No. 75644-3-I

939845

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is Weyerhaeuser Company, the Appellant in the Court of Appeals.

B. COURT OF APPEALS DECISION

Weyerhaeuser seeks review of the Court of Appeals' (Div. I) decision in *Street v. Weyerhaeuser Company*, __ Wn. App. __, __ P.3d __ (November 28, 2016) (COA No. 75644-3-I) (App. A).

C. ISSUES PRESENTED FOR REVIEW

1. Does the "arises naturally" requirement of the occupational disease statute, RCW 51.08.140, present an issue of causation?

2. Does a worker need to sustain his burden of proving his disease arose naturally from distinctive conditions of his particular employment through expert medical testimony?

D. STATEMENT OF THE CASE

1. Statement of Procedure

In November 2012, Roger Street ("claimant"), filed an application for workers' compensation benefits for a low back condition (spondylosis) that he attributed to his employment at Weyerhaeuser. (CP 84). The Department of Labor and Industries denied the claim by orders dated February 14, 2013 and June 10, 2013. (CP 64). Claimant appealed that decision to the Board of

Industrial Insurance Appeals, alleging that his low back condition constituted an occupational disease. (*Id.*).

By decision and order issued November 18, 2014, the Board concluded that the claimant's low back condition did not arise either naturally or proximately out of distinctive conditions of his particular employment. (CP 54). The Board therefore affirmed the Department's denial order. (*Id.*). Following claimant's motion for reconsideration, the Board affirmed its decision. (CP 7-8, 32). Claimant appealed to the Cowlitz County Superior Court from the Board's decision. (CP 1).

Weyerhaeuser subsequently filed a motion for judgment as a matter of law on the basis claimant had failed to present any expert testimony that could support the conclusion his lumbar spondylosis arose naturally out of distinctive conditions of his employment. (CP 445). On July 1, 2015, Judge Warning denied the motion. (CP 477-79).

A jury trial was held beginning October 8, 2015. The jury concluded that the Board had erred in finding that claimant's condition did not arise naturally and proximately out of distinctive conditions of his employment, and that the condition constituted an occupational disease. (CP 532). Therefore, the court entered a judgment on December 14, 2015 that reversed the Board's decision

and directed the Department to issue an order accepting the claim as an occupational disease. (CP 533-36).

Weyerhaeuser appealed the superior court's decision to the Court of Appeals, Division II, which transferred the matter to Division I. (CP 537). The court issued an unpublished decision on November 28, 2016, which held claimant did not need to present medical testimony to satisfy the "arises naturally" requirement, and concluded the lay testimony about claimant's job was sufficient to show it was distinctive. (*Slip Op.* 7, 11) (App. A).

2. Statement of Facts

Claimant began working for Weyerhaeuser in 1975 as a timber cutter. (CP 221-26). From 1991 to 2011, he worked in the paper mill at NORPAC, a Weyerhaeuser subsidiary. (CP 227).

Claimant related his back condition primarily to his job as an assistant winder operator or "4th hand" in the paper mill. (CP 229-35). He stated this job involved nearly constant lifting of cardboard paper roll cores into cradles, bending over to tape or sand the completed rolls, and maneuvering ("manhandling") several hundred pound completed rolls dozens of times per day. (CP 230-37).

On cross-examination, claimant acknowledged that he had worked at least 30 percent of his time at NORPAC in the stockroom

performing light duties, and at least one year as a winder operator or "3rd hand," a primarily supervisory position that involved very little physical labor. (CP 250-52, 257-60).

With respect to the "4th hand" position, claimant confirmed that he spent at least 20 percent of his shift sitting down monitoring the machine, pushing buttons and doing paperwork or computer work. (CP 251-52). He also conceded that the most of the paper cores that he used weighed only 2 to 10 pounds, and that heaviest cores weighed 25 pounds and were used only occasionally. (CP 253).

As to maneuvering the paper rolls, claimant acknowledged that, normally, an automated cradle lifted the completed rolls and put them on a conveyor belt. (CP 255-56). He conceded that he had to maneuver the rolls only during line shut downs, which occurred less than daily, and that when he did so the weight of the roll was supported by the conveyor belt. (CP 256-57).

Richard Moore, claimant's supervisor from 1996 to 2001, confirmed that claimant's work as a stockroom helper and 3rd hand was physically light. (CP 279, 294-297). Mr. Moore stated that the 4th hand position involved sitting at least 20 percent of the time. (CP 280-83). He confirmed other aspects of the job were also light, including checking the slitter (cutter) to ensure it was working

properly, inspecting the core alignment and pushing buttons to operate the cradle that loaded the completed rolls onto the conveyer. (CP 285-86). Mr. Moore noted that a 4th hand could go a couple of days without maneuvering a completed roll; and, that when maneuvering was required it was accomplished on the inclined conveyor, with gravity helping move the roll, often with the assistance of another worker. (CP 288, 295).

Dr. Peterson, claimant's internist, and Dr. Tsirulnikov, who provided claimant three epidural injections, testified for claimant. They based their opinions on the understanding that each shift claimant worked at Weyerhaeuser, he had to manually work with or roll approximately 200 to 2500 paper rolls that were 40-50 inches in diameter. (CP 319-23, 368). Neither doctor addressed whether claimant's work activities presented a distinct risk of causing lumbar spondylosis, compared to the type of activities found in other employments generally or the activities of daily living. (*See* CP 319-26, 353-56; 367-71, 289-91)

Dr. Rosenbaum performed an independent medical examination and later testified for Weyerhaeuser. (CP 401). He reviewed claimant's job analyses and discovery deposition transcript, and discussed with claimant the nature of his jobs. (CP 402).

Claimant told Dr. Rosenbaum that his job generally did not involve hard labor and only occasionally required him to move paper rolls. (CP 438). Dr. Rosenbaum concluded that claimant's work at Weyerhaeuser was not distinctive in terms of its potential for causing or aggravating lumbar spondylosis because it was much less physical than many occupations. (CP 425, 427).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should accept review because the question whether the "arises naturally" requirement of RCW 51.08.140 requires proof through medical testimony presents an issue of substantial public interest that should be determined by the court. RAP 13.4(b)(4). In *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987), the court addressed what must be proved to satisfy the "arises naturally" requirement. The issue of what type of testimony is needed to satisfy this requirement was not raised or addressed. No Washington appellate court has addressed that issue before this case. This is a potential issue in every occupational disease claim filed under the Industrial Insurance Act (IIA). The court should grant review to provide practitioners and lower tribunals guidance in litigating and adjudicating such claims.

Review should also be granted because the Court of Appeals' decision conflicts with this court's decisions that hold statutes should be interpreted to effectuate the intent of the legislature by giving statutory terms their ordinary meanings. RAP 13.4(b)(1). The Court of Appeals' decision is inconsistent with the well-established meaning of the phrase "arises...out of" employment, which the legislature used to define "occupational disease" in RCW 51.08.140. When the legislature grafted this phrase into the IIA's definition of occupational disease, it was understood to address whether the employment created a risk of causing the claimed condition. Here, the Court of Appeals acknowledged that causation issues must be proved through medical testimony, but nevertheless concluded that claimant did not need to present such evidence, without even addressing whether the "arises...out of" prong of the occupational disease statute presented a causation issue.

The court should also grant review because the Court of Appeals' decision is inconsistent with this court's analysis in *Dennis*, and the Court of Appeals decisions that have applied *Dennis*. RAP 13.4(b)(1) and (2). In *Dennis*, the court concluded that the phrase "arises naturally" requires proof that the "disease came about as a matter of course as a natural consequence or incident of distinctive

conditions of his or her employment." 109 Wn.2d at 481. The ordinary meaning of the phrases "matter of course" and "natural consequence or incident" confirms the principle that there must be something about the employment exposure that makes the development or aggravation of the worker's disease natural or expected; namely, the existence of a distinctive risk of causing or aggravating the worker's disease. The court's analysis in *Dennis* thus further supports the conclusion that the "arises naturally" requirement presents an issue of causation. The Court of Appeals' conclusion that medical testimony is not required to prove this causation issue contradicts the underpinning of the *Dennis* analysis, as well as many other cases that hold medical testimony is required to prove causation issues. RAP 13.4(b)(1) and (2).

For all these reasons, this court should grant review.

1. The "Arises Naturally" Requirement of the Occupational Disease Statute, RCW 51.08.140, Presents an Issue of Causation.

In construing the terms of any statute, the paramount duty of the courts is to ascertain and implement the intent of the legislature. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). This requires that, if possible, meaning be accorded to every word in the statute, and that terms be given their ordinary or common meanings.

Rettkowski v. Department of Ecology, 128 Wn.2d 508, 518, 810 P.2d 462 (1996).

The legislature defined "occupational disease" as "such disease or infection as arises naturally and proximately out of employment...." RCW 51.08.140. This court has held that the statute establishes two separate and distinct elements of an occupational disease, each of which must be proved to establish coverage; that is, that the disease arose both naturally and proximately out of the employment. *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *see also Potter v. Department of Labor and Industries*, 172 Wn. App. 301, 311, 289 P.3d 727 (2012).

In *Dennis*, this court addressed *what* must be proved to demonstrate a condition "arose naturally" out of the worker's employment. However, the court did not address *how* the worker must sustain this burden of proof. No prior Washington appellate decision has addressed that issue. It is therefore one of first impression.

To determine what type of proof is necessary to implement the legislature's intent in establishing the "arises naturally" requirement, an appellate court must first determine what type of issue these terms present. It would be difficult, if not impossible, to accurately

determine the type of proof needed for resolving any issue without first considering the nature of the issue to be proved. Here, the Court of Appeals "agree[d] that issues of medical causation must be proven with expert medical testimony[,]" but failed to address the nature of the issue presented by the "arises naturally" requirement. (*Slip Op* 12). The court's analysis and resulting conclusion were therefore fundamentally flawed.

The widely-understood meaning of "arises...out of" employment demonstrates that these terms present, at least in part, an issue of causation. Forty-three states require that an injury or disease "arise out of" employment in their workers' compensation coverage provisions. 1 Larson, *Workers' Compensation Law* § 6.10 at 3-1 (1997). This flows from the fact that most states modeled their injury and disease coverage formulas after the British Compensation Law, which provided coverage for conditions "arising out of and in the course of employment." *Id.*; *Stertz v. Industrial Insurance Commission,* 91 Wash. 588, 592, 158 P. 256 (1916). The 1941 Legislature incorporated the "arising out of" concept into Washington's occupational disease statute. Laws of 1941, ch. 235 § 1, p. 772. The legislature thus chose a commonly-used phrase, with a well-known meaning, to define occupational disease. Although the

IIA is unique in some respects, the requirement that an occupational disease "arise out of" employment is not unique, but common to most workers' compensation acts.

As Professor Larson has noted, in interpreting the "arising out of" requirement, appellate courts nationwide consistently have focused on whether the employment created a risk of causing the worker's particular disease. 1 Larson, *supra*, § 6.00 at 3-1. For this reason, Professor Larson stated: "The 'arising out of' test is primarily concerned with causal connection." *Id.* It refers to the "causal origin" of the disease and whether it was connected to a particular risk of the employment. Larson §§ 6.00, 6.10, at 3-1 to 3-3 (1997).

Thus, the longstanding, well-established meaning of the phrase "arising out of" employment demonstrates that it presents an issue of causation. The legislature is presumed to have been familiar with the generally-accepted meaning of this phrase when it defined occupational disease. *See Dennis, supra*, 109 Wn.2d at 477 (the legislature is presumed to have been aware of appellate court interpretations of proximate cause in defining occupational disease). The legislature provided no indication that it intended to depart from that meaning in grafting the phrase into the occupational disease definition. Absent proof of a contrary intent, the legislature should be

presumed to have intended that the phrase "arising...out of" employment be given its long-prevailing meaning. The legislature's adoption of the "arising...out of" phrase therefore reflects its intent to require a causation analysis in determining whether a claimed disease "arose naturally...out of" the worker's employment.

The Court of Appeals summarily rejected this argument, in the last paragraph of its decision, characterizing it as "novel." (*Slip Op* 12-13). The court did so without having addressed the nature of the issue raised by the phrase "arises naturally...out of employment," much less explaining what type of issue this phrase presented if not causation. The court's perception of novelty derives from a failure to appreciate that the legislature adopted the phrase after several decades of litigation in many arenas had demonstrated that the "arises out of" phrase presents an issue of causation. *See* Larson §§ 6.00 to 6.10, at 3-1 to 3-3 (1997).

This court's analysis in *Dennis* further demonstrates that the "arises naturally" requirement deals with causation. The court held that satisfaction of this requirement necessitates proof that the worker's:

> "...*occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her employment*....The worker in attempting to satisfy the 'naturally'

> requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; *the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment.*" (Emphasis added.)

109 Wn.2d. at 481. The court's use of the phrases "as a matter of course" and "natural consequence or incident" to explain the "arises naturally" requirement shows that these statutory terms are concerned with causation.

In ordinary usage, "matter of course" means "something that is to be expected as a natural or logical consequence." Merriam Webster's Collegiate Dictionary, 718 (10th ed. 1997). The phrase "natural consequence or incident" conveys the same meaning. Resolution of the question whether a consequence is natural, logical or expected necessarily focuses on the nature of what caused it.

This court's use of the phrases "as a matter of course" and "natural consequence or incident" to explain the "arises naturally" requirement therefore demonstrates that resolution of the "arises naturally" issue necessitates an analysis of the nature of what caused the disease in question. There must be something about the causative elements of the employment exposure that makes the development or aggravation of the worker's disease natural or

expected, such that the disease is appropriately viewed as having occurred "as a matter of course" as a "natural consequence or incident" of the employment exposure.

The court's further statement that the worker's disease must have come about from "distinctive conditions" of the employment demonstrates that the "arises naturally" requirement focuses, more specifically, on whether there is a distinct causal relationship between the worker's employment exposure and his or her disease. The term "distinctive" is defined as "serving to distinguish." Merriam Webster's Collegiate Dictionary, 338 (10th ed. 1997). "Distinguish" means "to mark as separate or different"; "to separate into kinds, classes or categories"; "to give prominence or distinction to"; or "to single out: to take special notice of." *Id.* These definitions of "distinguish" assume, and require, a comparison of one object with others.

The court confirmed this in *Dennis*, stating that in attempting to satisfy the "arises naturally" requirement, the worker must show his particular work conditions were a more likely cause of his disease "than conditions in everyday life or all employments in general." 109 Wn.2d at 481. This analysis requires a comparison of the worker's "particular employment conditions" with "conditions in everyday life or all employments in general" to address whether the worker's

exposure was "distinctive" when viewed as a cause of the disease in question.

In short, the *Dennis* court's analysis of the "arises naturally" requirement demonstrates that this prong of the occupational disease statute presents an issue of causation. More specifically, this phrase requires that the workplace cause be distinctive to the worker's employment. Such issues of causation must be proved through medical testimony.

The Court of Appeals nevertheless rejected Weyerhaeuser's position on this point on the basis that "nowhere...did [the *Dennis*] court state any such requirement" in explaining the application of "arises naturally." (*Slip Op* 8). Weyerhaeuser did not argue or imply, however, that this court had directly addressed whether medical testimony was needed to prove the "arises naturally" element. Weyerhaeuser did argue that the *Dennis* analysis demonstrated that "arises naturally" requires proof of a distinctive employment cause; and, that because causation issues must be proved through medical testimony, the "arises naturally" requirement must also be proved by medical testimony. (Br. of App. 15, 18, 19). In reaching its contrary conclusion, the Court of Appeals wrongly failed to address whether the phrase "arises naturally" presents a causation issue.

The Court of Appeals' analysis reflects the underlying premise that the concept of causation is limited to proximate causation and, therefore, that medical testimony is required only to prove proximate causation. The court also suggested this limited view of causation in its application of emphasis to this court's statement in *Dennis* that "**[t]he *causal*** connection between a claimant's physical condition and his or her employment must be established by competent ***medical testimony***...." (Emphasis added by Court of Appeals) (*Slip Op* 4).

Dennis does not support the Court of Appeals' narrow interpretation of causation. Proximate causation is only one type or aspect of causation. It deals, in part, with the issue whether the causative agent was a "but for" cause of the claimed condition or result. Natural causation, which is embodied in the "arises naturally" requirement, is another type of causation that addresses whether the causative agent was distinctive. The "arises naturally" requirement presents no less an issue of causation than proximate causation.

The Court of Appeals committed the same analytical errors in dismissing the other appellate authorities on which Weyerhaeuser had relied for the stated reason that they do "not refer to any requirement of expert testimony" to prove a worker's employment conditions were distinctive. (*Slip Op* 9-11). Again, the court

responded to an argument that was not made and failed to address Weyerhaeuser's actual argument: that several Court of Appeals decisions issued in reliance on *Dennis* confirmed a worker must prove a distinctive employment cause to establish an occupational disease. (Br. of App. 15-18). *Potter v. Department of Labor and Industries, supra; Gast v. Department of Labor & Indus.*, 70 Wn. App. 239, 852 P.2d 319, rev den 122 Wn.2d 1024 (1993); *Witherspoon v. Department of Labor and Industries*, 72 Wn. App. 847, 866 P.2d 78 (1994); *Wheeler v. Catholic Archdiocese*, 65 Wn. App, 552, 566, 829 P.2d 196 (1992), *reversed in part on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994). The Court of Appeals' decision here is inconsistent with each of these cases because it is based on the premise—not supported by any legal analysis—that the "arises naturally" requirement does not present an issue of causation.

The court's decision is particularly at odds with its own description of the basis for its decision in *Potter.* The court noted that in *Potter* it had held the claimant failed to satisfy the "arises naturally" requirement because she "provided no evidence that her office exposed her to a greater risk of contracting her disorder than other environments she had encountered." (*Slip Op* 10). The court failed to appreciate, however, that the risk of contracting a disorder is an issue

of causation. This statement from *Potter* demonstrates that the terms "arises naturally" address the causal risk existing in the employment exposure and whether it is distinctive, either in kind or degree.

Finally, the Court of Appeals relied on its observation that "nowhere in the jury instructions in this case is there any statement" that medical testimony is required to prove the "arises naturally" part of the occupational disease definition. (*Slip Op* 8, 11). The terms of the instruction refute this observation:

> "Proof that the condition arose naturally and proximately out of the employment must be established at least in part through expert testimony. The causal connection must be found to exist as a matter of probability..." (Emphasis added.) (CP 526).

"And" generally means both. The terms of the instruction provide no basis for concluding that any other meaning was intended. The ordinary meaning of the instruction's first sentence requires expert medical testimony to prove *both* the naturally *and* proximately prongs of the statute. The ordinary meaning of the instruction's second sentence shows that the "arises naturally and proximately" connection is one of causation. The court's contrary interpretation of this instruction is inconsistent with its terms.

2. A Worker Must Sustain His Burden of Proving His Disease Arose Naturally From Distinctive Conditions of His Particular Employment Through Expert Medical Testimony.

This court has long held that issues of medical causation must be proved through expert medical testimony. *Ehman v. Department of Labor & Industries*, 33 Wn.2d 584, 206 P.2d 787 (1949). The court reiterated that requirement in *Dennis*. 109 Wn.2d. at 477.

Here, the Court of Appeals agreed that expert medical testimony is required to show causation between a claimed disease and the employment. (*Slip Op* 11). But the court concluded that a claimant is not required to present medical testimony to prove his or her disease "arose naturally" from distinctive conditions of the employment. (*Id.*). This conclusion is inconsistent with the meaning of "arises naturally" and the nature of the issue these terms present.

As discussed, the "arises naturally" requirement presents an issue of causation that requires proof that the workers' particular employment exposure or activities presented a distinctive risk of causing the claimed disease, compared to the causal risk attendant to activities existing in employments generally and everyday life. This is an issue of causation. Therefore, a claimant must present medical testimony to satisfy the "arises naturally" requirement. The Court of Appeals' contrary conclusion flowed from its failure to address the nature of this issue.

That failure also led the court to conclude that the lay testimony about claimant's job provided the jury a sufficient basis for concluding claimant's allegedly frequent manhandling of paper rolls was a distinctive condition of his employment. (*Slip Op* 7). Only a medical expert is competent to address whether particular work activities presented a distinctive risk of causing a medical condition. Where, as here, there is an absence of medical testimony on that point, the "arises naturally" requirement is not satisfied.

F. CONCLUSION

For these reasons, the court should grant review and hold that a claimant seeking to establish an occupational disease must present medical testimony that demonstrates the disease arose naturally out of distinctive conditions of his or her employment. The court should conclude that Mr. Street presented no such evidence and therefore reverse the trial court's decision.

Respectfully submitted this 24th day of December, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGER A. STREET, Respondent, v. WEYERHAEUSER COMPANY, Appellant.	)	No. 75644-3-I DIVISION ONE UNPUBLISHED FILED: November 28, 2016

Cox, J. – Weyerhaeuser Co. appeals the trial court's judgment on a jury verdict in Roger Street's appeal from an adverse determination by the Board of Industrial Insurance Appeals. At issue is whether Street's chronic low back condition is an occupational disease that arose naturally and proximately out of his distinctive employment conditions. Because substantial evidence supports the jury's verdict, we affirm.

Street worked for either Weyerhaeuser or its subsidiary for his entire career. He first worked as a logger. Starting in 1991, he worked in various positions in a paper mill. His duties included moving 40 to 50 inch diameter rolls of paper. At times, Street had to "manhandle" rolls of paper to move them, which included twisting and pushing the rolls on conveyor belts. On average, these rolls weighed 1,000 pounds. Street's job also required that he repetitively load "cores," which weighed between 1.5 and 15 pounds.

In 2013, Street applied for workers' compensation benefits for a lower back condition. The Department of Labor and Industries denied his claim.

An Industrial Insurance Appeals Judge reversed the Department. The proposed decision and order stated that Street's manhandling of heavy paper rolls constituted distinctive conditions of employment. This decision further stated that Street's back condition arose "naturally and proximately" out of such distinctive employment conditions.

Weyerhaeuser petitioned for review to the Board of Industrial Insurance Appeals (the "Board"). The Board ruled that there was no showing of distinctive employment conditions. And the Board further ruled there was no showing that Street's back condition arose "naturally and proximately" out of any distinctive employment conditions.

On appeal to the superior court, a jury decided that the Board's decision and order was incorrect. The jury further found that Street's condition is an occupational disease.

Weyerhaeuser appeals.

OCCUPATIONAL DISEASE

Weyerhaeuser primarily argues that Street must present expert medical testimony showing that his work conditions were distinctive to his employment in order to establish an occupational disease. Essentially, this is a challenge to the sufficiency of the evidence supporting the jury verdict. We hold that there is sufficient evidence to support the jury's verdict.

The Industrial Insurance Act (IIA) governs the standard of review in workers' compensation cases, where an evidentiary hearing occurs only at the

Board.[1] The party challenging the Board decision in the superior court bears the burden of proving that the Board's findings and decision were not prima facie correct.[2] The superior court reviews de novo the Board's decision but does so solely on the Board record.[3] The superior court may substitute its own findings and decision for the Board's only if the superior court finds that the Board's findings and decision are incorrect by a preponderance of the credible evidence.[4]

In reviewing the superior court's decision, we review the record in the light most favorable to the party who prevailed in superior court.[5] We determine whether substantial evidence supports the jury verdict.[6] Substantial evidence is "'evidence sufficient to persuade a fair-minded, rational person of the truth of the matter.'"[7] We review de novo the trial court's conclusions of law.[8]

Under RCW 51.08.140, an occupational disease is a disease that "arises naturally and proximately out of employment." In this case, the parties

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[1] Potter v. Dep't of Labor & Indus., 172 Wn. App. 301, 310, 289 P.3d 727 (2012); see also RCW 51.52.100; RCW 51.52.115; RCW 51.52.140.

[2] Zavala v. Twin City Foods, 185 Wn. App. 838, 858, 343 P.3d 761 (2015).

[3] Potter, 172 Wn. App. at 310.

[4] Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

[5] Zavala, 185 Wn. App. at 859.

[6] Cedar River Water & Sewer Dist. v. King County, 178 Wn.2d 763, 777, 315 P.3d 1065 (2013).

[7] Dep't of Labor & Indus. v. Lyons Enters., 185 Wn.2d 721, 731, 374 P.3d 1097 (2016) (quoting R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (2004)).

[8] Potter, 172 Wn. App. at 310.

disagree about what is required to establish whether a disease arises naturally out of employment. Weyerhaeuser argues that Street must present expert medical testimony showing that his work conditions were distinctive to his particular employment and caused his back condition. Street disagrees. We agree with Street.

Dennis v. Department of Labor & Industries[9] is instructive. There, Kenneth Dennis had joint osteoarthritis in his wrists, and his job required that he cut metal with tin snips for four to five hours a day.[10] Dennis pursued an occupational disease claim.[11]

The parties disputed whether Dennis's disabling wrist condition arose naturally out of his employment.[12] The supreme court explained that "[t]he ***causal*** connection between a claimant's physical condition and his or her employment must be established by competent ***medical testimony*** which shows that the disease is probably, as opposed to possibly, caused by the employment."[13] In that case, the court stated there was "sufficient medical evidence in the record from which a trier of fact could infer the required causal connection" that the osteoarthritis in Dennis's wrists was rendered symptomatic

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[9] 109 Wn.2d 467, 477, 745 P.2d 1295 (1987).

[10] Id. at 469.

[11] Id.

[12] Id. at 478.

[13] Id. at 477 (emphasis added); see also Sacred Heart Med. Ctr. v. Dep't of Labor & Indus., 92 Wn.2d 631, 636-37, 600 P.2d 1015 (1979).

by repetitive tin snipping.[14] The court further stated that the "proximately" requirement was not seriously in dispute in that case.[15]

Similarly, here, we do not perceive any serious dispute whether there was sufficient evidence tying Street's back condition to his work. Street testified at the hearings, along with his former supervisor, his primary care physician, and the osteopathic physician for Street's pain management.

Street's primary care physician, whose testimony is to be given special consideration under the circumstances, testified that she diagnosed Street with "chronic low back pain related to degenerative arthritis" and "[d]egenerative disease of the spine."[16] She opined, on a more probable than not basis, that Street's heavy work generated mechanical loading that caused his degenerative disc condition.

There was testimony on behalf of Weyerhaeuser that was designed to refute this and other testimony on behalf of Street. The evaluation of witness credibility is the province of the jury and is not reviewable by this court.[17] We see no reason to depart from the rule that we review the sufficiency of the evidence in the light most favorable to the party who prevailed in superior court: Street.

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[14] Id.

[15] Id. at 478.

[16] Potter, 172 Wn. App. at 312.

[17] See State v. Andy, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

We move to consideration of the real dispute: whether medical testimony is required to fulfill the other requirements of an occupational disease. Again, we turn to Dennis.

The supreme court focused on the "naturally" language of the governing statute after considering the "proximately" language.[18] In the context of the statute, this word "naturally" is linked to the requirement that the occupational disease must "arise out of employment."[19]

After discussing, at length, this requirement, the court held:

> [A] worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of ***distinctive conditions*** of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, . . . and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her ***particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general***; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.[20]

In that case, Dennis and his attending physician testified.[21] The physician testified "that it was reasonable to assume that the localization of pain in

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[18] Dennis, 109 Wn.2d at 479.

[19] Id. at 480.

[20] Id. at 481 (emphasis added).

[21] Id. at 469

[Dennis's] wrists was related to his occupation."[22] The Board found that the continued use of tin snips for four or five hours per workday "exacerbated Dennis's preexisting osteoarthritis in his wrists, which became disabling."[23] The supreme court determined that the attending physician presented uncontroverted medical testimony "that more probably than not[,] Dennis's repetitive use of tin snips made the osteoarthritis in his wrists symptomatic and disabling."[24] Thus, the supreme court concluded that the medical evidence in the record was "sufficient to support the inference that Dennis's disabling wrist condition arose naturally and proximately out of his employment."[25]

Here, Street's attending physician provided similar testimony. She tied Street's lower back pain to the job that he was doing, on a more probable than not basis. She testified that she understood Street's job involved, among other things, heavy lifting and pushing of heavy rolls.

There was also testimonial evidence by Street and others that described the bending and pushing nature of Street's jobs in "manhandling" the paper rolls that he worked with in the paper mill. In other words, sufficient evidence exists in this record for the jury to have found that such manhandling of paper rolls was a distinctive condition of employment at the paper mill.

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[22] Id. at 483.

[23] Id. at 477.

[24] Id. at 469, 483.

[25] Id. at 477, 483.

Moreover, there is sufficient evidence to show that Street's chronic back pain related to degenerative arthritis and degenerative disease of the spine arose naturally and proximately out of distinctive conditions of his employment with Weyerhaeuser.

Weyerhaeuser claims that medical testimony is required to fulfill the requirement of showing the "naturally" part of the statutory definition. It purports to rely on Dennis for this proposition.

Nowhere in the last passage from that case, quoted earlier in this opinion, did the court state any such requirement. Nowhere in the jury instructions in this case is there any statement of such a requirement. The requirement does not, in our view, exist on the basis of any of the authorities that Weyerhaeuser argues.

For example, in Gast v. Department of Labor & Industries, Vickie Gast alleged an occupational disease caused by stress arising out of her employment.[26] Gast worked as a maintenance laborer, and rumors developed about her relationships with male coworkers.[27] Gast filed a benefits application with the Department, claiming that her coworkers' rumors, innuendos, and inappropriate comments were distinctive conditions of her employment.[28] The Department argued that such rumors or comments "coincidentally exist[ed] in the

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[26] 70 Wn. App. 239, 241, 852 P.2d 319 (1993).

[27] Id.

[28] Id. at 242.

workplace, . . . occur[red] in everyday life and employment in general, and [were] not distinctive conditions of employment."[29]

Division Three of this court concluded that the trial court "correctly determined as a matter of law that rumors, innuendos, and inappropriate comments by coworkers are not distinctive conditions of employment."[30] The court further stated that "[s]uch conditions are unfortunate occurrences in everyday life or all employments in general. Their occurrence at a specific workplace is coincidental and not a natural consequence or incident of distinctive employment conditions."[31]

The opinion does not refer to any requirement of expert medical testimony or state that Gast's claim failed because she did not present medical testimony showing that her work conditions were distinctive to her particular employment and caused her alleged disease.

Similarly, in Woldrich v. Vancouver Police Pension Board,[32] Division Two of this court determined that Albert Woldrich failed to establish that his disability arose as a natural consequence of distinctive employment conditions.[33]

The opinion neither references expert medical testimony nor states that Woldrich's claim failed because he did not present medical testimony showing

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[29] Id.

[30] Id. at 243.

[31] Id.

[32] 84 Wn. App. 387, 391-93, 928 P.2d 423 (1996).

[33] Id. at 393.

that his work conditions were distinctive to his particular employment and caused his disability.

In Potter v. Department of Labor & Industries, the Board concluded that Jane Potter did not sustain an occupational disease within the meaning of RCW 51.08.140.[34] There, Potter worked in a newly remodeled law office and argued that defective ventilation in the office, combined with the odor emanating from the new blinds in the office, caused her multiple chemical sensitivity disorder.[35] In rejecting Potter's claim, the Board stated that it had "evidence of use of certain chemicals in the remodel, some of which can cause neurological symptoms in certain quantities, but no evidence of exposure to anything other than permissible limits."[36] The Board also noted that "'[r]emodels are everywhere, and by no means limited to law offices, or to work for that matter.'"[37] The trial court affirmed the Board's decision, and we affirmed the trial court.[38]

Although Potter did present medical testimony, we concluded that Potter provided no evidence that her office exposed her to a greater risk of contracting her disorder than other environments she had encountered.[39] Like the previous two cases discussed above, the opinion does not state that Potter's claim failed

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[34] 172 Wn. App. 301, 308, 289 P.3d 727 (2012).

[35] Id. at 304, 306, 315-16.

[36] Id. at 308.

[37] Id. at 316.

[38] Id. at 309, 316.

[39] Id. at 316.

because she did not present expert medical testimony showing that her work conditions were distinctive to her particular employment and caused her disorder.

In sum, Dennis and opinions that follow do not support the argument that occupational disease claimants are required to present medical testimony showing that his or her work conditions are distinctive to his or her particular employment. Expert medical testimony is, of course, required to show causation between the disease and the employment. That was done in this case.

We note also that the relevant jury instruction in this case, to which Weyerhaeuser did not take exception, did not require such medical testimony. Rather, Instruction Number 14 provided:

> Proof that the condition arose naturally and proximately out of the employment must be established at least in part through expert testimony. The causal connection must be found to exist as a matter of probability; that is, more probably true than not true. An expert opinion that causation is only possible is not sufficient to prove proximate causation.[40]

In sum, Street was not required to present expert medical testimony to show that his "job duties and activities working for Weyerhaeuser constitute distinctive conditions of employment sufficiently different from his activities of everyday life."[41]

Weyerhaeuser argues that "whether particular work conditions constitute[] a 'distinctive' cause of a medical condition presents a medical question."[42] It

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[40] Clerk's Papers at 526.

[41] Id. at 534.

[42] Brief of Appellant at 19.

relies on Dennis and Zipp v. Seattle School District No. 1[43] to support this argument. It specifically states that "issues of medical causation must be proved through expert testimony."[44]

We agree that issues of medical causation must be proven with expert medical testimony. That was done in this case by Street's attending physician, whose testimony must be given special consideration and tied Street's low back pain to his employment conditions.

But neither Dennis nor Zipp supports the argument that expert medical evidence is required for other questions, specifically the one before us.

Weyerhaeuser also argues that the supreme court's discussion in Dennis about the medical testimony presented in that case "was very limited and did not purport to provide an exhaustive account of the attending physician's testimony as to the distinctiveness of the claimant's work exposure."[45] Other than implicitly conceding that this case does not support the proposition that it argues, we do not find this observation helpful. If anything, the lack of discussion in Dennis about the attending physician's testimony as to the distinctive work conditions further supports the conclusion that such expert medical testimony is not required.

Lastly, Weyerhaeuser argues that the legislature's use of the phrase "arising out of" to define an occupational disease requires medical testimony to

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[43] 36 Wn. App. 598, 601, 676 P.2d 538 (1984).

[44] Brief of Appellant at 19 (citing Dennis, 109 Wn.2d at 477).

[45] Reply Brief of Appellant at 14.

demonstrate the requisite distinctive employment conditions. It specifically argues that the phrase "arising out of" reflects the legislature's intent to require a causation analysis in determining whether a claimant's condition arose naturally from his or her employment. We do not read the supreme court's exhaustive discussion in Dennis to be consistent with this novel argument. Thus, we reject it.

ATTORNEY FEES AND COSTS

At Trial

Weyerhaeuser requests that we reverse the trial court's attorney fees and costs award to Street. Because we affirm the trial court's judgment in favor of Street, we decline to reverse the trial court's award of attorney fees and costs.

On Appeal

Street requests attorney fees and costs on appeal as a prevailing party under RCW 51.52.130. We grant Street's request for attorney fees and costs, subject to his compliance with RAP 18.1(d).

RCW 51.52.130 authorizes this court to grant reasonable attorney fees and costs "where a party other than the worker . . . is the appealing party and the worker's . . . right to relief is sustained." Here, Street did not appeal, and we affirm the trial court's judgment in his favor. Thus, we grant Street's request for attorney fees and costs.

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We affirm the judgment on the jury verdict and award Street fees on appeal, subject to his compliance with RAP 18.1(d).

COX, J.

WE CONCUR:

Mann, J.

Schindler, J.

CERTIFICATE OF FILING/SERVICE

I certify that I caused to be served the foregoing PETITION FOR REVIEW on the following persons by mailing to each of them on December 24, 2016 by first class mail a true copy contained in a sealed envelope on the date noted below, with postage prepaid, and addressed as follows:

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I further certify that I filed the original of the same document by mailing it by express/overnight mail in a sealed envelope on the same date, with postage prepaid, and addressed as follows:

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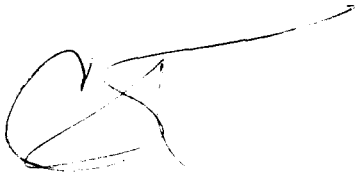
Dated this 24th day of December, 2016.



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