. He does not treat patients. [CP--Abraham, p. 42].

On October 17, 2012 Dr. Abraham performed an analysis of Mr. Hornsby's lung tissue biopsy. Dr. Abraham examined the tissue using light microscopy. [CP--Abraham, p. 8]. Dr. Abraham testified Mr. Hornsby's initial biopsy test results were abnormal. Dr. Abraham noted evidence of respiratory bronchiolitis which he related to smoking. He observed filling of air spaces with macrophages led him to affirm the diagnosis of desquamative interstitial pneumonitis. [CP--Abraham, p. 12]. There was also interstitial fibrosis and scarring in the supporting structure of the lung. Dr. Abraham documented most of the macrophages he observed contained dust particles of the type typically seen with smoking. [CP--Abraham, p. 13]. He concluded some of the findings were consistent with smoking and some were consistent with other exposures he opined did not come from smoking. [CP--Abraham, pp. 8-9].

Dr. Abraham completed a supplemental pathology report on November 12, 2012 following analysis of Mr. Hornsby's lung tissue with a

scanning electron microscope. Dr. Abraham stated he saw aluminum metal particles and aluminum silicate particles in Mr. Hornsby's lung tissue. [CP--Abraham, p. 18]. Dr. Abraham stated the aluminum exposure reflected in Mr. Hornsby's biopsy was of the type that has been previously seen to cause desquamative interstitial pneumonitis, and could also be associated with interstitial fibrosis. He did not think Mr. Hornsby's pulmonary fibrosis would have been caused by smoking alone. Dr. Abraham also stated Mr. Hornsby's respiratory bronchiolitis was more likely associated with smoking, which he stated was different from the fibrosis or the desquamative interstitial pneumonitis pattern. [CP--Abraham, pp. 32-33].

Dr. Abraham ultimately concluded the aluminum particles seen in Mr. Hornsby's biopsy had to have come from some environment where there was a source of aluminum fumes. [CP--Abraham, pp.41-42]. Dr. Abraham attributed the aluminum particles in Mr. Hornsby's lungs to his work at Alcoa Inc., based solely on his understanding of Mr. Hornsby's work history. Dr. Abraham testified he relied on the exposure history Mr. Hornsby provided to Dr. Raghu. [CP--Abraham, p. 42]. He confirmed he never spoke directly with Mr. Hornsby and he did not obtain any first-hand information regarding Mr. Hornsby's work or social history. Dr. Abraham

testified he was unsure of the extent and duration of Mr. Hornsby's smoking habit. [CP--Abraham, p. 53].

Dr. Abraham testified he had no knowledge regarding Mr. Hornsby's use of personal protective equipment over the course of his employment at Alcoa Inc., and he did not have any information regarding the extent of Mr. Hornsby's job duties at Alcoa Inc., apart from the information provided to him in Dr. Raghu's September 22, 2012 report. [CP--Abraham, pp. 56-57]. Dr. Abraham confirmed his testing of Mr. Hornsby's lung biopsy tissue could not indicate when Mr. Hornsby's exposure to aluminum occurred. [CP--Abraham, p. 51]. Dr. Abraham could only state Mr. Hornsby's exposure occurred prior to the date the biopsy was obtained in June 2011, which was four years after his employment at Alcoa Inc. ended. In order to confirm causation Dr. Abraham stated the exposure date would have to be correlated with the personal history provided by Mr. Hornsby. [CP--Abraham, p. 41].

Mr. Hornsby's Testimony

In his testimony before the Board Mr. Hornsby acknowledged he started smoking cigarettes at age 16, and with the exception of several brief periods of cessation, he had continued to smoke up through the date of the hearing. [CP--Hornsby, pp. 111-114]. Mr. Hornsby briefly discussed his employment prior to Alcoa Inc., noting he worked at several

auto wrecking yards as an auto parts dismantler from approximately 1990 through 2000. Mr. Hornsby stated he used an acetylene torch in his work dismantling cars. [CP--Hornsby, pp. 6-7; 98].

Mr. Hornsby described his employment at Alcoa Inc., detailing the various positions in which he worked, including Carbon Setter, Head Tapper and Utility Laborer. Mr. Hornsby confirmed he did not do any welding during his employment at Alcoa Inc. [CP--Hornsby, p.127]. Mr. Hornsby testified he worked at Alcoa Inc. from July 2000 through 2001, at which time he was laid off following curtailment at the plant. [CP--Hornsby, pp. 7; 9]. Mr. Hornsby stated he worked as a coal miner for Deserato Mine in Colorado for approximately three weeks. Mr. Hornsby returned to Alcoa Inc. when the plant reopened in 2003, and he remained there through May 2008. [CP--Hornsby, pp. 10-11; 13; 35].

Mr. Hornsby testified he used various types of personal protective equipment throughout the course of his employment at Alcoa Inc. Mr. Hornsby stated at the beginning of his employment he used a paper mask which he wore any time he was performing work duties. [CP--Hornsby, pp. 120-122]. Mr. Hornsby stated he was first fit tested for a respirator in 2005. [CP--Hornsby, p. 120]. In approximately 2006-2007, Mr. Hornsby stated he was given a Tyvek protective suit with forced air to wear while working in potlining. [CP--Hornsby, pp. 31-35]. Mr. Hornsby testified he

always wore some type of respiratory protection during his employment at Alcoa Inc. [CP--Hornsby, pp. 124-125; 136-138].

Mr. Hornsby recounted the course of his medical treatment from 2009 to the present. He acknowledged his pre-employment screening showed lung nodules in 2000. [CP--Hornsby, p. 11]. Mr. Hornsby was questioned extensively regarding his smoking history. He confirmed he began smoking at age 16, and since that time the quantity of cigarettes he smokes per day has varied. [CP--Hornsby, pp. 47-49; 111-114]. Mr. Hornsby noted he continued to smoke several cigarettes per day, despite recommendations from his treating physicians that he stop. [CP--Hornsby, p. 49].

III.

ARGUMENT IN REPONSE

Summary of Argument in Response on Assignment of Error No. 1

The superior court did not err in sustaining and affirming the Board's January 23, 2014 order that affirmed the Department of Labor and Industries order of February 22, 2012.

Argument in Response on Assignment of Error No. 1

Standards of Review

The appellate court reviews the decision of the superior court (an appellate court in the context of an industrial injury claim) and the Board *de novo*, but solely based on the evidence and testimony presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

Statutory construction is a question of law and is reviewed *de novo*. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). The primary goal of statutory construction is to implement legislative intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If a statute is plain and unambiguous its meaning must be primarily derived from the language of the statute. *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

On appellate review, the findings and decision of the Board shall be *prima facie* correct. RCW 51.52.115; *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 504, 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); *Jepson v Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). On appellate review, if the evidence is equally balanced then the findings of the Board must stand. *Garrett Freightliners, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 339, 725 P.2d 463 (1986).

Mr. Hornsby has failed to present sufficient evidence to overcome the presumption the findings of the Board, as affirmed by the superior court, are *prima facie* correct. The superior court did not err in sustaining and affirming the Board's January 23, 2014 order.

Summary of Argument in Response on Assignment of Error No. 2

The superior court did not err in adopting the Board's Finding of Fact #4 which states: "Mr. Hornsby's conditions diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis did not arise naturally and proximately out of the distinctive conditions of his employment."

Argument in Response on Assignment of Error No. 2

In order to meet his burden of proof in this appeal, Mr. Hornsby must prove by a preponderance of evidence his pulmonary condition is an

occupational disease, defined as "such disease or infection arising naturally and proximately out of employment." RCW 51.08.140. The two main elements of arising naturally and proximately are analyzed separately by the fact finder.

To arise naturally means the disease occurs naturally out of the distinct conditions of a claimant's employment. To show a distinct condition, the claimant must prove the disease was caused by conditions of his or her particular occupation, as opposed to conditions coincidentally occurring in the work place. The claimant must also prove the particular work conditions of his employment more probably caused the disease than conditions of everyday life or all employment in general.

Once Mr. Hornsby has established the distinctive conditions of his employment he must prove those distinctive conditions proximately caused his pulmonary condition, diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis. The proximately element requires the disease to be "probably" as opposed to "possibly" caused by the employment. Causation must be established by competent medical evidence. *McClelland v. ITT Rayonier, 65 Wn. App. 386 (1992).* This requires medical testimony specifically linking the distinct employment conditions to the end result. *In re Beverly Donahue*, Dckt. No. 96 3839 (1998).

Mr. Hornsby called four separate medical experts to testify on his behalf before the Board, three of whom treated him at various points in time for his pulmonary condition. Of those four experts, only Dr. Abraham provided any comment on the question of whether Mr. Hornsby's occupational exposure proximately caused his desquamative interstitial pneumonitis, respiratory bronchiolitis, and interstitial fibrosis.

Dr. Abraham never met Mr. Hornsby. Dr. Abraham never spoke directly with Mr. Hornsby or performed a physical examination of him. Dr. Abraham does not treat patients. Dr. Abraham's opinion is based almost entirely on second-hand information regarding Mr. Hornsby's social and employment history. It is significant that Mr. Hornsby's own treating physicians, the doctors who actually spoke with and examined him, did not support his assertion that his pulmonary condition was caused by an occupational exposure.

To compensate for his failure to manufacture more than one supporting opinion, Mr. Hornsby makes the dubious claim Dr. Abraham should be treated as his attending physician, and as such, his opinion should be given "special consideration" as prescribed by *Hamilton v. Dept. of Labor and Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988). Dr. Abraham is clearly a consulting expert, not an attending physician. His opinion is entitled to no "special consideration."

The history of Dr. Abraham's involvement shows he was consulted by Mr. Hornsby's actual attending physician, Dr. Raghu, to evaluate Mr. Hornsby's lung biopsy in late 2012. Dr. Abraham was not consulted until several months after Mr. Hornsby filed his appeal of the Department order denying his claim. Mr. Hornsby argues because Dr. Abraham was consulted by Dr. Raghu, he should be considered an attending physician.

Mr. Hornsby's argument distorts *Hamilton* beyond recognition. Dr. Abraham has never seen or rendered any type of treatment to Mr. Hornsby. He was consulted after this appeal was filed for the sole purpose of providing a supporting opinion regarding the cause of Mr. Hornsby's pulmonary condition. He is clearly not an attending physician by any stretch of the imagination. Accordingly, the Board and superior court did not afford Dr. Abraham's opinion any special consideration.

On October 17, 2012 Dr. Abraham performed an analysis of Mr. Hornsby's lung tissue biopsy using light microscopy. [CP--Abraham, p. 8]. Dr. Abraham testified Mr. Hornsby's initial biopsy test results were abnormal with findings consistent with cigarette smoking. [CP--Abraham, p. 13]. Dr. Abraham completed a supplemental pathology report on November 12, 2012 following analysis of Mr. Hornsby's lung tissue with a scanning electron microscope. Dr. Abraham stated he saw various metallic particles in Mr. Hornsby's lung tissue. [CP--Abraham, p. 18].

Dr. Abraham stated the aluminum particles seen in Mr. Hornsby's biopsy were comparable to the type seen in several remote studies of workers in different industrial settings who had developed desquamative interstitial pneumonitis and interstitial fibrosis. Dr. Abraham also stated Mr. Hornsby's respiratory bronchiolitis was more likely associated with smoking, which he stated was different from the fibrosis or the desquamative interstitial pneumonitis pattern. [CP--Abraham, pp. 32-33].

None of Mr. Hornsby's other medical experts endorsed Dr. Abraham's opinion regarding the cause of Mr. Hornsby's respiratory condition. In contrast, Drs. Simons and Cox confirmed the presence of aluminum particles in a patient's lungs does not necessarily result in the development of interstitial lung disease or pulmonary fibrosis.

Dr. Simons, a prominent and widely-respected practicing pulmonologist with over 25 years of experience in evaluating and treating complex lung diseases, directly addressed Dr. Abraham's observation of the presence of aluminum metals in Mr. Hornsby's lung biopsy. Dr. Simons testified the mere presence of aluminum particles in the lung tissue does not amount to credible medical evidence that the particles proximately caused any pathological disease. [CP--Simons, p. 24]. Dr. Simons opined Mr. Hornsby's condition clearly presented as a typical case of a smoker who developed desquamative interstitial pneumonia.

Dr. Simons addressed Dr. Abraham's citation of various case studies regarding heavy metal exposure and desquamative interstitial pneumonia, noting the studies themselves were not definitive. Dr. Simons affirmed there is no evidence to support the fact the aluminum is causing any physical condition or reaction. [CP--Simons, p. 25].

Dr. Cox also concluded Mr. Hornsby's lung conditions were not related to any exposure in the course of his employment with Alcoa Inc. on a more probable than not basis. [CP--Cox, pp. 47-49]. His opinion was based on radiographic evidence that Mr. Hornsby's lung condition had manifested prior to his employment at Alcoa Inc., and it continued to worsen unabated after his employment at Alcoa Inc. ended. Dr. Cox concluded Mr. Hornsby's desquamative interstitial pneumonia and pulmonary fibrosis resulted from his extensive smoking history.

The time line of Mr. Hornsby's medical treatment supports a finding that his progressive pulmonary decline is attributable entirely to his lifelong smoking habit, a habit which continues to the present. Mr. Hornsby had many small abnormal nodules in his lungs as early as 2000, prior to the beginning of his employment at Alcoa Inc. At that point, he had been a regular smoker for nearly 18 years. Mr. Hornsby did not begin actively treating for his lung condition until two years after his employment at Alcoa Inc. ended in 2008. Even in the absence of any

occupational exposure, Mr. Hornsby's lung condition has continued to worsen as he persists in habitual ingestion of toxic cigarette smoke against medical advice.

The medical testimony unequivocally establishes the fact desquamative interstitial pneumonia is a condition overwhelmingly associated with cigarette smoking. This is a conclusion supported by all the testifying medical experts, including Dr. Abraham.

The preponderance of medical and factual evidence shows Mr. Hornsby's conditions diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis did not arise naturally and proximately from the distinctive conditions of his employment.

Summary of Argument in Response on Assignment of Error No. 3

The superior court did not err in adopting the Board's Conclusion of Law #2, which states: "Mr. Hornsby's conditions diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis is not an occupational disease within the meaning of RCW 51.08.140."

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Argument in Response on Assignment of Error No. 3

As outlined herein, the medical evidence is clear that Mr. Hornsby's lifelong and ongoing smoking habit severely damaged his lungs and impaired his respiratory function. Each of Mr. Hornsby's definitive diagnoses, desquamative interstitial pneumonia, respiratory bronchiolitis and interstitial fibrosis, can be explained by his extensive smoking history, independent of any other external exposure. While the evidence regarding the effects of Mr. Hornsby's smoking is clear, he has failed to produce the requisite medical evidence that his occupational exposure caused or contributed to his respiratory condition.

Mr. Hornsby cites *Intalco Aluminum v. Dept. of Labor and Indus.*, 66 Wn.App. 644, 833 P.2d 390 (Wash. App. 1992), in support of his contention that his occupational disease claim should be allowed. However, *Intalco* and subsequent decisions by the Board applying *Intalco* have affirmed the fact an occupational disease claim will not be allowed solely on the basis of evidence of occupational exposure, particularly where the evidence is equivocal on causation.

In the Board decision *In re Gary L. Jackson*, Dckt. No. 96 2274 (March 23, 1998), the Board addressed a case factually similar to the case at bar, in which occupational and non-occupational factors were identified as potentially causative agents of Mr. Jackson's lung condition. In *Jackson*, the claimant was a 32-year-old non-smoker who worked as a

warehouse foreman for Interstate Batteries. Mr. Jackson alleged he was exposed to sulfuric acid, pyrolysis, and mist given off when charging batteries throughout his workday. Mr. Jackson subsequently developed interstitial lung fibrosis which he attributed to his occupational exposure. Mr. Jackson was also diagnosed with hypersensitivity pneumonia, which his doctors attributed to the five birds he kept in his home over the course of eight years. Mr. Jackson's claim was denied by the Department.

The Board acknowledged Mr. Jackson's complex medical records and diagnostic studies showed the presence of bird proteins, as well as other findings that arguably were not explained by avian exposure alone. The Board ultimately concluded Mr. Jackson did not show but for his exposures to sulfuric acid mist and pyrolysis fumes, he would not have developed his interstitial pneumonitis or hypersensitivity pneumonitis. The Board noted while the record strongly pointed to the birds in the home as the likely or probable cause of his condition, it was also possible Mr. Jackson had a more serious interstitial disease from unknown causes. However, he failed to produce a preponderance of evidence that his lung condition arose naturally and proximately as a result of his occupational exposure.

The *Intalco* holding was further developed in the Board decision *In re Robert O. Johnson*, Dckt. No. 03 17852 (July 12, 2005), particularly on

the question of the role of medical studies in establishing causation. In *Johnson,* the claimant alleged he had developed Parkinson's disease as a result of the distinctive conditions of his employment in the printing industry. The Board affirmed the Department order which denied the claim for an occupational disease, finding insufficient evidence linking Mr. Johnson's occupational solvent exposure to his Parkinson's disease on a more probable than not basis.

In *Johnson*, the Board noted there was evidence in the medical literature correlating environmental exposure to the development of Parkinson's disease; however, the Board also noted the literature was conflicting and correlation did not equate to causation.

In the present case, Dr. Abraham relied heavily on three medical articles to bolster his opinion regarding the cause of Mr. Hornsby's pulmonary condition. In *Johnson*, the Board stated in order to support causation on a more-probable-than-not basis, the medical literature would have to include many consistent studies showing a temporal connection between the occupational exposure and the development of the condition alleged, within an established latency period. The Board found Mr. Johnson's experts had not produced sufficient evidence in the medical literature to support their opinions regarding causation.

In the present case, the scant literature relied upon by Dr. Abraham and indeed his very conclusions, suffer from the same defect of conflating correlation and causation. The superior court noted some of the "studies" upon which Dr. Abraham relied were not actual population studies, but rather anecdotal instances involving a single person. In the study Dr. Abraham performed himself, he testified "while smoking causes inflammation, respiratory bronchiolitis, if there was fibrosis there, it may very well be related to additional exposures to dust like silica, aluminum silicates or metals." [CP--Abraham, p. 37]. Dr. Abraham's opinions are rendered in terms of *possibility* rather than *probability*.

The testimony presented by Dr. Abraham regarding the cause of Mr. Hornsby's pulmonary condition does not rise to the level of reasonable medical probability and it does not constitute a preponderance of evidence in favor of allowing this claim. Mr. Hornsby has failed to show on a more probable than not basis his desquamative interstitial pneumonitis, respiratory bronchiolitis and interstitial fibrosis constitute an occupational disease within the meaning of RCW 51.08.140, proximately caused by any exposure at Alcoa Inc.

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Summary of Argument in Response on Assignment of Error No. 4

The superior court did not err in adopting the Board's Conclusion of Law #3 which states: "The Department order dated February 22, 2012 is correct and is affirmed."

Argument in Response on Assignment of Error No. 4

Mr. Hornsby's Assignment of Error No. 4 is in essence a restatement of his Assignment of Error No. 1, and the same arguments in response apply. The Department order dated February 22, 2012 affirmed an earlier decision by the Department to deny this claim. Claim denial was correctly affirmed by the Board, based on the medical and factual evidence outlined herein.

The findings and decision of the Board are considered *prima facie* correct on appellate review. RCW 51.52.115; *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 504, 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); *Jepson v Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). On appellate review, if the evidence is equally balanced then the findings of the Board must stand. *Garrett Freightliners, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 339, 725 P.2d 463 (1986).

Mr. Hornsby has failed to present sufficient evidence to show the decisions of the Department, Board, and superior court are incorrect. The February 22, 2012 Department order is correct and should be upheld because Mr. Hornsby has not proven by a preponderance of evidence his pulmonary condition constitutes an occupational disease proximately caused by the distinctive conditions of his employment at Alcoa Inc.

Summary of Argument in Response on Assignment of Error No. 5

The superior court did not err in citing opinions of Dr. Lodhi as testified to in the perpetuation deposition of Dr. Simons as the basis for his medical conclusions.

Argument in Response on Assignment of Error No. 5

Mr. Hornsby contends the superior court erred in "relying" on opinions rendered by Dr. Lodhi which were referenced in statements made by Dr. Simons. Dr. Lodhi is a pulmonologist who began treating Mr. Hornsby in January 2011. She was not called as a witness in this appeal by Mr. Hornsby or Alcoa Inc. and she never provided any testimony in this matter. However, Dr. Lodhi's medical records were reviewed by all the testifying experts in this appeal, including Drs. Raghu, Simons, Cox, and Abraham. Dr. Lodhi's opinions and conclusions were allowed into evidence as the part of the basis for the opinions expressed by the testifying experts.

In Dr. Simons' deposition, he testified regarding his review of Dr. Lodhi's November 19, 2012 chart note in which Dr. Lodhi stated Mr. Hornsby's lung disease has an established relationship of smoking to DIP and the possibility of aluminum-induced lung disease may be a contributory factor. [CP--Simons, p. 49]. Dr. Simons testified the cause of DIP in the overwhelming majority of cases is cigarette smoking, and Mr. Hornsby's clinical presentation was consistent with DIP. [CP--Simons, p. 20]. Dr. Simons opined the mere presence of aluminum particulates in Mr. Hornsby's lung biopsy could not, on its own, prove the particulates were causing any pathological disease. [CP--Simons, p. 24].

In upholding the Board's January 23, 2014 order the superior court noted Dr. Lodhi's statement in her November 19, 2012 chart note "Mr. Hornsby's lung disease has an established relationship of smoking to DIP and the possibility of aluminum-induced lung disease may be a contributory factor" was a particularly cogent summary of all of the testimony presented in the appeal. [CP--Verbatim Report of Proceedings, pp. 59-60]. Mr. Hornsby has interpreted this statement as the superior court "relying" on a witness who did not actually testify before the Board. Mr. Hornsby asserts this constitutes reversible error because he was not afforded the opportunity to cross examine Dr. Lodhi regarding that statement.

Mr. Hornsby's assignment of error misinterprets the facts. The superior court did not base its decision on Dr. Lodhi's opinion. The superior court based its decision on the testimony of Drs. Cox, Simons, Raghu, and Abraham, which testimony established Mr. Hornsby's pulmonary condition was proximately caused by his lifelong smoking. The testimony of Drs. Cox, Simons, Raghu, and Abraham also established Mr. Hornsby's biopsy showed the presence of aluminum particulates, but there is no way to definitively determine when or how those particulates were introduced. Mr. Hornsby failed to present a preponderance of medical evidence to prove the aluminum particulates have resulted in any pathological disease. This is the evidence upon which the superior court based its decision. [CP--Verbatim Report of Proceedings, p. 60].

The fact the superior court cited language contained in a chart note from Dr. Lodhi in summarizing the testimony presented to the Board does not mean the court "relied" on Dr. Lodhi's statement. Nor does it mean Mr. Hornsby was prejudiced by his inability to cross examine Dr. Lodhi. The superior court relied on testimony the Board received from Drs. Cox, Simons, Raghu, and Abraham, which witnesses Mr. Hornsby was provided ample opportunity to cross examine.

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Summary of Argument in Response on Assignment of Error No. 6

The superior court did not err in concluding Mr. Hornsby did not meet his burden of proof by a preponderance of the evidence that his lung disease arose naturally and proximately out of the conditions of his employment at Alcoa Inc.

Argument in Response on Assignment of Error No. 6

At each stage of his appeal, the burden of proof has been on Mr. Hornsby to establish by a preponderance of the evidence the Department's February 22, 2012 decision, and subsequent decisions by the Board and superior court upholding the February 22, 2012 order, are incorrect. See RCW 51.52.115; *Layrite Products Co. v. Degenstein*, 74 Wash. App. 881, 880 P.2d 535 (1994).

Mr. Hornsby, as claimant, must be held to a strict proof that he is entitled to benefits under the Industrial Insurance Act. *E.g., Kirk v. Dep't of Labor & Indus.*, 192 Wash. 671, 674, 74 P. 2d 227 (1937); *D'Amico v. Conguista*, 24 Wn.2d 674, 683, 167 P.2d 157, 162 (1946). This strict standard of proof is not trumped by the so-called rule of liberal construction of the Industrial Insurance Act. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds Windust v. Dep't of Labor & Indus.*, 52 Wn.2d

33, 323 P.2d 241 (1958) ("We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act"). In other words, "persons entitled to the benefits of the act should be favored by a liberal interpretation of its provisions, but for this very reason, they should be held to strict proof of their title [right] as beneficiaries." *Ruse v. Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909, 911 (1998).

The liberal construction rule "does not apply to questions of fact but to matters concerning the construction of the statute, and that principle does not dispense with the requirement that those who claim benefits under the act must, by competent evidence, prove the facts upon which they rely." *Ehman v. Department of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949).

As the summarized evidence clearly shows, Mr. Hornsby has failed to produce a preponderance of evidence that his desquamative interstitial pneumonia, respiratory bronchiolitis and interstitial fibrosis were proximately caused by any occupational exposure at Alcoa Inc.

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Summary of Argument in Response on Assignment of Error No. 7

The superior court did not err in concluding that Dr. Abraham did not answer the question about causation of Mr. Hornsby's lung disease.

Argument in Response on Assignment of Error No. 7

In upholding the Board's January 23, 2014 decision the superior court noted Dr. Abraham failed to sufficiently respond to the question of whether Mr. Hornsby's desquamative interstitial pneumonia (DIP) was proximately caused by the aluminum particles identified in his lungs. [CP--Verbatim Report of Proceedings, p. 59]. The question posed to Dr. Abraham by Mr. Hornsby's counsel was stated as follows:

> Q: Do you have an opinion on a more probable than not basis to a reasonable degree of medical certainty whether the aluminum found in Mr. Hornsby's biopsies caused him to have lung diseases, DIP, pulmonary fibrosis, interstitial fibrosis and respiratory bronchiolitis? [CP--Abraham, p. 32].

Dr. Abraham responded:

> A: Well, I have to take those different descriptions one at a time. Certainly the aluminum exposure that is reflected in his biopsy is of the type that has been previously seen to cause DIP, and to be associated with interstitial fibrosis. The respiratory bronchiolitis, part of it is more likely related to smoking but could also be

> contributed to by the aluminum. But smoking is the major cause for the respiratory bronchiolitis which is different from the fibrosis or the DIP pattern itself. [CP--Abraham, pp. 32-33].

Dr. Abraham's response addresses the effects of aluminum exposure in *other* cases, but he does not direct his response to the specific facts of Mr. Hornsby's case. Dr. Abraham does not state the aluminum exposure reflected in Mr. Hornsby's biopsy *did* constitute a proximate cause his desquamative interstitial pneumonia on a more probable than not basis. He stated it was *of the type* that had been seen to cause the condition in other cases. Dr. Abraham also stated Mr. Hornsby's bronchiolitis *could be* contributed to by the aluminum, but does not state that aluminum exposure *is* a proximate cause of Mr. Hornsby's bronchiolitis on a more probable than not basis.

The superior court correctly concluded these answers from Dr. Abraham were non-responses. Mr. Hornsby's appeal turns on the question of whether the aluminum particulates in his lungs are actually causing or contributing to his desquamative interstitial pneumonia, respiratory bronchiolitis and interstitial fibrosis, on a more probable than not basis. Dr. Abraham's responses do not rise to the level of reasonable medical probability required to establish a compensable occupational disease.

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III.

CONCLUSION

The preponderance of medical evidence clearly shows Mr. Hornsby's desquamative interstitial pneumonia, respiratory bronchiolitis and interstitial fibrosis were all proximately caused by his lifelong smoking habit, which continues to this day.

The findings and decisions of the Board and superior court are considered *prima facie* correct in this appeal, and Mr. Hornsby has failed to present sufficient evidence to warrant reversal of those decisions. For the preceding reasons, this court should affirm the ruling of the superior court and enter judgment in favor of respondent, Alcoa Inc.

Respectfully submitted this 22nd day of December 2015.

Wallace, Klor & Mann, P.C.

Rebecca Wareham Portlock,
WSBA#45939
Attorneys for Respondent Alcoa Inc.
5800 Meadows Road
Lake Oswego, Oregon 97035
(503) 224-8949
rportlock@wallaceklormann.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day the document referenced below to the following, postage prepaid, first class mail to:

Claim No.: SG-12127
Docket No.: 12 15032
Claimant: Neil C. Hornsby

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Spokane, WA 99201

I further certify that I served the foregoing **BRIEF OF RESPONDENT** on the following parties on December 22, 2015 by mailing to said parties to this action a true copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last known addresses as follows, and deposited in the post office at Lake Oswego, Oregon on said day:

COPY TO:

Julie A. Anderson
Office of Julie A. Anderson
25 N. Wenatchee Avenue, Suite 106
Wenatchee, WA 98801

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Timothy Bibelheimer (via email)
Technical Claims Specialist II-WC
Helmsman Management Services
PO Box 4555
Portland, OR 97208-4555

Sheila Callihan (via email)
HR Manager
Alcoa-Wenatchee Works
6200 Malaga/Alcoa Highway
Malaga, WA 98828

DATED: December 22, 2015

WALLACE, KLOR & MANN, P.C.

Lawrence E. Mann, WSBA No. 20655
Rebecca Wareham Portlock, WSBA No. 45939
Of Attorneys for Alcoa and
Helmsman Management Services

WALLACE, KLOR & MANN, P.C.
5800 Meadows, Ste. 220
Lake Oswego, OR 97035
(550) 224-8949

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day the document referenced below to the following, postage prepaid, first class mail to:

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I further certify that I served the foregoing **BRIEF OF RESPONDENT** on the following parties on December 29, 2015 by mailing to said parties to this action a true copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last known addresses as follows, and deposited in the post office at Lake Oswego, Oregon on said day:

COPY TO:

Julie A. Anderson
Office of Julie A. Anderson
409 Mission Street
Wenatchee, WA 98801

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Timothy Bibelheimer (via email)
Technical Claims Specialist II-WC
Helmsman Management Services
PO Box 4555
Portland, OR 97208-4555

Sheila Callihan (via email)
HR Manager
Alcoa-Wenatchee Works
6200 Malaga/Alcoa Highway
Malaga, WA 98828

DATED: December 29, 2015

WALLACE, KLOR & MANN, P.C.

Lawrence E. Mann, WSBA No. 20655
Rebecca Wareham Portlock, WSBA No. 45939
Of Attorneys for Alcoa and
Helmsman Management Services

WALLACE, KLOR & MANN, P.C.
5800 Meadows, Ste. 220
Lake Oswego, OR 97035
(550) 224-8949

WALLACE, KLOR & MANN, P.C.
ATTORNEYS AT LAW

Christopher A. Bishop*
Kara M. Bolin
Jeffery H. Capener*
Sarah Z. Cohen
Brian J. Duckworth †*
Kelsey Fleharty
Brad G. Garber*
R. Bryan Kidder*
John L. Klor*
Lawrence E. Mann*
William A. Masters*
Rebecca W. Portlock*
Jacob C. Rasmussen †
Stephan A. Sherman
Schuyler T. Wallace, Jr.*
* Member Oregon and Washington Bars
†Member California Bar

LAKE OSWEGO
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
Ph: (503) 224-8949
Fax: (503) 224-0410

www.wallaceklormann.com

Please mail or fax all correspondence to our Lake Oswego office

SEATTLE
4200 Two Union Square
601 Union Street
Seattle, Washington 98101-4000
Ph: (206) 652-3265
Fax: (206) 652-3205

SAN JOSE
2033 Gateway Place
Suite 500
San Jose, California 95110
Ph: (408) 467-3845
Fax: (503)224-0410

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Comments:

Please see the attached amended certificate of service with Julie Anderson's correct address. A copy of the brief will be mailed to Julie Anderson today and I have emailed a copy of the brief to her.

Thank you,
Kimberly Ross
(503) 224-8949
kross@wallaceklormann.com