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No. 936161

SUPREME COURT OF THE STATE OF WASHINGTON

NEIL HORNSBY,

Petitioner,

v.

ALCOA INC.,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW (SIC)

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CAPENER & BISHOP, P.C.
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	2
III.	COUNTERSTATEMENT OF THE CASE.....	3
IV.	REASONS WHY REVIEW SHOULD BE DENIED	3
	A. Criteria for Acceptance of Discretionary Review.....	3
	B. This Case Does Not Involve an Issue of Substantial Public Interest Because the Court of Appeals Correctly Applied to the Substantial Evidence Standard of Review to Conclude that Mr. Hornsby Does Not Have an Occupational Disease.....	4
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Bering v. Share</i> , 106 Wn. 2d 212, 220, 721 P.2d 918 (1986).....	5
<i>Cyr v. Dep't of Labor & Indus.</i> , 47 Wn. 2d 92 (1955)	5
<i>Dennis v. Dept of Labor & Indus.</i> , 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)	3
<i>Ehman v. Dep't of Labor & Indus.</i> , 33 Wn. 2d 584 (1949)	6
<i>Garrett Freightliners, Inc. v. Dep't of Labor & Indus.</i> , 45 Wn. App. 335, 339, 725 P.2d 463 (1986)	5
<i>Grimes v. Lakeside Indus.</i> , 78 Wn. App. 554, 560-61, 897 P. 2d 431 (1995).....	5
<i>Hamilton v. Dept of Labor & Indus.</i> , 111 Wn.2d 569, 571, 761 P.2d 618 (1988)	11
<i>In re Beverly Donahue</i> , Dckt. No. 96 3839 (1998).....	7
<i>In re: Neil Hornsby</i> , No. 33122-9-III, slip op. at 9 (Court of Appeals, Division III, June 21, 2016)	2, 3, 10, 11, 13
<i>Jenkins v. Dep't of Labor & Indus.</i> , 85 Wn. App. 7 (1998)	5
<i>Jepson v Dep't of Labor & Indus.</i> , 89 Wn.2d 394, 401, 573 P.2d 10 (1977)	5
<i>Kilpatrick v. Dep't of Labor & Indus.</i> , 125 Wash. 2d 222, 883 P.2d 1370 (1994)	6
<i>McClelland v. ITT Rayonier</i> , 65 Wn. App. 386 (1992)	7
<i>Olympia Brewing Co. v. Dep't of Labor & Indus.</i> , 34 Wn.2d 498, 504, 208 P.2d 1181 (1949)	4, 5

<i>Ruse v. Dept of Labor & Indus.</i> , 138 Wn. 2d 1, 5-6, 977 P.2d 570 (1999)	5, 6
<i>Watson v. Dept of Labor & Indus.</i> , 133 Wn. App. 903, 909, 138. P.3d 177 (2006)	5
<i>Windust v. Dep't of Labor & Indus.</i> , 52 Wn.2d 33, 323 P.2d 241 (1958)	4
<i>Young v. Dept of Labor & Indus.</i> , 81 Wn. App. 123, 128, 913 P.2d 402 (1996)	5

Statutes

RCW 51.08.140	3, 7
RCW 51.52.115	4

Rules

RAP 13.3(b)	1
RAP 13.3(d)	1
RAP 13.4(b)	2, 3, 4

I. INTRODUCTION

This dispute arises from an industrial insurance claim. Petitioner, Neil Hornsby, claims that he sustained damage to his lungs in the course of his employment with Respondent, Alcoa Inc. Mr. Hornsby's occupational disease claim was denied by the Department of Labor & Industries because there was no evidence that Mr. Hornsby's medical condition was due to injurious exposure in the course of his employment.

After the Department denied his claim, Mr. Hornsby filed an appeal with the Board of Industrial Insurance Appeals (Board). The Board upheld the Department order that denied his occupational disease claim. The Board record was reviewed and considered in superior court and the superior court affirmed the Board's decision. Mr. Hornsby then sought review of the superior court decision by the Court of Appeals. On June 21, 2016, the Court of Appeals, Division III, issued an unpublished opinion affirming the superior court.

Mr. Hornsby now seeks discretionary review in this Court. Alcoa notes that pursuant to RAP 13.3(b), it appears that Mr. Hornsby's Motion should in fact be designated as a Petition for Review and not a Motion for Discretionary Review, as Mr. Hornsby seeks review of a decision by the Court of Appeals terminating review. Pursuant to RAP 13.3(d), a Motion

for Discretionary Review of a decision terminating review will be given the same effect as a Petition for Review.

This Court should deny discretionary review as being unwarranted under RAP 13.4(b). The unpublished decision by the Court of Appeals is fact-specific and consistent with Washington law. Mr. Hornsby presents no reasonable argument to support his contention that the Court of Appeals' decision affected a substantial public interest to warrant review by this Court.

II. COUNTERSTATEMENT OF THE ISSUES

Alcoa contends that the issues raised by Mr. Hornsby are inappropriate for review under RAP 13.4(b). Without waiving this objection, Alcoa notes that the issue before the Court of Appeals is correctly stated on Page 9 of its decision: "The issue is whether substantial evidence supports the trial court's findings and whether the findings support the trial court's conclusions of law and decision." *In re: Neil Hornsby*, No. 33122-9-III, slip op. at 9 (Court of Appeals, Division III, June 21, 2016.) Before the Court of Appeals, Mr. Hornsby contended that the trial court erred in determining that his lung diseases were not occupational diseases. Mr. Hornsby had the burden of proving by a preponderance of evidence that his pulmonary condition was an occupational disease, defined as "such disease or infection arising

naturally and proximately out of employment.” RCW 51.08.140; *Dennis v. Dept of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

If this Court were to grant review, the issue before the Court would be: Did the Court of Appeals properly find substantial evidence supporting the trial court’s finding that Mr. Hornsby failed to prove his pulmonary condition is an occupational disease?

III. COUNTERSTATEMENT OF THE CASE

Alcoa accepts as its Statement of the Case the statements of Facts and Procedures provided in the Court of Appeals opinion. *In re: Neil Hornsby*, slip op. at 1-9.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny discretionary review because Mr. Hornsby has not presented any reasonable argument for why review should be accepted under the criteria for review established by RAP 13.4(b).

A. Criteria for Acceptance of Discretionary Review.

Pursuant to RAP 13.4(b), the Supreme Court will accept a petition for review only in the following circumstances:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Hornsby argues that discretionary review should be granted under RAP 13.4(b)(4). Claimant contends the Court of Appeals erred by failing to properly review the Board transcript, and that this decision “jeopardizes other Labor and Industries claimant by denying a valid claim for an industrial disease.” Mr. Hornsby contends that the Court of Appeals did not give proper weight to resolve doubts in favor of the injured worker.

B. This Case Does Not Involve An Issue of Substantial Public Interest Because the Court of Appeals Correctly Applied the Substantial Evidence Standard of Review to Conclude that Mr. Hornsby Did Not Have an Occupational Disease.

Mr. Hornsby failed to present sufficient evidence before the Court of Appeals to warrant reversal of the superior court decision, which properly affirmed the findings and decision of the Board denying Mr. Hornsby's occupational disease claim.

On appellate review, the findings and decision of the Board shall be *prima facie* correct. RCW 51.52.115; *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 504, 208 P.2d 1181 (1949), *overruled on other grounds*; *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323

P.2d 241 (1958); *Jepson v Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). On appellate review, if the evidence is equally balanced then the findings of the Board must stand. *Garrett Freightliners, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 339, 725 P.2d 463 (1986).

Appellate review of a superior court decision is limited to whether substantial evidence supports the superior court's factual findings, and whether the superior court's conclusions of law properly flow from those findings. *Ruse v. Dept of Labor & Indus.*, 138 Wn. 2d 1, 5-6, 977 P.2d 570 (1999); *Young v. Dept of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Watson v. Dept of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). Substantial evidence is evidence of sufficient quantity to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn. 2d 212, 220, 721 P.2d 918 (1986); *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P. 2d 431 (1995).

Claimants are held to a strict standard of review for the right to receive benefits under the Industrial Insurance Act. *Olympia Brewing Co.*, 34 Wn. 2d 498; *Cyr v. Dep't of Labor & Indus.*, 47 Wn. 2d 92 (1955). This strict standard is not modified or eliminated by the liberal construction of the Act. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7

(1998). Thus, “persons entitled to the benefits of the Act should be favored by a liberal interpretation of its provision, but for this reason, it should be held to strict proof of their titles as beneficiaries.” *Ruse v. Dep’t of Labor & Indus.*, 90 Wn. App. 448 (1998).

The liberal construction rule does not apply to questions of fact, but to matters concerning the construction of the statute, and that principle does not suspend the requirement that those who claim benefits under the Act must, by competent evidence, prove the fact upon which they rely. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn. 2d 584 (1949).

Mr. Hornsby has cited the case of *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wash. 2d 222, 883 P.2d 1370 (1994), as supporting his argument that the Court of Appeals erred in upholding the trial court decision. However, *Kilpatrick* held only that doubts as to statutory construction should be resolved in favor of the worker. *Kilpatrick* does not expand the liberal construction rule to apply to questions of fact. Pursuant to the holding of *Olympia Brewing* and subsequent case law, Mr. Hornsby continues to be held to a strict standard of review for his right to receive benefits under the Industrial Insurance Act.

To meet this strict burden of proof, Mr. Hornsby has the burden of proving by a preponderance of evidence his pulmonary condition is an

occupational disease, defined as “such disease or infection arising naturally and proximately out of employment.” RCW 51.08.140.

To arise naturally means the disease occurs naturally out of the distinct conditions of a claimant’s employment. To show a distinct condition, the claimant must prove the disease was caused by conditions of his or her particular occupation, as opposed to conditions coincidentally occurring in the work place. The claimant must also prove the particular work conditions of his employment more probably caused the disease than conditions of everyday life or all employment in general.

If Mr. Hornsby were to establish distinctive conditions of his employment, he would then need to prove those distinctive conditions proximately caused his pulmonary condition, diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis and interstitial fibrosis. The proximately element requires the disease to be “probably” as opposed to “possibly” caused by the employment. Causation must be established by competent medical evidence. *McClelland v. ITT Rayonier*, 65 Wn. App. 386 (1992). This requires medical testimony specifically linking the distinct employment conditions to the end result. *In re Beverly Donahue*, Dckt. No. 96 3839 (1998).

The Court of Appeals determined that the superior court decision was supported by substantial evidence, and therefore properly affirmed

the findings and decision of the Board denying Mr. Hornsby's occupational disease claim. The Court of Appeals correctly determined that the trial court did not err in determining that Mr. Hornsby failed to prove through medical testimony that his lung conditions were more probably than not the result of his work activities for Alcoa.

Mr. Hornsby's primary argument is that the Court of Appeals erred in its consideration of the testimony of Dr. Abraham, one of four medical experts to testify on Mr. Hornsby's behalf before the Board. Dr. Abraham is an anatomic pathologist who specializes in research, teaching, and diagnosis of occupational lung disease. Dr. Abraham does not treat patients. CP –Abraham at 42.

On October 17, 2012, Dr. Abraham performed an analysis of Mr. Hornsby's lung tissue biopsy. CP –Abraham at 8. Dr. Abraham testified Mr. Hornsby's initial biopsy test results were abnormal. Dr. Abraham noted evidence of respiratory bronchiolitis that he related to smoking. He observed filling of air spaces with macrophages led him to affirm the diagnosis of desquamative interstitial pneumonitis CP –Abraham at 12. There was also interstitial fibrosis and scarring in the supporting structure of the lung. Dr. Abraham documented most of the macrophages he observed contained dust particles of the type typically seen with smoking.

CP –Abraham at 13. He concluded some of the findings were consistent with smoking and some were consistent with other exposures he opined did not come from smoking. CP–Abraham at 8-9.

Dr. Abraham completed a supplemental pathology report on November 12, 2012, following analysis of Mr. Hornsby's lung tissue with a scanning electron microscope. Dr. Abraham stated he saw aluminum metal particles and aluminum silicate particles in Mr. Hornsby's lung tissue. CP–Abraham at 18. Dr. Abraham ultimately concluded the aluminum particles seen in Mr. Hornsby's biopsy had to have come from some environment where there was a source of aluminum fumes CP–Abraham at 41-42. Dr. Abraham attributed the aluminum particles in Mr. Hornsby's lungs to his work at Alcoa Inc., based solely on his understanding of Mr. Hornsby's work history. Dr. Abraham testified he relied on the exposure history Mr. Hornsby provided to Dr. Raghu. CP–Abraham at 42. He confirmed he never spoke directly with Mr. Hornsby and he did not obtain any first-hand information regarding Mr. Hornsby's work or social history. Dr. Abraham testified he was unsure of the extent and duration of Mr. Hornsby's smoking habit. CP–Abraham at 53.

Dr. Abraham testified he had no knowledge regarding Mr. Hornsby's use of personal protective equipment over the course of his employment at Alcoa Inc., and he did not have any information regarding

the extent of Mr. Hornsby's job duties at Alcoa Inc., apart from the information provided to him in Dr. Raghu's September 22, 2012 report. CP–Abraham at 56-57. Dr. Abraham confirmed his testing of Mr. Hornsby's lung biopsy tissue could not indicate when Mr. Hornsby's exposure to aluminum occurred. CP–Abraham at 51. Dr. Abraham could only state Mr. Hornsby's exposure occurred prior to the date the biopsy was obtained in June 2011, which was four years after his employment at Alcoa Inc. ended. In order to confirm causation, Dr. Abraham stated the exposure date would have to be correlated with the personal history provided by Mr. Hornsby. CP–Abraham at 41.

When directly asked by Mr. Hornsby whether he had an opinion, on a more probable than not basis, to a reasonable degree of medical certainty whether the aluminum found in the biopsies caused Mr. Hornsby's lung conditions, Dr. Abraham failed to provide a definitive answer. CP–Abraham at 32-33.

Thus, the Court of Appeals correctly concluded that "... Abraham did not specifically state whether aluminum dust caused a disease, but rather testified that exposure to the dust is associated with one of Hornsby's type of diseases. Abraham provided no conclusive response required to establish causation." *In re: Neil Hornsby*, slip op. at 11-12.

The Court of Appeals rejected Mr. Hornsby's assertion that Dr. Abraham's testimony should be given any "special consideration" as an attending physician under *Hamilton v. Dept of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). The Court of Appeals determined that Dr. Abraham was not Mr. Hornsby's attending physician, as he never personally met with Mr. Hornsby. *In re: Neil Hornsby*, slip op. at 12. Regardless, the Court of Appeals noted that even if Dr. Abraham had been Mr. Hornsby's attending physician, "he uttered no opinion that Hornsby's lung disease was probably caused by work exposures." *In re: Neil Hornsby, Id.*

Also of significance, none of Mr. Hornsby's other medical experts endorsed Dr. Abraham's opinion regarding the cause of Mr. Hornsby's respiratory condition. Mr. Hornsby's own treating physicians, who actually spoke with and examined him, did not support his assertion that his pulmonary condition was caused by occupational exposure.

Alcoa's medical experts, Drs. Simons and Cox, confirmed that the presence of aluminum particles in a patient's lungs does not necessarily result in the development of interstitial lung disease or pulmonary fibrosis.

Dr. Simons is a prominent and widely respected practicing pulmonologist with more than 25 years of experience in evaluating and treating complex lung diseases. CP-Simons at 6-8. Prior to testifying, Dr.

Simons reviewed more than 300 pages of medical records in this case, as well as the records and opinions of Dr. Abraham. CP-Simons at 12-13. Dr. Simons addressed Dr. Abraham's observation of the presence of aluminum metals in Mr. Hornsby's lung biopsy, and testified the mere presence of aluminum particles in the lung tissue does not amount to credible medical evidence that the particles proximately caused any pathological disease. CP-Simons at 24. Dr. Simons opined Mr. Hornsby's condition presented as a typical case of a smoker who developed desquamative interstitial pneumonia. CP-Simons at 25. Dr. Simons testified there was no evidence to support a theory that aluminum is causing any physical condition or reaction. CP-Simons at 25.

Dr. Cox is a Board certified physician fellowship trained in pulmonary disease. He is in full-time active practice in pulmonary critical care. Dr. Cox performed a pulmonary evaluation of Mr. Hornsby in October 2011. Dr. Cox reviewed numerous medical records related to Mr. Hornsby's pulmonary conditions at the time of his evaluation and subsequent to that exam. CP-Cox at 33-34. Based on his evaluation of claimant and review of the medical records, Dr. Cox testified that Mr. Hornsby's lung conditions were not related to any exposure in the course of his employment with Alcoa Inc. on a more probable than not basis. CP-Cox at 47-49.

Mr. Hornsby asserts that the Court of Appeals erred in not discrediting the testimony of Drs. Simon and Cox. However, under the substantial evidence standard of review, the Court of Appeals was required to accept the fact finder's view on credibility of the witnesses. The appellate court will not substitute its judgment for the trial court when reviewing findings of fact, because the trial court is in a better position to evaluate the credibility of witnesses. *Noble v. A&R Envtl. Servs., LLC*, 140 Wash. App. 29, 34, 164 P.3d 519, 521 (2007); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990); *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993).

Applying the correct standard of review, the Court of Appeals noted that the trial court considered Dr. Simons' testimony convincing and the testimony of Dr. Cox less persuasive. *In re: Neil Hornsby*, slip op. at 9. The Court of Appeals further noted that the trial court found Dr. Abraham's passive response to specific questions and lack of peer-reviewed work on DIP troubling, and also cited the lack of testimonial support from claimant's treating pulmonologist, Dr. Raghu. *In re: Neil Hornsby, Id.*

The Court of Appeals therefore did not err in its weighing of the medical testimony in this case. After a careful and thorough consideration


of the Board transcript, and using the appropriate substantial evidence standard of review, the Court of Appeals correctly affirmed the superior court's finding that Mr. Hornsby failed to meet his burden to prove an occupational disease by a preponderance of medical evidence. The Court of Appeals' decision was correct and consistent with the industrial insurance act and prior published decisions of this Court and the Court of Appeals. Mr. Hornsby's Motion for Discretionary Review therefore involves no issue of substantial public interest that should be determined by the Supreme Court, and should be denied.

V. CONCLUSION

For the preceding reasons, this Court should deny the Petition for Review.

Respectfully submitted this 6th day of October 2016.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of October, 2016, I caused a true and correct copy of this ANSWER TO MOTION FOR DISCRETIONARY REVIEW (SIC) to be served on the following in the manner indicated below:

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October 6, 2016

VIA EMAIL

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RE: Neil Hornsby, *Petitioner*, v. Alcoa Inc., *Respondent*
Case No. 936161

Dear Ms. Carlson:

Enclosed for filing with the Washington State Supreme Court is the Respondent's
Answer to Motion for Discretionary Review (SIC) in the above-referenced case.

Thank you for your assistance in this matter.

Cordially yours,

WALLACE · KLOR · MANN
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Lawrence E. Mann

LEM/kms
Enclosure

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Dear Clerk,

Attached for filing is a cover letter and Respondent Alcoa Inc.'s *Answer to Motion for Discretionary Review (SIC)* in the above-referenced case. The details for this case are as follows:

Case Name: Neil Hornsby, Petitioner, v. Alcoa Inc., Respondent
Case No. 936161

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If you have any further questions, please feel free to contact me.

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