69438-3

69438-3

NO. 69438-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AARON BELL,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES FOR THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. Aaron Bell spent 24 years working in the drywall industry. During these years, he sustained three industrial injuries to his low back in 1991, 1998, and 2002, and underwent two surgeries on his lumbar spine. Following recovery from the second surgery in 2004, Mr. Bell was retrained as a loan officer. However, despite this, he returned to drywall work in September 2006 and worked until June 2009, when he was ultimately laid off due to a lack of work. In August 2009, Mr. Bell filed a workers' compensation claim for lumbar degenerative disc disease allegedly caused by his drywall work between 2006 and 2009. Bell appeals from a superior court judgment affirming a Board of Industrial Insurance Appeals' (Board) order, that affirmed a Department of Labor and Industries (Department) order rejecting his claim.

This Court should decline Mr. Bell's invitation to reweigh the evidence as well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, ample medical testimony supports the superior court's finding that Mr. Bell's return to work in 2006 did not aggravate his preexisting low back condition.

Additionally, Mr. Bell's arguments that the superior court failed to construe the Industrial Insurance Act, Title 51 RCW, in favor of the worker, failed to give special consideration and weight to the testimony of Mr. Bell's attending physician, and made insufficient findings of fact are without merit. The Department requests this Court affirm the superior court's judgment.

II. COUNTERSTATEMENT OF THE ISSUES

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

2. Did the superior court err by failing to find in Mr. Bell's favor when the Industrial Insurance Act requires a worker to prove entitlement to benefits and the rule of liberal construction applies to issues of statutory construction only?

3. Does the rule requiring a trier of fact to give special consideration to the testimony of an attending physician mean a superior court must disregard the testimony of other medical experts and find in a worker's favor?

5. Should this Court remand this case to the superior court for additional factual findings where the superior court's decision includes factual findings sufficient to support its legal conclusions?

III. COUNTERSTATEMENT OF THE CASE

A. Mr. Bell Has An Extensive History Of Prior Low Back Industrial Injuries, Prior Low Back Surgeries, And Has Been

Previously Rated With A Category 3 Impairment Rating For His Lumbar Spine

Mr. Bell worked in the drywall industry for over 24 years. *See* CP 116. He first sustained an industrial injury to his low back in 1991. CP 144. This injury was allowed as a workers' compensation claim and the claim was closed in 1993 with a permanent partial disability award equal to Category 2 lumbar spine impairment.[1] CP 248, 325.

Mr. Bell injured his back again in 1998. CP 147. He filed another claim with the Department, which was allowed. CP 148, 326. Surgery was performed on the spine between the fourth and fifth lumbar vertebrae in October 1999. CP 328. In March 2001, an independent medical examiner rated Mr. Bell's impairment as being equal to Category 3 lumbar spine.[2] CP 249, 329.

A third low back injury was sustained in November 2002 and the Department allowed a claim for this injury. CP 150, 329. Under this claim, Dr. Sanford Wright performed surgery on Mr. Bell's lumbar spine between the fifth lumbar vertebra and first sacral vertebra on the right side in October 2004. CP 152, 337.

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[1] *See* WAC 296-20-280(2).
[2] *See* WAC 296-20-280(3).

B. Mr. Bell's Low Back Symptoms Never Completely Resolved After The 2004 Surgery And, Despite Having Been Retrained As A Loan Officer, Mr. Bell Returned To Drywall Work In September 2006

Mr. Bell has never been pain free since his 2002 injury. CP 225. He consistently complained of back pain at visits to Dr. Summe's office between 2004 and 2006, during which Mr. Bell was not performing drywall work. CP 252. Many examinations from 2004 to 2006 revealed positive straight-leg test results, low back spasms, and limited range of motion of the lumbar spine, including findings of low back pain and muscle spasm at a September 2006 visit. CP 241, 250. Mr. Bell was prescribed Percocet and Methadone for low back pain throughout this time period. CP 252.

From 2002 through September 2006, Mr. Bell did not work as he was temporarily and totally disabled as a result of his 2002 injury. CP 131, 338. In 2005, a physical capacities evaluation determined Mr. Bell was incapable of returning to work as a drywall applicator. CP 338. As such, Mr. Bell was retrained as a loan officer. CP 115.

Mr. Bell worked at U.S. National Mortgage in July 2006 for approximately four-and–a-half weeks until he quit for financial reasons. CP 120. Mr. Bell returned to drywall work in September 2006 and worked until June 2009, with the exception of occasional layoffs including

one between September 2008 and February 2009. CP 121, 136, 141. In June 2009, he was laid off due to a lack of available work. CP 170. Mr. Bell testified his low back pain got progressively worse while working and he always worked with some pain. CP 122.

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

In May 2009, Mr. Bell visited Dr. Jeff Summe, an osteopathic physician, who had previously treated Mr. Bell starting in August 2004. CP 215, 249. When Mr. Bell visited Dr. Summe in May and June 2009, it was Dr. Summe's understanding that the low back condition for which he was treating him was related to the November 2002 work injury. CP 255-56.

Magnetic resonance imaging (MRI) of Mr. Bell's lumbar spine was performed in May 2009. CP 218, 228. This MRI was compared to a previous film from August 2004. CP 263. The comparison indicated progressive narrowing of the intervertebral disc space between the fifth lumbar vertebra and the first sacral vertebra with continued right foraminal disc protrusion. CP 263. A July 2009 electromyography (EMG) indicated a chronic right-greater-than-left radiculopathy, stemming from the fourth lumbar vertebra to the first sacral vertebra. CP 243-44.

Following a July 21, 2009 visit, Dr. Summe signed a workers' compensation claim form after Mr. Bell told him his low back and leg pain had gotten worse due to performing his job. CP 217, 259. The claim alleged an occupational disease involving Mr. Bell's low back as a result of his drywall employment between 2006 and 2009. CP 197. At the July 21 visit, Dr. Summe found moderate muscle spasms throughout the lumbar region and a positive straight leg raise test on the right side. CP 218.

On August 5, 2009, Dr. William Stump, a board certified neurologist, performed an independent medical examination of Mr. Bell. CP 318. This examination was requested in connection with the 2002 injury claim. CP 321. Dr. Stump found Mr. Bell had a recurrent disc herniation between the fifth lumbar vertebra and first sacral vertebra that accounted for the findings on the physical examination. CP 322. Dr. Stump thought there were multiple causes for Mr. Bell's condition as of that date -- the patient's genetics, prior industrial injuries to his low back, and the previous surgeries. CP 322.

On November 5, 2009, Mr. Bell saw Dr. Sanford Wright, who had performed his 2004 surgery. CP 276, 278. Mr. Bell informed Dr. Wright that day-to-day activities aggravated his chronic, residual, progressive pain. CP 279. Mr. Bell did not mention his drywall work between 2006

and 2009 to Dr. Wright. CP 279. Dr. Wright reviewed the latest MRI and noted abnormalities and worsening where he had previously performed surgery. CP 283. Dr. Wright then performed a redo laminectomy and fusion on January 27, 2010. CP 297. All of Dr. Wright's treatment of Mr. Bell was provided under the 2002 industrial injury claim. CP 295-96.

The Department denied Mr. Bell's August 3, 2009 application for benefits, and Mr. Bell appealed to the Board. CP 70-75. Mr. Bell presented the testimony of Dr. Summe and Dr. Wright to support allowance of his 2009 occupational disease claim. *See* CP 209-309. Dr. Summe testified Mr. Bell's drywall work from 2006 to 2009 "accelerated" the progressive worsening of his low back condition. CP 265. Dr. Summe also testified that the objective findings in June 22, 2009, the first visit after stopping drywall work, were "fairly close" to the objective findings present during visits between 2004 and 2006, noting the only difference being an inability to stand on his toes or his heel of his right foot. CP 251. Dr. Summe also testified that at the June 2009 visit there were "moderate to severe" muscle spasms, but also admitted the degree of muscle spasms was not recorded at the last visit prior to Mr. Bell returning to work in 2006. CP 250-51.

Dr. Wright testified regarding his examination and treatment of Mr. Bell's low back during November 2009 to January 2010. CP 278,

296. Dr. Wright testified Mr. Bell's low back condition for which he was treating him was related to his 2002 industrial injury claim. CP 295-96. Dr. Wright further testified it was possible the worsening indicated in the comparison of the 2005 and 2009 MRIs, as well as the subjective symptoms of worsening, were a result of the natural progression of the preexisting disease. CP 290-95. He stated it was likely the disc herniation was a result of natural progression of the preexisting disease. CP 292. Ultimately, however, Dr. Wright testified Mr. Bell's drywall work from 2006 to 2009 more probably than not aggravated his low back condition. CP 302-03.

D. Dr. Stump Testified That There Was No Objective Medical Evidence That Mr. Bell's Preexisting Low Back Condition Worsened As A Result Of His Return To Work And, Rather, That Any Worsening Of Mr. Bell's Low Back Was A Natural Progression Of The Preexisting Disease

Dr. Stump opined the objective medical data did not indicate that any significant worsening of Mr. Bell's low back condition occurred over the time period during which Mr. Bell returned to work. CP 360, 362, 372. Although Dr. Stump testified returning to heavy duty work, such as drywall work, *could* potentially aggravate a low back condition, he testified that based on the lack of significant objective findings of worsening in Mr. Bell's case, he did not feel the worsening indicated in Mr. Bell's condition was proximately caused by a return to work. CP 360,

362, 372. Rather, Dr. Stump concluded that the worsening was the result of the natural progression of Mr. Bell's preexisting low back disease, proximately caused by a combination of Mr. Bell's genetics, prior low back surgeries, and prior low back injuries. CP 322.

Dr. Stump explained that a comparison of a 2004 MRI with a 2009 MRI showed little progression in the degenerative process, commenting that "although he reported carrying out those activities, comparing the MRIs would suggest there had been little change in that degenerative process during that five year period of time," and opined the changes were chronic in nature. CP 358-59. Dr. Stump also testified the EMG data did not suggest that there had been significant progression of the underlying degenerative process. CP 361-63.

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

After considering the testimony presented by Mr. Bell and the Department, the industrial appeals judge found in a proposed decision that the distinctive conditions of Mr. Bell's drywall work between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition, and concluded Mr. Bell did not sustain an occupational disease within the meaning of RCW 51.08.140. CP 61-67. The judge noted, "[i]n

Mr. Bell's case the evidence is that the disability was caused by the 2002 industrial injury which acted upon Mr. Bell's prior injuries and genetic makeup. His return to work did not create a new disability; it was present and active and covered by an open Department claim." CP 65. The Board denied Mr. Bell's petition for review, thereby adopting the proposed decision and order. CP 37. Mr. Bell appealed to superior court, and, following a bench trial, the court affirmed the Board and adopted its findings. CP 7-10. Mr. Bell appeals to this Court. CP 1-6.

IV. SUMMARY OF ARGUMENT

Substantial evidence supports the superior court's finding that Mr. Bell's return to drywall work did not proximately cause an aggravation of his preexisting low back condition.[3] Dr. Stump testified that Mr. Bell's low back condition was the result of the natural progression of his preexisting low back condition, proximately caused by a combination of his genetics, prior industrial injuries, and prior surgeries. CP 322. He explained that the lack of significant objective findings of worsening indicated that any worsening present was attributable to the expected, natural progression of the pre-existing degenerative disc disease, and not his return to work. CP 360, 362, 372. Further, both Mr. Bell's physicians

[3] In this appeal, Mr. Bell failed to assign error to specific findings of fact as required by RAP 10.3(g). However, by reference to the associated discussion of issues it is presumed that Mr. Bell is not arguing that he sustained a new disease, but rather that there was an aggravation of his pre-existing low back disease.

failed to identify any *new* disability that resulted from Mr. Bell's return to work, as opposed to the disability that was already present and progressively worsening. *See generally* CP 209-309.

Additionally, the superior court did not err by failing to find in Mr. Bell's favor as the rule of liberal construction applies to issues of statutory construction only; a worker still must prove entitlement to benefits by competent evidence. Mr. Bell's argument that the superior court failed to give special consideration and weight to the testimony of Mr. Bell's attending physician also fails as the rule of special consideration does not require a finding in favor of the attending physician's testimony. Finally, remand is not appropriate here as the superior court entered sufficient findings of fact to support its legal conclusions and to allow this Court to perform its review. CP 8-9.

V. STANDARD OF REVIEW

In a workers' compensation case, the superior court reviews a decision of the Board of Industrial Insurance Appeals de novo on the certified appeal board record. RCW 51.52.115; *Elliot v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). The

superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *McClelland*, 65 Wn. App at 390.

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). This Court limits its review to "'examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.'" *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).[4] "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

When undertaking substantial evidence review, the appellant court does not reweigh the evidence or re-balance the competing testimony

[4] Mr. Bell incorrectly asserts that "[i]n reviewing the matter at hand, the Court is tasked with the same standard of review as the superior court." App. Br. at 6. The superior court applies the preponderance of the evidence standard; the Court of Appeals applies the substantial evidence standard. *Ruse*, 138 Wn.2d at 5.

presented to the fact finder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P. 3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inference from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

VI. ARGUMENT

A. Substantial Evidence Supports The Superior Court's Finding That The Distinctive Conditions Of Mr. Bell's Drywall Work Between 2006 And 2009 Did Not Proximately Cause An Aggravation Of His Preexisting Low Back Condition

Mr. Bell contends substantial evidence does not support the superior court's finding that the distinctive conditions of his drywall employment between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition. App. Br. at 7-17. This argument fails.

A worker who has an occupational disease is entitled to receive benefits under the Industrial Insurance Act. RCW 51.32.180. An occupational disease is a "disease or infection as arises naturally and

proximately out of employment." RCW 51.08.140. "A worker is entitled to benefits if the employment either causes a disabling disease or aggravates a preexisting disease so as to result in a new disability." *Ruse*, 138 Wn.2d at 7.

To show that a worker's medical condition arises naturally out of employment, he or she must establish that the occupational disease "came about as a matter of course as a natural consequence or incident of distinctive conditions" of her employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

The causal connection between the work and the disability must be made through the use of medical evidence showing, more probably than not, "*but for* the aggravating condition of the job, the claimed disability would not have arisen." *Ruse*, 138 Wn.2d at 7; *see also Dennis*, 109 Wn.2d at 477; *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49-50, 163 P.2d 133 (1945) (holding that testimony that "a condition might have, or could probably have, been brought about by a certain happening" is insufficient as a matter of law to present a case to a jury, since evidence merely establishing that something is possible, as opposed to probable, is, at best, "conjectural and speculative").

In an aggravation case, "the employment does not cause the disease, but it *causes the disability* because the employment conditions

accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the *disability* being *caused* by the employment in an aggravation case." *Ruse*, 138 Wn.2d at 7.

1. Dr. Stump Testified That Any Worsening Of Mr. Bell's Low Back Over The Period Of Time During Which He Returned To Drywall Work Was The Result Of The Natural Progression Of His Preexisting Disease, Rather Than From His Return To Work

Substantial evidence supports the superior court's finding that the distinctive conditions of Mr. Bell's drywall work between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition. Dr. Stump testified that Mr. Bell's low back condition was proximately caused by a combination of his genetics, prior low back injuries, and prior low back surgeries, and not as a result of his return to work. CP 322, 360, 362, 372.

Dr. Stump grounded his opinion on the fact that the objective medical data did not indicate that significant worsening of Mr. Bell's low back condition occurred over the time period during which Mr. Bell returned to work. CP 360, 362, 372. Dr. Stump explained the lack of significant worsening indicated to him the worsening was attributable to a natural progression of the preexisting disease, as opposed to Mr. Bell's return to work. CP 360, 362, 372. Dr. Stump specifically relied upon the objective medical data from a comparison of the 2004 and 2009 MRIs,

which indicated there had been little change in the degenerative process during that five-year period of time and that the changes were chronic in nature. CP 360, 362, 372. Dr. Stump also testified the EMG data did not suggest that there had been significant progression of the underlying degenerative process. CP 360, 362, 372.

Although Dr. Stump testified that a return to heavy duty work, such as drywall work, could potentially aggravate a low back condition, he did not feel that this occurred in Mr. Bell's case. CP 360, 362, 372. Dr. Stump explained:

> patients that have the genetic background who perform those type of activities will tend to have the degenerative process progress more rapidly than if they wouldn't do those type of activities. *However, one would have to say that although he reported carrying out those activities, comparing the MRIs would suggest there had been little change in that degenerative process during that five-year prior of time, I believe it was.*

CP 360 (emphasis added); *see also* CP 362. Mr. Bell's case is, thus, analogous to the factual scenario in *Ruse*, where courts found that the claimant's low back condition was proximately caused by the natural progression of the pre-existing disease, and not by the heavy duty work. *Ruse*, 138 Wn.2d at 7-8.

Mr. Bell quotes two passages from Dr. Stump's testimony in support of his assertion that Dr. Stump testified that "Mr. Bell's physical

work played a significant role and accelerated and caused rapid progression of Mr. Bell's condition." App. Br. at 13. What Mr. Bell fails to mention is that Dr. Stump directly contradicted this proposition when asked on cross-examination whether he had testified that Mr. Bell's return to drywall work aggravated his low back condition. Dr. Stump responded:

> Actually, I didn't -- what I said was that there had not been objective change between the two MRIs that we talked about...the description of those two MRIs were very similar. So there had not been significant progression. There was a little bit. The facets were a bit more degenerated between that time period [2005 to 2009]. What I said, I believe, is that this was the type of activity that *could* have led to progression, but the imaging studies did not support that.

CP 372 (emphasis added).

Mr. Bell takes isolated quotes out of context. Reading Dr. Stump's quotes about what he would expect in a person that engaged in drywall work in context with Dr. Stump's further statements regarding what the medical findings actually indicated in Mr. Bell's case, it is plain that Dr. Stump's opinion was that the work activities on a more probable than not basis did not cause an aggravation of Mr. Bell's preexisting condition. Although a fact-finder certainly may have taken the quoted material into account, it is not the role of the appellate court to reweigh the evidence. *See Fox*, 154 Wn. App. at 527.

Dr. Stump's testimony thus provides substantial evidence to support the findings of the superior court and the Board that there was no work-related aggravation of Mr. Bell's low back condition.

2. Both Physicians Testifying On Behalf Of Mr. Bell Failed To Identify Any *New* Disability That Resulted From The Return To Work As Opposed To The Natural Progression Of The Preexisting Disease

Dr. Summe's testimony supports the superior court's finding that Mr. Bell's drywall work did not aggravate his low back condition as he failed to identify any *new* disability that resulted from the return to work as opposed to the natural progression of the preexisting disease. *See generally* CP 209-269. Though ultimately opining Mr. Bell's return to drywall work aggravated his low back condition, Dr. Summe also testified Mr. Bell's condition for which he treated under the 2002 injury claim in May and June 2009 looked "objectively the same" as the condition for which he filed an application for benefits for an occupational disease in July 2009. CP 259-60. Dr. Summe further testified that the objective findings present in Mr. Bell's low back in September 2006, prior to the return to work, were "fairly close" to the objective findings present in May 2009, indicating only a new finding of an inability to stand on his toes or his heel of his right foot and, possibly—though he could not confirm—an increase in the intensity of muscle spasm from moderate to moderate-

severe. CP 250-51. Dr. Summe's testimony thus failed to identify the *new* disability that resulted from Mr. Bell's return to work, as required under *Ruse*. *See Ruse*, 138 Wn.2d at 7.

Dr. Wright likewise failed to identify any *new* disability that was proximately caused by Mr. Bell's return to work. *See generally* CP 270-309. Dr. Wright examined Mr. Bell for his low back in November 2009, a few months after he stopped drywall work, and performed surgery on his lumbar spine in January 2010. CP 278, 296. Dr. Wright testified that it was his understanding that the condition for which he examined and treated Mr. Bell during this time period was the low back condition under the 2002 industrial injury claim. CP 295.

The failure of Mr. Bell's two medical witnesses to identify a *new* disability, as required by *Ruse* in an aggravation case, further supports the superior court's finding that the distinctive conditions of Mr. Bell's drywall work did not proximately cause an aggravation of his preexisting low back condition.

3. Mr. Bell Applies The Incorrect Standard Of Review To Argue That Substantial Evidence Does Not Support The Superior Court's Findings

Mr. Bell argues that substantial evidence does not support the superior court's finding because "the preponderance of the evidence clearly indicates that Mr. Bell suffered an occupational disease due to his

work related aggravation and acceleration of his low back conditions." App. Br. at 12. This argument ignores the correct standard of review. Mr. Bell asks this Court to reweigh the evidence and to find that the evidence he presented in the form of Dr. Summe's and Dr. Wright's testimony was more convincing than the testimony of Dr. Stump, presented by the Department. At this stage, this Court cannot reweigh the evidence, re-balance the testimony, or substitute its own judgment for that of the superior court. *Fox*, 154 Wn. App. at 527; *Korst*, 136 Wn. App. at 206; *Gagnon*, 110 Wn. App. at 485. The superior court rejected Mr. Bell's arguments that his witnesses' testimony was more credible than the testimony of the Department's witness. On appeal, substantial evidence supports the superior court's finding that Mr. Bell's drywall work between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition.

B. The Superior Court Did Not Err By Failing To Find In Mr. Bell's Favor As The Industrial Insurance Act Requires A Worker To Prove Entitlement To Benefits And The Rule Of Liberal Construction Applies To Issues Of Statutory Construction Only

Mr. Bell's argument that the superior court failed to construe the Industrial Insurance Act in his favor is without merit. App. Br. at 17-18. While courts should liberally construe the Industrial Insurance Act, "that rule does not apply to questions of fact but to matters concerning the

construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Further, "the 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*, 33 Wn.2d at 595. Liberal construction applies only to ambiguous statutes. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993).

Mr. Bell fails to identify an ambiguous provision of the Industrial Insurance Act for which he seeks a liberal construction and, as such, it is presumed that Mr. Bell is arguing that the rule of liberal construction be applied to the questions of fact presented in this case. *See* App. Br. 17-8. His argument is thus without merit.

C. The Rule Of Special Consideration Does Not Mean That The Superior Court Must Disregard The Testimony Of Other Medical Experts And Find In The Worker's Favor

Mr. Bell argues the superior court failed to give special consideration and weight to the testimony of Mr. Bell's attending physician, Dr. Summe. App. Br. at 17. The Court should reject this argument. While special consideration in the form of careful thought should be given to an attending physician's testimony, there is no requirement to give such testimony *greater* weight or credibility, or to believe or disbelieve such testimony. *See Hamilton v. Dep't of Labor &*

Indus., 111 Wn.2d 569, 572, 761 P.2d 618 (1988). If this were the case, there would be no need for medical witnesses other than the attending physician to ever testify in a workers' compensation matter. The superior court did not err simply because it did not find for an injured worker.

Further, a superior court judge, acting as the trier-of-fact, is presumed to know and apply the law. *See In re Harbart*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975) ("In Washington, a trial judge is presumed to know rules of evidence and is presumed to have considered only the evidence properly before the court, and for proper purposes."). And, the law on special consideration was briefed in the appellant's trial brief, which was reviewed by the superior court along with the entirety of the certified appeal board record. CP 4, 20. Without some indication that the superior court chose to ignore this provision of law, this Court should not delve into whether the superior court deviated from the law simply because the findings of fact do not identify the attending physician.

D. Remand Of This Case To The Superior Court For Additional Factual Findings Is Not Appropriate As The Superior Court's Decision Includes Factual Findings Sufficient To Support Its Legal Conclusions And To Permit Review By This Court

Mr. Bell argues that the findings of fact made by the superior court do not comply with *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 395 P.2d 633 (1964). App. Br. at 20-21. Mr. Bell, however,

fails to recognize that *Groff* does not mandate a superior court to include certain types of findings. The language in *Groff* is precatory. *See Groff*, 65 Wn.2d at 40-46. Though *Groff* urges the superior court to enter findings that reflect the conflicting allegations and evidence, recognize the rule of special consideration, and indicate why the testimony of the examining physician is preferable, these are not requirements. *Id. Groff* itself recognizes this and notes that "the degree of particularly required in findings of fact must necessarily be gauged by the case at hand." *Id.* at 40.

The concern of the appellate court in *Groff* for more specific findings is understandable—in that case, there was only a mere conclusory finding for the court to review, not an actual *factual* finding. *See Groff,* 65 Wn.2d at 38-39 (reviewing finding of fact no. 7: "the Board correctly construed the law and has correctly found the facts herein and has correctly determined that the order . . . should be sustained . . . ."). Here, however, the superior court actually made *factual* findings regarding the history of Mr. Bell's industrial injuries to his low back, the distinctive conditions of Mr. Bell's employment, and that the distinctive conditions of Mr. Bell's drywall employment did not cause an aggravation of his preexisting low back condition. CP 8-9. These are factual findings that support the superior court's ultimate conclusion of law, that Mr. Bell did not sustain an occupational disease within the meaning of RCW

51.08.140. These factual findings are "sufficient to indicate the factual basis for the ultimate conclusion," *Groff*, 65 Wn.2d at 40, and they are sufficient to permit this Court to perform its duty, which is to review whether substantial evidence exists to support these particular findings. The concern of a mere conclusory finding present in *Groff* is not present in this case. As such, remand is not appropriate.

VII. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court's judgment.

RESPECTFULLY SUBMITTED this 21st day of February, 2013.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AARON BELL, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on February 21, 2013, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below-described manner:

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