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STATE OF WASHINGTON

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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent,

v.

WEYERHAEUSER COMPANY,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in concluding that claimant's work activities for Weyerhaeuser constituted distinctive conditions of employment and that his low back condition arose naturally out of the employment. (CP 534-35).

2. Claimant is not entitled to an award of assessed attorney fees and costs. (CP 533, 535).

B. Issues Pertaining to Assignments of Error

1. Did claimant present any expert testimony that could support the conclusion his work exposure was distinctive to his particular employment, compared to other employments generally and everyday life, when viewed as a cause of lumbar spondylosis?

2. Is claimant entitled to assessed attorney fees and costs?

II. STATEMENT OF THE CASE

A. Statement of Procedure

In November 2012, Roger Street ("claimant"), filed an application for workers' compensation benefits for a low back condition that he attributed to his employment at Weyerhaeuser.

(CP 84). By order dated February 14, 2013, the Department of Labor and Industries denied the claim. (CP 64). Following claimant's protest, the Department affirmed its decision by order issued June 10, 2013. (*Id.*). Claimant appealed that decision to the Board of Industrial Insurance Appeals. (*Id.*).

The Board conducted hearings commencing in March 2013. Claimant alleged that his low back condition constituted an occupational disease. (CP 217).

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.*).

On November 24, 2014, claimant filed a motion for reconsideration of the Board's decision and requested Board Member Eng to recuse himself from the proceeding. (CP 32). By order dated February 3, 2015, the Board and Mr. Eng found recusal inappropriate and affirmed the Board's decision. (CP 7-8). 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 particular employment. (CP 445). On July 1, 2015, Judge Warning ruled that claimant had presented sufficient expert testimony to present a jury question on this issue and therefore 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). By judgment and order entered December 14, 2015, the court reversed the Board's decision and remanded the matter to the Department with instructions to issue an order accepting the claim as an occupational disease. (CP 533-36).

Weyerhaeuser has appealed from the superior court's decision. (CP 537).

B. Statement of Facts

Claimant began working for Weyerhaeuser in 1975 as a timber cutter. His testimony addressed very little of the specifics of such work (CP 221-26) and no medical testimony related claimant's low back condition to that work.

From 1991 to 2011, claimant worked in the paper mill at NORPAC, a Weyerhaeuser subsidiary. (CP 227). Claimant's direct examination testimony about this job focused entirely on his work as an assistant winder operator or "4th hand," suggesting this represented his job as a whole. (CP 229-35). He stated he was in the "back end of the paper machines the whole time," virtually constantly lifting cardboard paper roll cores into cradles, bending over to tape or sand the completed rolls, and 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 assistant winder or "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 with which he worked weighed only 2 to 10 pounds, and that heaviest cores were only 25 pounds, which he used only occasionally. (CP 253). Claimant further acknowledged that an automated cradle lifted the completed rolls and put them on a conveyor belt. (CP 255-56). He agreed he had to maneuver (*i.e.*, "manhandle") the rolls only during line shut downs that 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 was claimant's supervisor for at total of approximately five years from 1996 to 2011. (CP 279, 297). He testified that during this time, claimant worked approximately 75 percent of the time as a stockroom helper. (CP 295, 297). He confirmed that the stockroom helper position involved a variety of physically light duties. (CP 295-96). Mr. Moore also confirmed that the winder operator position involved very little physical activity—mostly monitoring people and equipment. (CP 294). He testified

that most paper cores weighed only 1.5 to 10 pounds and that only occasionally rolls of up to a maximum of 25 pounds were used. (CP 284).

Mr. Moore stated that the assistant winder position involved sitting at least 20 percent of the time, including approximately 5 of the 10 minutes that it took for the paper to be wound on a given roll. (CP 280-83). He confirmed other aspects of the job included 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 an assistant winder operator could go a couple of days without maneuvering the completed rolls, and that this was accomplished on the inclined conveyor, with gravity helping move the roll, and often with the assistance of another worker. (CP 288, 295).

Dr. Peterson is an internist who provided claimant's primary care for approximately 20 years and testified on his behalf. (CP 313, 315). She did not see claimant for any low back concerns from 1995 until October 2002. (CP 328-29). In October 2002, claimant reported that he had awakened with low back pain three days

earlier without any known injury or trauma. (CP 331-32).

An April 2003 lumbar MRI scan revealed only minimal lumbar pathology. (CP 330). Claimant was 49 years old and had worked for Weyerhaeuser/NORPAC 31 years by that time. (CP 330-31).

Claimant did not return to Dr. Peterson for treatment of back pain from January 2004 until September 2006. (CP 333). In September 2006, he reported he had awakened with low back pain, which he attributed to having helped his in laws move furniture three days earlier. (*Id.*).

Claimant next saw Dr. Peterson with back complaints in November 2009. (CP 334-35). He stated he had "tweaked" his back two months earlier doing landscaping work off-the-job. (*Id.*).

Dr. Peterson documented only one occasion when claimant sought treatment for an episode of low back symptoms that he related to work activities. (CP 418).

In September 2010, claimant saw Dr. Peterson and reported he had lost 47 pounds and no longer had any back symptoms. (CP 335). He previously had weighed over 250 pounds and stood less than 6 feet tall. (CP 336).

Dr. Peterson testified that the work activities had contributed to claimant's low back condition based on her understanding that his job typically was "very heavy" and that much of it involved "lifting and hefting and moving huge paper rolls." (CP 319-20). She confirmed it was her understanding that each shift claimant regularly had to manually roll approximately 200 to 2500 full paper rolls that were 40-50 inches in diameter. (CP 320-21). Dr. Peterson believed that claimant had been required to use "a lot of his body weight" in pushing the huge rolls on a regular basis. (CP 322-23). Dr. Peterson did not compare claimant's duties, actual or perceived, to the activities of other employments or daily living, or otherwise address whether such work was distinctive to his particular employment.

Dr. Tsirulnikov also testified for claimant. He or his physicians assistant saw claimant for his back condition a total of three to four times, three of which were only for injections. (CP 371-72). In a discovery deposition five days before his perpetuation deposition, Dr. Tsirulnikov testified it was only "possible" that claimant's work had contributed to his low back condition and that he could not say how the condition had developed. (CP 384-85).

He also testified in the discovery deposition that he could not speculate what caused claimant's symptoms. (CP 387-88). When claimant's counsel recited claimant's alleged job duties to Dr. Tsirulnikov and asked whether the duties probably had caused claimant's condition, the doctor responded that he was willing to say only that the work "may be a factor" and that he could say it was only "possible." (CP 388-89).

Five days later, Dr. Tsirulnikov testified the work had contributed to claimant's low back condition, although he could not tell to what extent, based on his understanding that claimant regularly performed "hard labor." (CP 368-69). In so testifying, he was asked to assume that claimant had manually worked with 200 to 2500 full paper rolls each shift that were 40 to 50 inches in diameter and very heavy. (CP 368). Dr. Tsirulnikov, like Dr. Peterson, did not compare claimant's duties, actual or not, to the activities of other employments or daily living, or otherwise address whether such work was distinctive to his particular employment.

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 or address paper jams. (CP 438).

Dr. Rosenbaum diagnosed lumbar spondylosis or degenerative disc disease. (CP 406). He stated such pathology is very common, particularly in claimant's age group, and that genetic factors are "overwhelmingly" its major cause. (CP 408). Dr. Rosenbaum testified that claimant's work activities at Weyerhaeuser were not a proximate cause of his low back condition. (CP 411, 443). He relied in part on the Battié study of identical twins who had discordant work histories, which demonstrated genetic factors were by far the predominant cause of lumbar degenerative pathology. (CP 411). Dr. Rosenbaum noted the Battié study had indicated the broad spectrum of physical loading activities (*i.e.*, sedentary to very heavy) considered together was only a 2 to 3 percent *or less* contributor to such pathology. (CP 442). He stated claimant's particular work exposure probably had not contributed to his condition because it was fairly light in comparison to much of the hard, physical labor in the spectrum of

physical loading activities. (CP 427, 441-43). Dr. Rosenbaum concluded that claimant would have developed "the same condition to the same degree," if he had not worked at Weyerhaeuser. (CP 443). In addition, Dr. Rosenbaum concluded that claimant's work at Weyerhaeuser was not distinctive in terms of its potential for causing or aggravating such lumbar pathology because it was not particularly physical—much less so than many occupations. (CP 425, 427).

III. SCOPE OF REVIEW

The scope of this court's review on workers' compensation appeals is the same as in other civil matters. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 395 P.2d 633 (1964). That is, the court reviews the trial court's decision for errors of law and to determine if the trial court's findings are supported by substantial evidence, and whether the court's conclusions flow from the findings. *Id.* at 41; *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). The court reviews questions of law *de novo*. *Rose v. Department of Labor and Industries*, 57 Wn. App. 751, 790 P.2d 201, *rev den* 115 Wn.2d 1010 (1990).

IV. ARGUMENT

A. The Trial Court Erred In Concluding That Claimant's Work Activities at Weyerhaeuser Constituted Distinctive Conditions of Employment and That His Low Back Condition Arose Naturally Out of the Employment.

1. Claimant Had the Burden of Proving His Lumbar Spondylosis "Arose Naturally" Out of Conditions of His Particular Employment That Were Distinctive, Compared to Other Employments Generally and Everyday Life, When Viewed as a Cause of Spondylosis.

The legislature did not intend the Industrial Insurance Act (IIA) "to provide workmen with life, health or accident insurance at the expense of the industry in which they are employed." *Favor v. Department of Labor and Industries*, 53 Wn.2d 698, 703, 336 P.2d 382 (1959). Accordingly, the legislature did not define "occupational disease" to include all conditions bearing a causal relationship to the employment. The legislature instead placed limitations on disease coverage by defining "occupational disease" as "such disease or infection as arises naturally and proximately out of employment...." RCW 51.08.140. The legislature thus

established two separate and distinct elements for an occupational disease, each of which must be proved to establish coverage.

In *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987), the Supreme Court rejected the view that the "arises naturally" prong of RCW 51.08.140 does not impose a distinct, independent element of a claimant's burden of proof. There, Division I of the Court of Appeals determined that the lower tribunals had too restrictively interpreted the "arises naturally" requirement in rejecting the worker's claim. *Dennis v. Department of Labor and Industries*, 44 Wn. App. 423, 436, 722 P.2d 1317 (1986). The court stated that the "ultimate criterion" in determining the compensability of an occupational disease claim was simply whether the employment caused a disability that did not previously exist. *Id.* at 429. The court held that a claimant could satisfy the "arises naturally" requirement merely by showing "a *logical relationship* between the disease-based disability and the work...." (Emphasis added.) *Id.* at 436.

On review, the Supreme Court rejected the Court of Appeals' dilution of the "arises naturally" requirement. 109 Wn.2d at 479. Although the court agreed that a claimant's condition need not be

"unique" or "peculiar to" his employment, it confirmed the terms "arises naturally" must be given effect, and that an occupational disease claimant has the burden of proving his condition "arose naturally" from his employment that is independent of his burden of proving proximate causation. 109 Wn.2d at 479, 481. More recently, the Court of Appeals likewise has held that a claimant seeking to establish an occupational disease must prove the claimed condition "arose both (1) 'naturally' and (2) 'proximately' out of [the] employment." *Potter v. Department of Labor and Industries*, 172 Wn.App. 301, 311, 289 P.3d 727 (2012). In short, although generally the IIA is liberally interpreted, the appellate courts already have interpreted the "arises naturally" prong of the occupational disease statute and held it requires proof of "natural" causation, as well as proximate causation.

The *Dennis* court also confirmed what must be proved to satisfy the "arises naturally" requirement. The court held these terms require 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 analysis of contrasting the claimant's "particular employment conditions" with "conditions in everyday life or all employments in general" necessitates a comparison of the claimant's work activities with those existing generally in other employments and daily life to determine whether the worker's exposure was distinctive when viewed as a cause of the disease in question. The court's analysis thus confirms that occupational disease coverage extends only to diseases that bear a distinctive causal relationship to the worker's particular employment, in contrast to diseases resulting from employment activities of a type that are common to other employments or everyday life.

Since *Dennis*, the Court of Appeals has issued several decisions which reinforce the conclusion that proof of such a distinctive employment cause is required to establish an occupational disease. In *Gast v. Department of Labor & Indus.*, 70 Wn. App. 239, 852 P.2d 319, *rev den* 122 Wn.2d 1024 (1993), the

claimant sought occupational disease coverage for a stress-related disease allegedly caused by workplace rumors, innuendos, and inappropriate comments made by co-workers. 72 Wn. App. at 240. On review, the court affirmed denial of the claim, stating that "rumors, innuendos, and inappropriate comments by coworkers are not distinctive conditions of employment...[because such] conditions are unfortunate occurrences in everyday life or all employments in general." 72 Wn. App. at 243.

Similarly, in *Witherspoon v. Department of Labor and Industries*, 72 Wn. App. 847, 866 P.2d 78 (1994), the claimant filed an occupational disease claim for spinal meningitis, contending he had contracted the disease from an apparently ill coworker in the employer's slaughterhouse. 72 Wn. App. at 849. In the trial court, the jury found in the claimant's favor and the court denied the employer's motion for judgment notwithstanding the verdict. 72 Wn. App. 850. On review, the Court of Appeals held, as a matter of law, the claimant's evidence had failed to satisfy the "arises naturally" prong of RCW 51.08.140 as interpreted in *Dennis*. 72 Wn. App. at 851. The court explained:

> "There was no showing that the conditions of Mr. Witherspoon's employment caused him to be in

> contact with the bacteria any more than he would be in ordinary life or other employments. His exposure to meningitis in the workplace as opposed to elsewhere was merely coincidental and not a result of any distinctive conditions of his employment with IBP. Compare *Gast* [*supra*]."

Id. The court therefore held the trial court had erred when it denied the employer's motion, and reversed and remanded the matter for entry of judgment in favor of the employer. *Id.*

In *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 employer defendant to a civil discrimination suit argued the suit was barred by the IIA's exclusive remedy provision on the basis the plaintiff's mental disability, allegedly due to supervisor harassment, constituted an occupational disease. 65 Wn. App. at 566. The court rejected the employer's argument, reasoning:

> "...[N]othing in the record suggests that [plaintiff's] particular employment at the Center more probably caused her disability than conditions in all employments in general. The conditions she encountered were not particular to her occupation, but only coincidentally occurred in her workplace. *See Dennis*, 109 Wn. 2d at 481. *They could just as easily have occurred in any other workplace.*" (Emphasis added.) 65 Wn. App. at 567.

See also Ruse v. Department of Labor and Industries, 90 Wn. App. 448, 454, 966, P.2d. 909 (1998), *affirmed on other grounds*, 138 Wn.2d 1, 977 P.2d. 570 (1999) (the Court of Appeals held the "heavy labor" and "hard work generally" to which the claimant attributed his back condition were "found in numerous types of employment and of life in general" and therefore did "not satisfy the statutory mandate that 'distinctive' conditions of employment proximately caused [his] disability."

In summary, *Dennis* and its progeny establish that a condition does not qualify as an occupational disease unless there is a distinctive causal relationship between that condition and the claimant's particular employment. A claimant seeking to establish an occupational disease therefore has the burden of proving that his particular employment exposure was "distinctive," compared to other employments generally and everyday life, when viewed as a cause of the disease.

2. Claimant Presented No Expert Medical Testimony That Could Support the Conclusion That His Work Exposure Was Distinctive to His Particular Employment When Viewed as a Cause of Lumbar Spondylosis.

Claimant's low back condition has been diagnosed as lumbar spondylosis or degenerative disc disease.[1] Claimant had the burden of proving his spondylosis arose both "naturally and proximately" out of his work activities at Weyerhaeuser. RCW 51.08.140; *Dennis v. Dept. of Labor and Industries*, *supra,* 109 Wn.2d at 479; *Potter v. Department of Labor and Industries*, *supra*, 172 Wn.App. at 311. As discussed, to satisfy the "natural" causation requirement, there must be proof that the work activities at Weyerhaeuser were distinctive, compared to activities that are common to employment generally and daily life, when viewed as a cause of lumbar spondylosis. *Dennis, supra; Potter, supra; Witherspoon, supra; Gast, supra.*

The issue whether particular work conditions constituted a "distinctive" cause of a medical condition presents a medical question. The appellate courts have long held, including in *Dennis*, that issues of medical causation must be proved through expert medical testimony. *Dennis,* 109 Wn.2d. at 477*; Zipp v. Seattle School Dist. No. 1*, 36 Wn.App. 598, 676 P.2d 538 (1984. This requirement necessarily flows from the nature of the issue. Only a

[1] These are synonymous terms. (CP 406). Weyerhaeuser will refer to claimant's condition primarily as spondylosis.

medical expert is competent to reliably address whether particular activities present a risk of causing a specific kind of pathology or medical condition. The need for such expertise is heightened where, as here, the issue is whether the particular activities present a causal risk that is distinctive compared to other activities or exposures.

The requirement of expert medical testimony also flows from the legislature's use of the near-universal phrase "arising out of" in defining an occupational disease. *See* 1 Larson, *Workers' Compensation Law* § 6.00 at 3-1 (1997). As 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). The legislature's use of the "arising out of" phrase therefore reflects its intent to require a causation analysis in determining whether the disease "arose naturally" from the employment. And since that causation analysis relates to a medical condition, medical testimony is necessary to demonstrate the requisite distinctive conditions of employment.

Claimant presented *no expert testimony* that addressed, directly or indirectly, the question whether his work activities were distinctive, compared to other employments and the activities of daily living, when viewed as a cause of lumbar spondylosis. The record indicates claimant's actual employment activities were not particularly strenuous or dissimilar from those pursued in many other employments. Neither Dr. Peterson nor Dr. Tsirulnikov compared claimant's work activities to those generally inherent in other employments or daily living, or otherwise addressed whether claimant's activities were distinctive to his particular employment when viewed as a cause of lumbar spondylosis.

On the other hand, Dr. Rosenbaum considered whether claimant's work activities were distinctive when compared to other employments and affirmatively testified that claimant's work at Weyerhaeuser was not distinctive in terms of its potential for causing or aggravating lumbar spondylosis. (CP 425-27). In fact, Dr. Rosenbaum stated that because claimant's work was not particularly physical—much less so than many occupations—it was *less* likely to contribute to lumbar spondylosis. (CP 427).

In summary, claimant presented no expert testimony that could support the essential finding that his lumbar spondylosis arose naturally out of distinctive conditions of his particular employment. The record supports only the conclusion that claimant's work activities were not distinctive to his particular employment when viewed as a cause of spondylosis. Therefore, the trial court's decision must be reversed and judgment should be entered in favor of Weyerhaeuser. *Witherspoon, supra.*

B. Claimant Is Not Entitled To Assessed Attorney Fees and Costs.

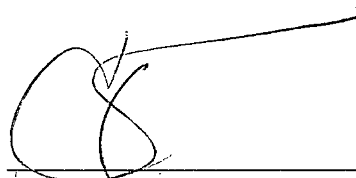
Assessed attorney fees and costs are authorized only when the claimant prevails on appeal. RCW 51.52.130. As stated, this court should reverse the trial's court's decision and grant judgment in favor of Weyerhaeuser. In that event, the award of assessed attorney fees and costs must also be reversed because claimant would not have prevailed on any issue.

V. CONCLUSION

The court should conclude claimant failed to present the expert testimony that is necessary to support the conclusion that his low back condition arose naturally out of his employment.

Because this is an essential element of proving an occupational disease, the court should reverse the trial court's decision and order reinstatement of the Department order that denied this claim. The award of assessed attorney fees and costs should also be reversed.

DATED: April 29, 2016.



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CERTIFICATE OF MAILING

I certify that on April 29, 2016, I served the foregoing Brief of Appellant on the following persons by mailing them each a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

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