89799-9

Court of Appeals, Div. I, Case No. 69438-3-I

SUPREME COURT
OF THE STATE OF WASHINGTON

Aaron Bell,

Appellant/Petitioner,

v.

Department of Labor & Industries,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Aaron Bell, the injured worker/Claimant at the Board of Industrial Insurance Appeals, and the plaintiff/appellant at the Snohomish County Superior Court and Division One of the Court of Appeals, seeks review of the opinion entered by the Court of Appeals referenced in Section II below.

II. COURT OF APPEALS' DECISION

Mr. Bell asks this Court to review the opinion of the Court of Appeals, Division One, which was filed on December 16, 2013. A copy of the unpublished opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Whether substantial evidence existed for the Court of Appeals to uphold the superior court's finding that Mr. Bell's work as a drywaller between 2006 and 2009 was not a proximate cause of the aggravation, acceleration, and/or hastening of Mr. Bell's preexisting low back condition.

B. Whether the lower courts properly followed the requirements set forth in the Washington State Supreme Court case of Groff v. Department of Labor & Industries.

IV. STATEMENT OF THE CASE

A. Factual Background

On July 21, 2009, Mr. Bell completed the form titled "Report of Industrial Injury or Occupational Disease," which was given claim number AK79707. *See* Clerk's Papers (CP) 197. Mr. Bell stated that his date of last occupational exposure and time of injury were "progressive" and that his "low back and leg pain has gotten worse from doing ... [his] job" over time. CP 122, 197.

Between July 2006 and August 2006, and after being retrained, Mr. Bell tried his hand at a commission based job and even resorted to delivering pizza. CP 66, 120, 342. Unfortunately, this new line of work was not bringing in enough income to sustain his families basic economic needs. Id. Financially, his family was not surviving. Mr. Bell was forced to look to other means to provide for his family. Having been in the business for over 24 years and knowing that his earnings could support his family, Mr. Bell returned to work as a drywaller in August of 2006. Id.

Mr. Bell last worked as a drywaller on June 5, 2009 for Brent Smith Drywall in Woodinville, Washington. *See* CP 66, 197, 342. He had been in the drywall industry for over 24 years. CP 66, 116. The requirements of the job were very taxing on Mr. Bell's body. The work of a drywaller is very physical, in that he is constantly lifting weight upwards

of 125 pounds, not to mention the 40 pound tool belt already around his waist. CP 66, 232, 280, 305. His job was far from stationary and, all while carrying this heavy weight, Mr. Bell's job as a drywaller required him to "frequently bend, kneel, stretch and twist." CP 66. This very physically demanding job took a toll on Mr. Bell's body and had caused him to have work related back injuries and related surgeries in the past. Id. When he returned to drywalling in 2006 he was lifting and bending more than he had ever done in the past because he wanted to impress his employers as jobs were hard to come by. CP 125. Toward the end of 2008, Mr. Bell began to experience severe right leg pain. CP 122. His right leg pain and low back progressively got worse, even to the point where he would drive "to work hiked up on one side of [his] buttock trying to keep the weight off [his] right side just [so he could] work." CP 122. Mr. Bell would take "[a] lot of aspirin", as well as up to a dozen Aleve per day for the pain so he could work, all while hoping and waiting for it to subside. CP 122, 127. It never did and he finally made an appointment to see a doctor which led to this claim. CP 122-23.

B. Procedural Background

Mr. Bell filed an application for benefits with the Department of Labor & Industries (Department) on July 21, 2009 due to his occupation. CP 101, 197. On August 25, 2009, the Department issued an order

rejecting Mr. Bell's claim for benefits. CP 70, 101. Mr. Bell filed a timely protest of the August 25, 2009 order with the Department on September 3, 2009. CP 101. In response, the Department issued an order on September 14, 2009 which affirmed the August 25, 2009 rejection order. CP 69, 101. Mr. Bell filed a timely appeal to the September 14, 2009 affirm order on September 22, 2009, which was granted for consideration by the Board of Industrial Insurance Appeals (Board) on October 21, 2009. CP 72-76. Following depositions and hearings at the Board, the Industrial Appeals Judge issued a Proposed Decision and Order (PD&O) on November 23, 2010 which affirmed the Department's rejection order of August 25, 2009. CP 61-68. Mr. Bell filed a timely Petition for Review (PFR) of the PD&O on January 4, 2011. CP 41-54. Mr. Bell's PFR was subsequently denied by the Board on January 18, 2011 which in turn made the PD&O a final decision and order of the Board. CP 37-40. In response, Mr. Bell filed a timely appeal to Snohomish County Superior Court[1]. Trial briefs were submitted by both Mr. Bell as well as the Department on August 31, 2012. CP 11-33. The bench trial/oral argument was held at Snohomish County Superior Court

[1] Mr. Bell's Notice of Appeal to Superior Court appears to be absent from the Clerk's Papers.

on the morning of September 10, 2012[2]. CP 7-10. On October 15, 2012, the superior court affirmed the Board's order of January 18, 2011 which ultimately affirmed the Department's rejection order of August 25, 2009. *Id.* Mr. Bell filed a timely Notice of Appeal to Court of Appeals on October 17, 2012. CP 1-2. Mr. Bell filed the Designation of Clerk's Papers by the required deadline and further notified the Court that no Statement of Arrangements was filed as there was no transcription or recording of the relevant proceedings at the trial court level.

V. ARGUMENT

A. The Court of Appeals' Determination that Substantial Evidence Existed to Uphold the Superior Court's Decision is of Substantial Public Interest that Needs to be Addressed by this Court and Runs Contrary to Previous Decisions by this Court.

Substantial evidence does not exist to uphold the lower court's decision that Mr. Bell's low back condition should not be considered an occupational disease as contemplated by Title 51 and, in doing so, the lower courts have created a matter of substantial public interest and have forged ahead contrary to decisions by this Court. *See* Wash. R. App. P. 13.4. "Substantial evidence" has been defined as "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Grimes v. Lakeside Indus., 78 Wash. App. 554, 560-

[2] The Superior Court's Findings of Fact and Conclusions of Law and Judgment incorrectly states the bench trial/oral argument date as September 11, 2012. *See* CP 8:1-2.

61, 897 P.2d 431 (1995) (*citing* Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed,* 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987)).

In the current matter, all three of the doctors who testified in the matter, including Dr. Stump who testified on behalf of the Department, agreed that Mr. Bell was in an occupation that played a significant role in his low back condition as well as the progression of said condition. CP 228, 265, 267, 281, 302-03, 324[3], 369[4]. Where Dr. Stump differed from Dr. Summe and Dr. Wright is in their ultimate opinions of whether Mr. Bell's low back condition was aggravated, accelerated, and or hastened due to his work as a drywaller between 2006 and 2009. Dr. Stump, the one time examiner, opined that Mr. Bell's degenerative condition would have progressed with or without the drywall work between 2006 and 2009. *See generally* CP 310-369. Even with this generalized, conclusory opinion, Dr. Stump misses the point. Dr. Stump never testified that Mr. Bell's low back condition would have progressed to the level it did or at

[3] According to Dr. Stump, "patients that have degenerative disease are more susceptible to have that disease progress depending on the type of physical activity they did. That activity can obviously be work or nonwork related. But this gentleman does have an occupation in which there's a significant amount of heavy type of bending, lifting-type activity, so one would believe that his work activities was a significant factor in the development of his degenerative disk disease." CP 324 (emphasis added).

[4] Dr. Stump continued, "[s]o one could state that because of his genetic aspect, because of his prior injuries and the surgeries that have been carried out, by returning to the heavy-duty-type work, he was more likely to experience progression of his degenerative process and more likely to have problems in the future." CP 369 (emphasis added).

the pace it did absent Mr. Bell's occupation as a drywaller between 2006 and 2009. Id. Natural progression is one thing, but natural progression plus aggravation, acceleration, and/or hastening is another.

The focus should be on whether the occupational exposure played any role, whatsoever, in bringing about the aggravation, acceleration, and/or hastening of the condition or pre existing condition, even to include the occupational exposure and the pre existing condition working together to cause the aggravation, acceleration and/or hastening. *See* Dennis v. Dep't of Labor & Indus., 109 Wash.2d 467, 481, 745 P.2d 1295 (1987); *see* Harbor Plywood Corp. v. Dep't of Labor & Indus., 48 Wash.2d 553, 556, 295 P.2d 310 (1956); *see* Towne v. Dep't of Labor & Indus., 51 Wash.2d 644, 647, 320 P.2d 1094 (1958); *see* Guiles v. Dep't of Labor & Indus., 13 Wash.2d 605, 613, 126 P.2d 195 (1942); *see* Ruse v. Dep't of Labor & Indus., 138 Wash.2d 1, 6-7, 977 P.2d 570 (1999). There is no denying that Mr. Bell had a pre existing low back condition, but it should be noted that this didn't keep him from working as a drywaller between 2006 and 2009. It wasn't until after his latest stint as a drywaller between 2006 and 2009 that his treating/attending physician determined that he was not able to work. CP 240, 267. More so, Mr. Bell's treating/attending physician, along with his neurosurgeon, Dr. Wright, referenced objective findings to support their conclusion that Mr. Bell's low back condition

was aggravated, accelerated, and/or hastened due to his work as a drywaller between 2006 and 2009. *See generally* CP 209-309. Both Dr. Summe and Dr. Wright had the opportunity to compare MRIs from 2004 and 2009 which showed progressive narrowing of the L5-S1 intervertebral disc space and a recurrent disc herniation[5]. CP 228, 234, 284, 288. While both Dr. Summe and Dr. Wright acknowledged that Mr. Bell has a degenerative condition that can progress naturally, after being fully apprised of Mr. Bell's work requirements, they were both able to determine that the changes between the MRIs, along with other objective findings found on examination, were proximately caused, at least in part, by his occupation as a drywaller between 2006 and 2009. CP 228, 234, 265, 284, 288. According to Dr. Summe, Mr. Bell's treating/attending physician, but for his occupation as a drywaller between 2006 and 2009, Mr. Bell's low back condition would not have progressed to the degree that it did. CP 265, 267.

It should be quite apparent to a fair-minded, rational person that Mr. Bell's work as a drywaller between 2006 and 2009 was, at a minimum, a proximate cause of the aggravation, acceleration, and/or

[5] Dr. Stump also recognized that Mr. Bell had a recurrent disc herniation. CP 322.

hastening of his pre existing low back condition and his subsequent inability to work[6].

Further, due to their omission from any of the lower courts decisions, it is unknown whether the lower courts properly applied Title 51 principals and standards, such as the treating/attending physician principal, when reaching their decisions/opinions. Therefore, it is unknown whether the lower courts decisions would be the same had the proper standards and principals been correctly applied and acknowledged in their decisions/opinions. This is addressed further below.

B. The Lower Courts Created a Matter of Substantial Public Interest When they Decided Not to Follow this Court's Requirements as Set Forth In Groff v. Department of Labor & Industries.

In not following the Washington State Supreme Court case of Groff v. Department of Labor & Industries, the lower courts created a matter of substantial public interest that needs to be addressed by this Court and subsequently overturned and remanded. *See* Wash. R. App. P. 13.4. When a decision of the Board of Industrial Insurance Appeals is appealed to the superior court level, Title 51 requires that the superior

[6] In the lower courts emphasis has been put on the fact that Drs. Summe and Wright originally thought that Mr. Bell's low back condition was related to a prior claim that he had with the Department. Both doctors subsequently determined that Mr. Bell's low back condition should be considered an occupational disease, instead of being billed on a prior claim. The doctors' administrative decision should not hold any weight or have any bearing on whether Mr. Bell's low back condition should be considered an occupational disease per Title 51.

court hear the matter *de novo*. *See* Wash. Rev. Code Ann. § 51.52.115 (West 2013). This Court set further requirements in Groff v. Department of Labor & Industries of what is expected of a superior court in a Title 51 appeal. *See generally* Groff v. Dep't of Labor & Indus., 65 Wash.2d 35, 395 P.2d 633 (1964). This Court in Groff determined that

> [f]or an adequate appellate review in cases such as the one now before us, this court should have, from the trial court which has tried the case do [sic] novo, findings of fact (supplemented, if need be, by a memorandum decision or oral opinion) which show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts.

Id. at 40.

In the case at hand, all of the findings of fact and conclusions of law of the superior court are, for all intents and purposes, identical to those of the Board. CP 4-6, 66-67. The only difference in findings of fact between the superior court and the Board is one procedural finding that has absolutely no bearing on the merits of this case. Id. The only difference in conclusions of law between the superior court and the Board are procedural/jurisdictional changes. Id. There was absolutely no independent appraisal of the evidence by the superior court in this matter. In effect, the superior court "rubber stamped" the decision by the Board.

"Rubber stamping" by the superior court is unacceptable and runs contrary to the purpose and intent of a *de novo* review, and this should not be tolerated by this Court on a public interest basis, not to mention this Court's previous decision in Groff. Our State's injured workers deserve better, and superior courts must adhere to precedence set forth by this Court.

Even if the Court of Appeals is determined to be correct in stating that the superior court's identical findings and conclusions were acceptable because the superior court could review the Board's findings, which still negates an actual *de novo* review and still amounts to "rubber stamping", specific principals of Title 51 were not acknowledged and therefore it is unknown whether they were properly applied. *See* Court of Appeals Opinion at 8; *see* CP 4-6, 61-67. This Court determined that "special consideration should be given to the opinion of the plaintiff attending physician." Hamilton v. Dep't of Labor & Indus., 111 Wash.2d 569, 570, 761 P.2d 618 (1988). In Groff, this Court stated that the superior court "should, in its findings, indicate that it recognizes that we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician." Groff, 65 Wash.2d at 45 (*citing* Spalding v. Dep't of Labor & Indus., 29 Wash.2d 115, 186 P.2d 76 (1947); Seattle-Tacoma Shipbuilding Co. v. Dep't of

Labor & Indus., 26 Wash.2d 233, 173 P.2d 786 (1946); Peterson v. Dep't of Labor & Indus., 22 Wash.2d 647, 157 P.2d 298 (1945); Smith v. Dep't of Labor & Indus., 180 Wash. 84, 38 P.2d 1016 (1934)). Further, if the opinion of the IME doctor is preferable to that of the treating/attending physician than there should be some indication by the superior court why this is so. Id. at 45-47.

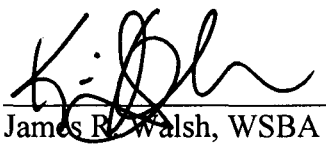
In the current matter, neither the superior court nor the Board gave an adequate reason for why the ultimate opinions of the treating/attending physician, Dr. Summe, as well as the opinions of Dr. Wright, were set aside in favor of the opinion of the IME doctor, Dr. Stump. CP 4-6, 61-67. More so, there is absolutely no indication by the superior court or the Board that they acknowledged or even applied the longstanding treating/attending physician principle of Title 51. Id. By not doing so, the superior court and the Board run contrary to the precedent and requirements established by this Court. In Groff, as in this matter, "[i]t is impossible to tell upon what underlying facts the [superior] court relied and whether the proper standards were applied." Groff, 65 Wash.2d at 40.

VI. CONCLUSION

Mr. Bell respectfully requests that the Supreme Court accept this matter for review, reverse the Court of Appeals and superior court, and

remand this matter to the Department of Labor & Industries with an order directing the Department to accept Mr. Bell's claim as an occupational disease. Alternatively, Mr. Bell would respectfully request that this Court remand this matter to the Snohomish County Superior Court for Findings of Fact and Conclusions of Law to be entered in compliance with Groff.

RESPECTFULLY SUBMITTED this 14th day of January, 2014.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AARON BELL, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	)	No. 69438-3-I DIVISION ONE UNPUBLISHED OPINION FILED: December 16, 2013

GROSSE, J. — When, as here, substantial evidence supports the Board of Industrial Insurance Appeals' conclusion that a worker failed to show that his employment aggravated a preexisting injury so as to result in a new disability, the trial court correctly affirmed the Department of Labor and Industries' rejection of the worker's claim for benefits. Accordingly, we affirm.

FACTS

Aaron Bell has worked as a drywaller for over 24 years and has a long history of back problems. He first sustained an industrial injury to his lower back on August 1, 1991, for which he filed a workers' compensation claim. The claim was allowed and was closed in 1993. He received a permanent partial disability award equal to Category 2 lumbar spine.[1]

In 1998, he injured his lower back again and filed another claim which was allowed. On October 25, 1999, he had surgery. On February 5, 2001, he had another surgery. In March 2001, an independent medical examiner rated Bell's impairment as

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

being equal to Category 3 lumbar spine. It is unclear when this claim was closed.

In November 2002, Bell sustained a third injury to his lower back. He again filed a claim which the Department of Labor and Industries' (Department) allowed. From November 2002 through September 2006, Bell did not perform drywalling work.

In August 2004, Dr. Jeff Summe began treating Bell. Bell consistently complained of back pain at visits to Dr. Summe between 2004 and 2006. In October 2004, Dr. Sanford Wright performed surgery on Bell's lumbar spine between the fifth lumbar vertebra (L5) and first sacral vertebra (S1) on the right side. This was covered by the 2002 claim, which remained open.

In 2005, a physical capabilities evaluation determined that Bell was incapable of returning to work as a drywall applicator. Bell was then retrained as a loan officer. In July 2006, Bell worked briefly as a loan officer but quit for financial reasons. In September 2006, he returned to drywall work because he needed to make more money.

On August 25, 2008, Bell saw Dr. James Lusk complaining of chronic lower back pain and increased lower back pain following being on a ride at a fair. Dr. Lusk believed he had a strain but did not feel he had a radiculopathy. On April 3, 2009, Bell saw Dr. Alan Li and reported increasing problems with back pain about a month before.

On May 20, 2009, Bell again visited Dr. Summe about his lower back pain. Dr. Summe believed that this lower back condition was related to the November 2002 work injury and treated him under that claim. Dr. Summe's examination revealed moderate muscle spasming through the lumbar region and positive straight leg raising on the right.

On May 29, 2009, Bell had an MRI (magnetic resonance imaging) scan. Dr.

Summe compared this MRI to one taken in August 2004. The latest MRI showed progressive narrowing of the L5-S2 intervertebral disc space with continued right foraminal disc protrusion. Dr. Summe referred Bell to Dr. Sanford Wright, the neurosurgeon who had performed surgery on Bell back in 2004.

In June 2009, Bell was laid off due to lack of available work. On August 3, 2009, Bell filed another claim based on his last visit to Dr. Summe. On August 5, 2009, at the request of the Department, Dr. William Stump, a neurologist, examined Bell and reviewed his medical records.

Dr. Stump believed that Bell had a recurrent disc herniation at L5-S1 on the right that was accounting for the findings he observed on examination. He thought there were multiple causes for this condition, including Bell's base-line genetics, prior industrial injuries that created change in his lumbar spine, and a new incident in 2002 that led to surgery followed by progressive symptoms in 2009, which led to the identification of disc abnormalities at L4-5 and L5-S1 that were greater than previously observed.

On August 25, 2009, the Department rejected Bell's claim for lack of proof of a specific injury at a definite time and place in the course of employment. Bell filed a protest of the order and on September 14, 2009, the Department issued an order affirming the August 25, 2009 rejection of his claim. Bell then appealed to the Board of Industrial Insurance Appeals (Board). On November 23, 2010, the industrial appeals judge issued a proposed decision and order (PD&O) affirming the Department's rejection order. Bell filed a petition for review of the PD&O, which was denied by the Board. Bell then appealed to the Snohomish County Superior Court. After a bench

trial, during which the superior court considered the testimony of Dr. Stump, Dr. Wright, and Dr. Summe, the court affirmed the Department's rejection order. Bell appeals from the superior court's order.

ANALYSIS

Bell contends that the superior court erred by affirming the Department's order because the preponderance of the evidence supports his claim that his return to drywall work proximately caused an aggravation of his back condition. We disagree.

The Board's decision is prima facie correct and a party attacking the decision must support its challenge by a preponderance of the evidence.[2] The superior court reviews the Board's decision de novo.[3] We review the Board's 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.'"[4] Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter."[5]

The Industrial Insurance Act, Title 51 RCW, should be construed liberally in favor of injured workers.[6] But the burden remains on the worker claiming entitlement to disability benefits for an occupational disease to prove that "the disabling condition arose naturally and proximately out of employment."[7] Such a worker is entitled to benefits when the employment either causes a disabling disease, or aggravates a

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[2] Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).
[3] RCW 51.52.115.
[4] Ruse, 138 Wn.2d at 5-6 (quoting Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).
[5] R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413, review denied, 152 Wn.2d 1034, 103 P.3d 201 (2004).
[6] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).
[7] Ruse, 138 Wn.2d at 6 (citing Dennis, 109 Wn.2d at 481).

preexisting disease so as to result in a new disability.[8] "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."[9] Thus, the disability is caused by the employment in an aggravation case.[10]

In a disability claim premised on aggravation of a preexisting disease, "[t]he worker must prove a condition of the job 'more probably than not' caused the disability, . . . and the disability 'came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment.'"[11] "The 'more probably than not' causation standard requires a showing that, but for the aggravating condition of the job, the claimed disability would not have arisen."[12]

Here, the Board concluded:

> In 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. The requirement in Ruse is logical since a person's work conditions would not cause a preexisting symptomatic disease; they could only aggravate it to a point where the worker is in some way disabled. This is not the fact pattern in this appeal. Mr. Bell had both the preexisting disease and disability and it probably would have naturally progressed even without his return to drywalling. This is the opinion of all the doctors and due to this fact the Department order should be affirmed.

The Board also found that the record did not support Bell's position that "but for his return to drywalling in 2006 and his continuing to work through June 2009 he would not have had the worsening of his preexisting low back condition for which he began to

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[8] Ruse, 138 Wn.2d at 7.
[9] Ruse, 138 Wn.2d at 7 (emphasis omitted).
[10] Ruse, 138 Wn.2d at 7.
[11] Ruse, 138 Wn.2d at 7 (quoting Dennis, 109 Wn.2d at 477).
[12] Ruse, 138 Wn.2d at 7 (emphasis omitted) (quoting Dennis, 109 Wn.2d at 477).

seek treatment in 2008 with Dr. Lusk." As the Board found:

> There is no dispute that Mr. Bell has had low back problems since at least August 1991. He has had four surgeries and was actually retrained by the Department to do lighter work but returned to drywalling. All the doctors agree that Mr. Bell's work as a drywaller contributed to the worsening of his condition but when he left drywalling in 2009 he was laid off and did not quit due to his physical condition though his symptoms did increase around the same time. He told Dr. Lusk that the increased problems were due to a ride at a fair rather than his work duties. As can be seen by the testimony of Drs. Summe and Wright, even though they knew Mr. Bell's work history and the type of work he did they related the need for treatment beginning in 2009 to the 2002 industrial injury.
>
> Mr. Bell testified that he always had some back pain. . . . He told Dr. Stump that he had continual low back symptoms to varying degrees since his first injury. Both Dr. Summe and Dr. Wright assumed the need for treatment in 2009 was due to the 2002 injury and Dr. Summe first provided treatment under that claim number until he helped Mr. Bell file his occupational disease claim. . . . Exhibit No. 8 which was signed by Mr. Bell on December 16, 2009, shows that he stated that the date his condition began was 2002. When asked about filing the occupational disease claim Dr. Summe stated that ". . . it was definitely an ongoing aggravation of his prior L&I claim."
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> Dr. Wright, who also began treating Bell in 2009 under the Y-claim [(2002 claim)], thought that Mr. Bell's condition was related to the 2002 injury. . . . He testified that based on Bell's history it was likely that the progressive worsening found on the 2004 and 2009 MRI's [sic] was a progression of the preexisting condition. . . . He also stated that Mr. Bell's condition was probably going to worsen over time regardless of his daily living or work activities when considering his prior injuries. . . . The discharge summary of the January 2010 surgery specifically indicated that Mr. Bell's condition was related to the 2002 industrial injury.

The superior court affirmed, finding that "[t]he distinctive conditions of Mr. Bell's work as a drywaller between 2006 and 2009 did not proximately cause an aggravation of his preexisting low back condition nor did they proximately cause any new low back condition." The court concluded that "Bell did not sustain an occupational disease within the meaning of RCW 51.08.140 that arose naturally and proximately from his employment as a drywaller between 2006 and 2009," and that "[t]he Board's January 18, 2011 order that adopted the November 23, 2010 [PD&O] is correct and is affirmed."

Bell argues that the superior court erred by affirming the Board because the preponderance of the evidence supports his claim, pointing to Dr. Summe's and Dr. Wright's testimony that his return to drywall work aggravated his low back condition. But as the Department correctly notes, we do not reweigh the evidence on review; rather, we determine only if substantial evidence supports the Board's findings. As the citations to the record demonstrate, these findings were supported by substantial evidence.

While Dr. Summe and Dr. Wright did ultimately opine that Bell's return to work aggravated his condition, their other testimony supports the Board's findings and conclusions as set forth above. And as the Department contends, none of their testimony identified any new disability that resulted from his return to work. Rather, Dr. Summe testified that the condition for which Bell was treated in May and June 2009 under the 2002 injury claim looked "[o]bjectively . . . the same" as the condition for which he filed the July 2009 claim, and that the objective findings present in his low back in September 2006, before his return to work, were "fairly close" to the objective findings present in May 2009. Dr. Wright also testified that it was his understanding that the condition for which he treated Bell in November 2009 was the low back condition covered by the 2002 injury claim.

Bell further contends that the Board failed to give special consideration to his attending physician, as is required in such cases.[13] But as the Department notes, giving special consideration does not necessarily mean giving greater weight or credibility.[14] Here, the Board did thoroughly consider the testimony of Dr. Summe and relied on it in

[13] See Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 570, 761 P.2d 618 (1988).
[14] See Hamilton, 111 Wn.2d at 572.

part to support its ruling.

Finally, Bell contends that the superior court's findings and conclusions are inadequate under the standards set forth in Groff v. Department of Labor and Industries.[15] In Groff, neither the Board nor the superior court made any written analysis of the evidence in a lengthy record of an appeal of a denial of benefits for a disabling pulmonary condition a worker claimed was caused by exposure to fumes at his workplace.[16] Rather, "[t]he Board contented itself with" a "brief five-line summary of the critical issue,"[17] and the superior court made a similar cursory finding that the Board correctly construed the law and found the facts and that the plaintiff failed to produce evidence sufficient to preponderate against the Board's findings.[18] As a result, there were no substantive findings and conclusions to review, thereby preventing effective appellate review of the factual issues.[19] Accordingly, the court remanded back to the superior court to enter sufficient findings that indicate the factual bases for the ultimate conclusion, including why it disbelieved testimony of the treating physician and what, if anything, was the more likely cause of the worker's condition.[20]

Here, the superior court's findings were admittedly limited and conclusory. But unlike in Groff, the Board here entered findings and conclusions along with a detailed analysis of its conclusion and the evidence in support of it. Thus, the superior court's conclusion that the Board's findings and conclusions were correct could be adequately reviewed by examining the Board's findings. As discussed above, these were

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[15] 65 Wn.2d 35, 395 P.2d 633 (1964).
[16] 65 Wn.2d at 36.
[17] Groff, 65 Wn.2d at 37.
[18] Groff, 65 Wn.2d at 38-39.
[19] Groff, 65 Wn.2d at 39.
[20] Groff, 65 Wn.2d at 40, 46.

supported by substantial evidence and supported the conclusion that Bell failed to show that his return to work proximately caused an aggravation of his preexisting injury so as to disable him.

We affirm.

WE CONCUR:

89799-9

COURT OF APPEALS DIVISION I, IN AND FOR THE STATE OF WASHINGTON

AARON BELL,
Plaintiff/Petitioner

vs.
DEPARTMENT OF LABOR & INDUSTRIES,
Defendant/Respondent

Cause #: 69438-3-I

Declaration of Service of:
PETITION FOR REVIEW

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of Jan 14 2014 3:45PM at the address of 800 5TH AVE #2000 SEATTLE, within the County of KING, State of WASHINGTON, the declarant duly served the above described documents upon ATTORNEY GENERAL as DESIGNEE for DEPARTMENT OF LABOR & INDUSTRIES by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with PAUL WEIDEMAN ASSISTANT ATTORNEY GENERAL, a white male, approx 40 years old, 5'11" tall, weighing 160 - 180 lbs, with brown hair and brown eyes.

No information was provided that indicates that the subjects served are members of the U.S. military.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: January 14, 2014 at Seattle, WA

by _____
R. MezaVelasco

Service Fee Total: $ 64.50

ABC Legal Services, Inc.
206 521-9000
Tracking #: 7860519

ORIGINAL
PROOF OF SERVICE

BELL
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