Supreme Court No. 93984-5

Court of Appeals, Division One, No. 75644-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent is Roger Street, who was the Respondent in the Court of Appeals and the Plaintiff in the trial court. Roger Street is also referred to as the Claimant.

B. DECISION

The Court of Appeals unpublished decision, filed November 28, 2016, affirmed a jury verdict finding Mr. Street's chronic low back condition is an occupational disease that arose naturally and proximately out of his distinctive conditions of employment.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' unpublished opinion conflict with any decision of the Supreme Court or any published Court of Appeals decision justifying review under RAP 13.4(b)(1)&(2)?

2. Does the Court of Appeals' unpublished opinion upholding a jury verdict involve an issue of substantial public interest justifying review under RAP 13.4(b)(4)?

3. Is Mr. Street entitled to an award for attorney fees and costs arising from the filing of this Answer to Petition for Review?

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D. STATEMENT OF THE CASE

Statement of Procedure

Mr. Street agrees with the Statement of Procedure as set forth in Weyerhaeuser's Petition for Review, with exception taken to Weyerhaeuser's interpretation of the Court of Appeals' holding. The courts unpublished opinion held that substantial evidence supported the jury's verdict finding that Mr. Street's chronic low back condition constituted an occupational disease that arose naturally and proximately out of his distinctive conditions of employment.

Statement of Facts

Claimant, a 59-year old man at the time of testimony, worked his entire career for Weyerhaeuser. CP 218-219. He first worked in the woods logging. CP 220-227. In 1991, claimant moved into a mill position with a paper company, Norpac, which is a Weyerhaeuser subsidiary. CP 227-228. In these mill positions, referred to as 6th hand, 5th hand, 4th hand and 3rd hand, claimant would perform a lot of twisting, turning, bending and stooping. CP 231. Claimant discussed having to bend over, pull, and sand up to 800 paper rolls per day. CR 233-234. He described "manhandling" these paper rolls dozens of times per day in the first ten years of his employment. CP 237. These rolls were estimated to weigh 1000 pounds. CR 261. Claimant went on to describe his job duties

during machine breakdowns, which included being down on his hands and knees, manhandling rolls. CP 243-244.

Claimant acknowledged having back issues spanning most of his employment with Weyerhaeuser, but not having had any type of recreational accident outside of work that would have injured his back. CP 246. He also acknowledged that with the dawn of automation, the job became less physically demanding. However, the first ten years he was on the physically demanding winder job 90-percent of the time. CP 260.

Weyerhaeuser presented the testimony of Richard Moore who supervised claimant for "two to five, total" years. CP 279. Mr. Moore testified that during the years that claimant worked for him, he worked in a lighter demand stockroom helper position 75-percent of the time. CP 297. On cross-examination, Mr. Moore acknowledged that claimant would be manhandling rolls weighing between 800 pounds to 1500 pounds. CP 300.

Dr. Patricia Peterson, a board-certified internal medicine physician, testified on behalf of claimant. She has been his primary care physician for 20 years. CP 313-315. Dr. Peterson was familiar with claimant's jobs throughout the years, describing them as managing and moving huge rolls of paper, doing some computer work, all during a 12-hour shift, day after day. CP 319-321.

Dr. Peterson testified that the nature of claimant's work was at least a part of his current back problems, diagnosed as chronic low back pain related to degenerative arthritis and degenerative disc disease of the spine. CP 321, 323. Dr. Peterson explained that the degenerative disc disease by itself is not the problem; the problem arises when some type of trauma renders that condition symptomatic. CP 340. She further testified that his particular work contributed to the his painful back condition as opposed to "everyday wear and tear of just living." CP 322.

Dr. Yuri Tsirulnikov also testified. He is a pain management specialist and saw the claimant about five to six times in 2013, including several visits to administer injections. CP 362-364, 372. He diagnosed claimant with chronic degenerative changes in the spine, inflammation of the nerve roots called radiculitis, spinal stenosis, lumbar spondylosis and facet arthropathy. CP 365-366. Dr. Tsirulnikov testified that, although he could not determine the extent of contribution, he believed claimant's work condition was at least, in part, the reason for his back conditions. CP 367-368.

Lastly, Dr. Thomas Rosenbaum, a neurosurgeon who examined claimant one-time in 2014 at the request of Weyerhaeuser's attorney, testified. CP 401. Dr. Rosenbaum's opinions were based on his belief that claimant's job did not involve hard labor and only occasionally

required him to move paper rolls or address paper jams. CP 438. He testified that if there was any contribution from exertional work activities, it was between two to three percent. CP 433-434.

E. ARGUMENT

RCW 51.04.010 assures "sure and certain for relief for workers injured in their work..." This Industrial Insurance Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. RCW 51.12.010; *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979).

1. Weyerhaeuser has not established that the Court of Appeals' unpublished decision conflicts with a decision of the Supreme Court or any published Court of Appeals decision justifying review under RAP 13.4(b)(1)&(2).

Weyerhaeuser suggests the unpublished decision in this case conflicts with this Court's prior decision holding that "the 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. *Dennis v. Department of Labor & Indus.*,

109 Wn.2d 467, 477, 745, P.2d 1295 (1987). As the Court of Appeals correctly found, and Mr. Street argues, *Dennis* is entirely consistent with, and factually similar to, the case at hand.

a. This case is consistent with prior cases interpreting occupational disease claims.

It is difficult to ascertain whether Weyerhaeuser argues that the present case conflicts with the *Dennis* case or whether the present case is a case of first impression because its believes the detailed occupational disease analysis in *Dennis* is somehow lacking. Weyerhaeuser cites both conflicting arguments at various points in its Petition for Review. PFR at 7; PFR at 9.

In *Dennis,* this Court held that, in attempting to prove the "naturally" requirements of an occupational disease claim, a worker "must show that his or her particular work conditions more probably caused his or her 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." *Id.,* at 481. In *Dennis,* the Court held there was sufficient evidence to present the case to a jury where the record consisted of Dennis' attending physician's testimony that while all people are susceptible to osteoarthritis, some may be more susceptible

than others; he stated the disease does not always become symptomatic; and that osteoarthritis is presumably related to wear and tear. The attending physician in that case also testified that more probably than not Dennis' repetitive use of tin snips made the osteoarthritis in his wrists symptomatic and disabling and that it was reasonable to assume that the localization of pain his wrists was related to his occupation. *Id.*, at 483.

The record in this case is similar to *Dennis*. The attending physician, Dr. Patricia Peterson, has treated claimant for 20 years. CP 315. She testified about her understanding of claimant's job, which included managing, lifting and moving huge rolls of paper. CP 319-320. She testified that claimant's work was "at least a part of his current condition." CP 321. Dr. Peterson was asked why claimant's work in particular was involved rather than everyday wear and tear of life. CP 322. She discussed the role that repetitive heavy labor plays into the claimant's back condition. CP 323. Dr. Peterson further testified that extreme repetition of handling paper rolls throughout the long workday was a factor in claimant's back condition. CP 355.

Following this testimony, the jury was instructed properly on the elements required to prove an occupational disease claim. CP 495. The trial court also gave a separate instruction on the "naturally" element of

an occupational disease claim. CP 496. Weyerhaeuser did not object to either of these jury instructions.

The testimony of an attending physician is to be given special consideration. *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). It was reasonable for the jury to infer from the testimony of the attending physician that the claimant met his burden of proof as it relates to the "naturally" element.

Weyerhaeuser argues that the present case conflicts with other Court of Appeals decisions, namely *Potter v. Department of Labor & Indus.*, 172 Wn.App. 301, 289 P.3d 727 (2012); *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 & Indus.*, 72 Wn.App. 847, 866 P.2d 78 (1994). These cases do not support Weyerhaeuser's theory that a conflict exists.

Potter involved a claim of multiple chemical sensitivity disorder. The court denied the claim finding "no evidence of exposure to anything other than permissible limits." *Potter*, at 308. In *Gast*, the court denied a stress-related claim finding that "as a matter of law...rumors, innuendos, and inappropriate comments by coworkers are not distinctive conditions of employment." *Gast*, at 243. In *Witherspoon*, a slaughterhouse plant worker who contracted spinal

meningitis after his co-worker coughed in his face did not satisfy the "naturally" element because his exposure was "merely coincidental and not a result of any distinctive condition of his employment." *Witherspoon,* at 851. In all of these cases, the courts never held that the claims failed because of a lack of medical testimony. These holdings are consistent with the holding in Mr. Street's case.

In the present case, there was a plethora of testimony regarding claimant's job duties with Weyerhaeuser. Claimant testified that his job was very physically demanding and involved manhandling one-thousand pound paper rolls. CP 237, 261. The job also involved significant twisting, turning, bending, and stooping. CP 231. Claimant's supervisor, on the other hand, diminished the amount of heavy labor the claimant's job required. Importantly, Mr. Moore only directly observed claimant's job for "two to five years" out of his entire career with Weyerhaeuser. CP 279. The jury clearly chose not to believe the testimony of the claimant's supervisor.

Weyerhaeuser further assumes that because its one-time reviewing medical witness, Dr. Rosenbaum, was willing to say that claimant's job was not distinctive, claimant has not met his burden of proof. This argument is a mixing of the "proximately" and "naturally" requirements. Regardless, Dr. Peterson's testimony that claimant's

"particular work as opposed to everyday wear and tear of just living" is more than sufficient medical testimony to allow a jury to infer the requisite proof, if such medical connection was required.

b. The Court of Appeals' unpublished decision cannot create binding precedent.

GR 14.1(a) states in relevant part:

> Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

The decision of the Court of Appeals in this case was not published nor did Mr. Street seek to have it published. As such, this case cannot create precedential conflict with any other case, even if one were to presume conflict was present.

2. Weyerhaeuser has not established that the Court of Appeals' unpublished decision upholding a jury verdict involves an issue of substantial public interest justifying review under RAP 13.4(b)(4).

Weyerhaeuser spends little time in its Petition arguing how this case rises to the level of "substantial public interest" other than by asserting this issue is a potential issue in every occupational disease claim. PFR, at 6. This could be said of any decision before any court.

As discussed at length, supra, the criteria for allowance of an occupational disease claim is well-settled through *Dennis* and its progeny. Substantial public interest is best served by upholding jury verdicts that are supported by substantial evidence, such as in Mr. Street's case. Jury Instruction Number 14, to which no party objected, states:

> 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. CP at 526.

Neither the facts of this case, nor the jury instructions, nor settled case law interpret occupational disease requirements in the manner Weyerhaeuser requests. That is, this Court has never required that a medical doctor become an expert in defining a distinctive work condition. If such expert testimony was required, it can certainly be said that the worker is an expert as to the conditions of his or employment. In this case, claimant adequately and thoroughly addressed the heavy labor portions of his job. His attending physician then addressed the role those activities played into his current back condition. As in *Dennis,* this testimony was sufficient to allow a jury to infer that

claimant's disabling back condition arose naturally and proximately out of his employment.

3. Mr. Street is entitled to an award for attorney fees and costs resulting from the filing of this Answer.

RCW 51.52.130 authorizes attorney's fees and costs when a claimant prevails on appeal to this Court. This section states in relevant part, "...in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court." Further under RAP 18.1(j), a prevailing party who was awarded attorney's fees before the Court of Appeals may be entitled to attorney's fees before this Court if a Petition for Review is denied. In the November 28, 2016 unpublished decision, Division One awarded Mr. Street's attorney fees and costs. As such, the claimant asserts his right to an award of reasonable fees and costs should this Court deny Weyerhaeuser's Petition for Review.[1]

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[1] Mr. Street also continues to assert his right to receive attorney fees and costs that were awarded before the Superior Court and Court of Appeals as affirmed and awarded, respectively, by the Court of Appeals.

F. CONCLUSION

Mr. Street respectfully requests this Court deny review as Weyerhaeuser has failed to prove a just reason exists to grant review under RAP 13.4(b). The Court of Appeals' unpublished opinion does not conflict with any Supreme Court case or Court of Appeals published case. Further, the unpublished opinion does not rise to the level of substantial public interest given the well-settled case law in this subject matter and the interest served by upholding jury verdicts that are supported by substantial evidence.

Mr. Street further requests that attorney fees and costs be awarded should this Court deny Weyerhaeuser's Petition for Review.

Dated this 25th day of January, 2017.

Jill A. Karmy, WSBA #34132
Attorney for Mr. Street

CERTIFICATE OF FILING AND SERVICE

I certify that I caused to be served the foregoing Answer to Petition for Review on the following persons by mailing to each of them on January 25, 2017 by first class mail a true copy contained in a sealed envelope with postage prepaid and addressed as follows:

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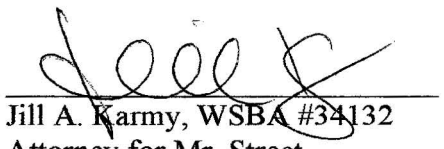
I further certify that I filed the original via email to Supreme@courts.wa.gov on January 25, 2017.

Dated this 25th day of January, 2017.



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