NO. 93497-5

SUPREME COURT OF THE STATE OF WASHINGTON

ALEKSANDR RUMYANTSEV,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Alexandr Rumyantsev petitions for review but cites no rule of appellate procedure to justify review, and none exists. This case involves applying well-settled case law to the facts. Rumyantsev twice hit his head at work but failed to file a claim for workers' compensation benefits within a year of his injuries, as required by statute. He then contended that he suffered an occupational disease from the same events. If true, the time limit to file would have been two years rather than one. Statutes and well-settled case law require workers to show that distinctive conditions of their employment naturally and proximately caused any occupational disease, as opposed to ordinary conditions in everyday life or in all employment.

Here, Rumyantsev presented no testimony about his specific job duties, but contends that the fact that he hit his head twice at work means that distinctive conditions of his employment had to cause the disease. The Court of Appeals correctly held that substantial evidence showed he failed to prove his distinctive conditions of his employment caused an occupational disease.

Rumyantsev can point to no rule of appellate procedure warranting review of his fact-specific case. In any event, the Court of Appeals correctly held that substantial evidence supported the superior court's decision. This Court should deny review.

II. ISSUE

If the Court were to accept review, the issue would be:

Does substantial evidence support the superior court's finding that two injuries to Rumyantsev's head were not distinctive conditions of his employment, and thus, there was no evidence of occupational disease entitling him to benefits?

III. STATEMENT OF THE CASE

Rumyantsev worked as a laborer at Huntwood Industries in Spokane. BR Alexandr at 8, Ex 2.[1] On March 19 and May 13, 2010, he injured his head at work. BR Alexandr at 9-10, 13; Exs 2, 5. The first injury occurred when he hit the front of his head on a gluing machine, while the second occurred when a co-worker hit the back of his head with a board. BR Alexandr at 9-10, 13; Exs 2, 5. Both times, Rumyantsev received first aid and continued work. BR Alexandr at 10-12, 14.

In September 2011, Rumyantsev stopped working at Huntwood Industries. BR Alexandr at 21-22. He soon began seeking medical attention for his deteriorating health. BR Vera at 45-47. On October 2, 2012, Dr. Lanya Cox saw Rumyantsev and diagnosed a traumatic brain injury resulting from either one or both of the head injuries. BR Cox at 5-7. Dr. Cox helped Rumyantsev fill out and submit a claim with the

[1] "BR" refers to the Board's certified appeal board record. This brief references witness testimony by BR, last name, and page number.

Department, stating that Rumyantsev suffered from migraines, eye pain, and hearing loss caused by the two 2010 head injuries. BR Cox at 7; Ex 1.

The Department denied Rumyantsev's claim because he failed to file his claim within a year of the date of injury. Ex 3. Rumyantsev appealed to the Board of Industrial Insurance Appeals, arguing that the traumatic brain injury qualified as an occupational disease. BR 36-37.

Rumyantsev testified about his injuries, but he never explained what work he did for Huntwood. BR Alexandr at 9-15. Dr. Cox testified that Rumyantsev had delayed effects of his work-related injuries, but she did not know his specific job duties. BR Cox at 29. The Board concluded that the traumatic brain injury did not qualify as an occupational disease. The Board affirmed the Department's order. BR 1, 26-34.

Following a bench trial, the superior court affirmed. CP 46. The superior court found that Rumyantsev presented no evidence regarding his specific job duties, that the injuries to his head did not constitute distinctive conditions of his employment, and that his condition did not arise naturally and proximately out of the distinctive conditions of his employment. CP 45-46. Thus, his condition was not an occupational disease subject to the two-year time limit to file.

The Court of Appeals affirmed. *Rumyantsev v. Dep't of Labor & Indus.*, No. 33181-4-III (Wash. Ct. App. June 2, 2016) (unpublished

decision). The court held that the record showed that Rumyantsev failed to present any evidence of distinctive work conditions that gave rise naturally to the claimed disease. Slip op. at 4. Substantial evidence supported the superior court's decision. Slip op. at 4. Rumyantsev seeks review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Rumyantsev fails to cite any rule that warrants review, and none apply. In any event, the Court of Appeals correctly held that substantial evidence showed that Rumyantsev failed to present evidence of the distinctive conditions of his employment. He submitted no testimony regarding his specific job duties. Alternatively, substantial evidence shows that the injuries to Rumyantsev's head were more probably caused by conditions in everyday life or all employments in general, as there was no evidence that the injuries were a natural consequence of conditions of his particular employment. This Court should deny review.[2]

A. Rumyantsev Fails to Show that His Fact-Specific Case Warrants Review Under the Rules of Appellate Procedure

Rumyantsev's failure to cite any rule under RAP 13.4 is reason enough to deny review. *See* RAP 13.4. His petition shows that no reason to grant review exists. Rumyantsev can point to no conflict between the Court of Appeals' decision and any other appellate decision. His argument

[2] Rumyantsev does not seek review of the Court of Appeals rejecting his request that the Department allow a claim for noise induced hearing loss, so the Department will not address that here.

focuses on the facts of his case, essentially amounting to a substantial evidence challenge. He does not ask this Court to wade into any unanswered, complicated legal questions whose analysis would benefit the bench and bar. As he cannot point to any RAP (and none exists) to warrant review, this is reason enough to deny review. *See* RAP 13.4.

B. Substantial Evidence Supports the Superior Court's Finding that Rumyantsev Failed to Show that the Distinctive Conditions of His Employment Caused an Occupational Disease

In any event, the Court of Appeals correctly held that substantial evidence supported the superior court's decision. Rumyantsev failed to file his application for benefits within one year of his industrial injuries, as required by RCW 51.28.050. *See Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 388, 391, 810 P.2d 1363 (1991) (the one year limit for industrial injuries is *not* tolled until the worker discovers the injury). While a worker may file a claim for an occupational disease within two years from when the worker receives a doctor's notice that he or she has an occupational disease, Rumyantsev failed to prove that he has an occupational disease. RCW 51.28.055. Since he failed to timely file his application for his industrial injuries and failed prove an occupational disease, the Department correctly rejected his claim.

An industrial injury is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. Both instances of Rumyantsev hitting his head at work meet that definition, so he had one year from each injury to file a claim. RCW 51.28.050. It is true that the Board has said that a worker can have both an occupational disease and industrial injury under certain circumstances, but Rumyantsev has not demonstrated them here. *See In re Sharon Baxter*, No. 92 5897, 1994 WL 76747, *1-2 (Bd. Indus. Ins. App., January 7, 1994).

When the Legislature chose to allow benefits for occupational diseases, it placed limitations on those diseases that would be covered. The Legislature defined an "occupational disease" as "such disease or infection as arises naturally and proximately out of employment under the mandatory elective adoption provisions of this title." RCW 51.08.140.

The Court has explained that while an injury need not arise out of employment, an occupational disease does when it requires that the disease occur "naturally . . . out of employment." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). To obtain benefits, "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." *Dennis*, 109 Wn.2d at 481. Although the condition need not be particular to the place of employment, the burden is on the worker to prove 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 condition of that worker's particular employment." *Id.* (emphasis added). The conditions "must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidently occurring in his or her workplace." *Id.* (emphasis in original). A worker needs to present specific job duties to show what particular conditions of the work could cause the disease. *Id.*

Rumyantsev bore the burden to prove his entitlement to benefits. RCW 51.52.050(2)(a); *see Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014). Rumynatsev failed to meet his burden for two independent reasons.

First, as the Court of Appeals recognized, substantial evidence shows that Rumyantsev failed to present evidence about the distinctive conditions of his employment that gave rise to any kind of occupational disease. Rumyantsev testified only generally to how the injuries occurred: by a clamp hitting his head and a board hitting his head. BR Alexandr at

10, 13-14. While discussing moving boards during the second injury, there is no mention about his role. And his accident reports and claim for benefits state only that he is a "Toiler/grader/stacker" whose labor on any job was "as needed by supervisor." Exs 1, 2, 5.

The Court of Appeals thus correctly concluded that substantial evidence showed that Rumyantsev presented no testimony regarding his specific job duties. Slip op. at 4; *see* CP 45. As there is no evidence about his specific job duties, he cannot show how those duties put particular conditions on him that led to any occupational disease, as required by *Dennis*. The Court of Appeals correctly recognized this and affirmed.

Second, the Court of Appeals correctly recognized that Rumyantsev's argument begs the question, in that he asks the court to leap from having two injuries at work to recognizing an occupational disease, all without proving that the injuries were a natural incident of conditions of his particular employment. Again, the problem is that he failed to present evidence of his specific job duties.

The risk of hitting one's head is not unique to the conditions of Rumyantsev's job as a laborer. That hazard can occur at any job, at home, or elsewhere. That is why Dr. Cox could only testify that Rumyantsev had delayed effects of work-related injuries. BR Cox at 29. Since she did not know the specific job duties, she could not, and did not, testify that the

distinctive conditions of Rumyantsev's job caused an occupational disease. The Court of Appeals correctly held that substantial evidence supported the finding that Rumyantsev failed to prove that his alleged condition was naturally and proximately caused by the distinctive conditions of his employment.

C. Rumyantsev's Reliance on *Baxter* is Misplaced

Aside from the fact that Board decisions are not binding on appellate courts, Rumyantsev misplaces his reliance on *Baxter*.[3] In that case, the claimant was a nurse whose job duties included working with needles. *Baxter*, 1994 WL 76747 at *2.When she contracted hepatitis, it resulted from the distinctive conditions of her specific job duties, namely working with needles. *See id.* By contrast, there is no evidence here as to how Rumyantsev's specific job duties placed him at risk of a head injury that could lead to an occupational disease.

Rumyantsev essentially asks this Court to hold that because he suffered injuries at work and diseases, regardless of how those injuries occurred, then he does not need to present evidence that the distinctive conditions of his employment naturally led to an occupational disease. Such argument is inconsistent with logic and well-established case law, and as the Court of Appeals stated, begs the question. Accidents at work

[3]And there is no rule that provides for this Court's review when an appellate court disagrees with the Board.

do not per se constitute distinctive conditions of employment, in that they can just as easily be caused by something completely unrelated to the worker's specific job duties.[4] That a condition can manifest itself five years later does not automatically turn the condition into an occupational disease.[5] This Court should deny review

V. CONCLUSION

Rumyantsev fails to meet the requirements of RAP 13.4 to warrant review. The Court of Appeals correctly held that, in this fact-specific case, substantial evidence showed that Rumyantsev failed to meet his burden to prove that the distinctive conditions of his employment naturally led to an occupational disease. This Court should deny review.

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[4] Rumyantsev's argument that accidents at work should be considered distinctive conditions of employment when they cause disease-like processes thus fails. Rumyantsev Pet. at 4, 9. This argument seeks to add a third type of allowed claim (in addition to industrial injuries and occupational diseases): injuries that lead to disease-like processes. No statute or case supports adding this third type of claim.

[5] It is for this reason the Legislature provides that a worker can seek benefits for an occupational disease within two years of learning from a doctor about a worker's occupational disease. RCW 51.28.055. But those diseases must result from distinctive conditions of employment to qualify. *Dennis*, 109 Wn.2d at 481. Contrary to his self-serving argument, the record shows that Rumyantsev failed to put in evidence about those distinctive conditions. *Contra* Rumyantsev Pet. at 12.

RESPECTFULLY SUBMITTED this 14th day of October, 2016.

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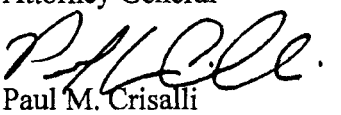

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CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES; and this CERTIFICATE OF SERVICE in the below described manner.

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DATED this 14th day of October, 2016, at Seattle, Washington.

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