No. 331229

WASHINGTON STATE COURT OF APPEALS

DIVISION III

NEIL HORNSBY, Petitioner

v.

ALCOA Inc., Respondent

MOTION FOR DISCRETIONARY REVIEW

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STATUTES

COURT RULES

A. IDENTITY OF PETITIONER: The Appellant, Neil Hornsby, is filing this Motion For Discretionary Review;

B. CITATION TO COURT OF APPEALS DECISION: The Court of Appeals, Division III decision affirming the trial court was filed on June 21, 2016. The Order Denying the Appellant's Motion for Reconsideration was filed on July 11, 2016.

C. ISSUES FOR REVIEW: The issues for review are as follows:

1. Whether The Court of Appeals, Div. III erred in finding that Dr. Jerrold Abraham did not give a specific and detailed opinion about the causal relationship between the exposures to aluminum at the Alcoa plant and Neil Hornsby's lung diseases;

2. Whether the Court of Appeals, Div. III erred in not discrediting Dr. Simons' Testimony;

3. Whether the Court of Appeals, Div. III erred in not discrediting Dr. Cox's testimony .

D. STATEMENT OF THE CASE:

Dr. Abraham's Testimony

Dr. Jerrold L. Abraham M.D. is an anatomic pathologist , who deals with the analysis and diagnosis based on cells and tissues Page 4, lines 8-10. His area of main interest in research and teaching has been the area of occupational disease, especially lung diseases and of the methods to analyze and characterize dust and other particles retained in peoples lungs. Page 5 lines 19-21. He used a method called SEM/EDS, which combines a scanning electronic microscope with the energy dispersive X-ray spectrograph. Perpetuation Deposition of Jerrold Abraham, M. D. , Page 6, lines 8 – 24 (hereinafter referred to by pages and lines.)

Dr. Abraham didn't invent the instrumentation, but he had been involved in finding better ways to utilize that kind of analytical technique to help others characterize tissues and what's in tissues such as dust particles. Page 6, lines 25; page 7 lines 1 – 3. The technology has been applied to many other exposures, including silica, aluminum silicates, and various metals including iron, aluminum, or titanium, all kinds of steel or tungsten carbide, and so forth. Page 7, lines 11-14. SEM/EDS technology came into use in medicine in the late 1960s and early 1970s. Page 7, lines 15-22.

Dr. Abraham has testified about this technology for many years. Page 7, lines 22-25. Dr. Raghu referred Neil Hornsby's case to Dr. Abraham. Dr. Abraham agreed to analyze Neil Hornsby's lung biopsies. Page 10, lines 1-10; Page 11, lines 1-6. Neil Hornsby's biopsies were taken from the right middle lobe and right lower lobe, superior segment. Page 12, lines 5-7.

Dr. Abrahams's initial report was based just on glass microscope slides he initially

received. Page 8, lines 16-20. Based on his review under the glass microscope, Dr. Abraham found that Neil Hornsby's biopsies were abnormal, Page 8, lines 19-25. Dr. Abraham saw the filling of air spaces with macrophage cells. And he saw some inflammatory white blood cells that are called leukocytes and plasma cells Page 8, lines 21-25. There was dust visible, much more than would be expected from the general background population. Page 9, lines 1-3. "Some of it was consistent with smoking and some consistent with other exposures that did not come from smoking." Page 9, lines 3-5.

Dr. Abraham concluded in his preliminary report that the lung was abnormal, and there were several things abnormal about it which he described in his report, "indicating evidence of respiratory bronchiolitis, related to smoking possibly to some degree. There were also the filling of air spaces with macrophages that led it to the diagnosis of desquamative interstitial pneumonia ... abbreviated DIP." Page 12, lines 6-22.

Most of the macrophages contained dust particles of the type seen with smoking, and also some were opaque, that looked different, dark particles, and some were birefringent or crystalline particles that show up as bright when one uses polarized light. Page 13, lines 1-5.

Dr. Abraham testified that the opaque and birefringent particles are" indicative of exposures to something more than just smoking." Page 13, lines-10. (Emphasis added.) Dr.

Abraham testified that through years of experience, he knows what dusts from smoking look like and what dusts from things other than smoking look like. Page 13, lines 11-14.

Dr. Abraham requested that he be said Mr. Hornsby's paraffin blocks from his biopsies so that he could do further studies. Page 17, lines -9. The SEM/EDS analysis revealed that there were 90% approximately very fine aluminum metal type of particles in block A1. Page 18, lines 16-25. And in block B1, in addition to aluminum, there were a large number of aluminum silicate particles. Page 18, lines 24-25; page 19 lines 1-2.

The most unusual finding was the presence of aluminum tiny particles that are not something found in the general population. Page 19, lines 5-7. Dr. Abraham was asked, quote "Would a smoker who had not been exposed to aluminum show markedly abnormal lung burden of particles containing aluminum metal or aluminum oxides?" Dr. Abraham replied, "No." Page 19, lines 10-13.

After reviewing the paraffin blocks, Dr. Abrahams's conclusion was "that his lung definitely showed evidence of exposures to aluminum, very fine aluminum particles. And they are present where they wouldn't be expected to be detected with this method in the general population unless someone who has had unusual exposure to aluminum or aluminum oxide particles. There are -- – many of them are very small, the type seen with welding or similar heated materials, fume generation." Page 31, lines 19-25; Page 32, lines 1-3.

After Dr. Abraham explained this background, the following testimony was taken:

A: And in addition to the aluminum, there was other particles including aluminum silicate and silica that can't even-- aluminum silicates were present, not evenly distributed in the lungs but more so in Part B than Part A.

And the particles were seen in the area of the lung in macrophages where there was fibrosis in the lungs and the interstitium. So basically the lung acts as an indicator that someone has had exposure like a filter doesn't make up anything, it just reflects what's inhaled by the person and retained in their lungs.

Q: Do you have an opinion on a more probable than not basis to a reasonable degree of medical certainty whether the aluminum found in Mr. Hornsby's biopsies caused him to have lung diseases, DIP, pulmonary fibrosis, interstitial fibrosis, and respiratory bronchiolitis?

A: Well, I have to take those different descriptions one at a time. Certainly the aluminum exposure that is reflected in his biopsy is of the type that has been previously seen to cause DIP, and to be associated with interstitial fibrosis. The respiratory bronchiolitis, part of it is more likely related to smoking but could also be contributed to by the aluminum. But smoking is a major cause for the respiratory bronchiolitis which is different from the fibrosis or the DIP pattern itself.

Q: If Mr. Hornsby had not been exposed to aluminum, with smoking cigarettes alone have caused the abnormal findings you discussed?

A: it wouldn't it have caused all of them, but it would have probably caused the respiratory bronchiolitis. But it wouldn't have caused interstitial fibrosis as far as I am aware.

Q: With respect to other particles found in the lungs, do you think that they were a contributory factor to his lung disease or were there are not enough particles to make that conclusion?

A: Well, I think they reflected the fact that Mr. Hornsby has had exposure to a large number of different kinds of particles, with aluminum being the predominant one--hold on one second....

THE WITNESS: Excuse me. I don't know if I finished answering your question. I'm sorry, I had an interrupting phone call.

MS. ANDERSON: Okay...

THE WITNESS: Did I finish answering that?

MS. ANDERSON: Can we read that back?

(Testimony requested read.)

A: Sounds like – why don't you repeat the question and I'll try to give you a fuller answer.

Q: (By Ms. Anderson) You indicated there were some other particles other than aluminum found in Mr. Hornsby's lungs. Do you believe that those other particles contributed to his lung disease or whether or not there were enough of those particles to make that conclusion?

A: Well, the other particles besides the aluminum are indicative of exposure to both background and as such they contribute to the lung injury. I can't say to what degree, but that they were possible for the fibrosis. But certainly aluminum silicates have been associated with some degree of fibrosis, not as much as silica. That is the major finding related to the fibrosis would be the aluminum from what I have seen so far in his lungs.

Q: Earlier you talked about a symposium that you did with Dr. Raghu related to cases like Mr. Hornsby. Do you recall any conclusions with respect to that symposium?

A: Well, yes, that was the symposium that I said Dr. Raghu and I organized for the American Thoracic Society that was held in San Francisco last May, May of 2012. And that symposium was a half day which has a theme that many or some unknown fraction or proportion of patients diagnosed as having lung disease is idiopathic, meaning there's no known cause. In fact, have histories and evidence to exposures to one kind of dust or another.

If their tissues are analyzed in this manner that's done, like I have done in Mr. Hornsby's case in which other labs around the world have done in other cases, so that the symposium consisted of presentations by Dr. Raghu and by myself, and by I think for other speakers from

around the world that have been interested in this question of looking for evidence of exposures to environmental factors. And the conclusion is that there is good epidemiological evidence the people that have been diagnosed with what's called idiopathic pulmonary fibrosis have greater risk if they have had exposure to various metals, for example.

And there's pathologic evidence both from my lab and there were also studies reported from the lab in Belgium that had found evidence of exposures to various dusts such as metals or asbestos or silica in cases where it wasn't evident to the pathologist initially. But when they did further studies such as the electron microscope studies, those exposures became evident.

And most importantly there's an international report or consensus statement by the American Thoracic Society along with the European Respiratory Society that was updated last year, I think, that strongly advises physicians making diagnosis of people with interstitial lung disease not to call the disease "idiopathic" when somebody has had a history of exposure to materials known to be capable of causing pulmonary injury and fibrosis. That diagnosis of "idiopathic" is only supposed to be made after excluding such exposures.

Q: When you see fibrosis in smokers, what is it usually related to?

A: Well, usually if there's fibrosis in smokers, it hasn't been very well studied. There is a study we did a few years ago in my lab that looked at that question, looking at our prospective, meaning designing the study before the patients were examined instead of after the fact, which makes it more powerful scientifically.

And we looked at a number of patients, approximately 30- some- odd patients, and whose biopsies were done and whom we had a smoking history. And we had some occupational history, and we also were able to analyze the lung biopsy tissue in about 16 or 18 of them.

And what we found was that the amount of fibrosis was related to the amount of dust we could detect both by light microscopy and also using this SEM/EDS. And the amount of fibrosis was not related to the smoking history, the duration of smoking or intensity of smoking.

But that in addition to the fibrosis, there was another thing we looked at which was the amount of respiratory bronchiolitis and that was related to the amount of smoking and less so to

the amount of dust that we could demonstrate by light microscopy or by scanning electron microscopy.

So there was the attempt to separate out the respiratory bronchiolitis part from the fibrosis. And the indication from that paper is that while smoking causes that inflammation, the respiratory bronchiolitis, if there was fibrosis there, it may very well be related to additional exposures to dust like silica, aluminum silicates, or metals.

Q: And was that study the subject of a published article?

A: Yes, it was. I think it's one I sent you.

Q: Was that " Pulmonary Fibrosis and Aluminum Oxide Workers"?

A: No, that was the one about smoking by --

Q: "Inorganic Dust Exposure Causes Pulmonary Fibrosis in Smokers"?

A: Right, by Dr. Nasr, ... spelled N-A-S-R, the first author. That was published in 2006.

Q: Okay.

A: That's the study I just described.

Q: And did you also participate in writing an article called "Pulmonary Fibrosis in Aluminum Oxide Workers"?

A: Yes.

Q: And what was the nature of that study?

A: That was a study published in, oh, 1990, a long time ago, of workers who had worked at a plant where they made aluminum oxide abrasives, like for sandpaper and sanding wheels and stuff like that.

And what was found in those was that there was interstitial fibrosis that was associated with those exposures and no other exposures were demonstrated that explained the fibrosis.

There wasn't evidence of asbestos exposure in any significant amount and there wasn't any evidence of silicosis from the crystalline silica dust exposure.

The main thing that was measured was metals. And a majority of the metals found were aluminum oxide.

Q: Did you also participate in a study called "Desquamative Interstitial Pneumonia in an Aluminum Welder"?

A: YES, and that goes back yet further. That goes back to 1982. That's a while ago. That was a report of a case from England actually where that was sent to me for this kind of analysis back then, by the pathologist in England. And the person had been a welder with aluminum that developed what turned out to be desquamative interstitial pneumonia. Interestingly, he was a non-smoker for 20 years prior to that biopsy.

Q: And with respect to that article, was there any indication that there had been previous studies about a link between aluminum and interstitial fibrosis of the upper lobes related to bauxite smelting?

A: Yes, I mean there's literature going back to the '30s or '40s some of which is cited. And that article, I think it goes back to 1930's and 40's.

...

Q: (by Ms. Anderson) And you indicated in that article that the person was a non-smoker?

A: Well, he was an ex-smoker, but the history available is that he had quit 20 years earlier. He had been welding for 16 years, reportedly quit smoking years earlier. Page 32, line 4 to page 37, lines 9.

Neil Hornsby's counsel asked Dr. Abraham the following question: Do you have an opinion on a more probable than not basis to a reasonable degree of medical certainty whether the aluminum found in Mr. Hornsby's biopsies caused him to have lung diseases DIP, pulmonary fibrosis, interstitial fibrosis, and respiratory bronchiolitis?"

Dr. Abraham replied:

A.: Will have to take those different descriptions one at a time. Certainly the aluminum exposure that is reflected in his biopsies of the type that has been previously seen because the DIP. And it to be associated with interstitial fibrosis. The respiratory bronchiolitis, part of it is more likely related to smoking but it could also be contributed to by the aluminum. Smoking is a major cause for the respiratory bronchiolitis which is different from the fibrosis or the DIP pattern itself.

Court of Appeals, Div. III in this case gave the opinion as follows:

> Hornsby's experts provided no verification that his lung diseases were probably caused by his employment and not exposures in everyday life. Raghu provided no testimony as to the causation of Hornsby's ailments.

Dr. Cox's Testimony

Dr. Cox got paid to do the IME from company who sets up the examination in this case from Inland Medical. In this case, Dr. Cox testified that Alcoa requested that he do additional work. He billed Employer's counsel Mr. Mann's office directly for reviewing Raghu and Abraham records. Dr. Cox's rate was $400 per hour for record review and for deposition per L&I. RP 53. Dr. Cox spent 5 – 6 hours from 7-14-13 to date of deposition July 23, 2013 preparing for the deposition. Dr. Cox admitted he had only "glanced" through Neil Hornsby's lay testimony in front of the judge. RP 54. Dr. Cox didn't recall that in many of Alcoa's yearly questionnaires Hornsby said he smoked half a pack a day. RP 55. Dr. Cox didn't remember that Neil Hornsby testified that there were periods of time he didn't smoke at all. Dr. Cox didn't recall Neil Hornsby's

testimony about the 3 year period he quit completely. RP 56. Dr. Cox didn't recall that Neil testified that Alcoa employees were not allowed to smoke on the Alcoa site. RP 56-57.

Dr. Cox also admitted that he didn't recall Neil Hornsby's testimony that he was constantly exposed to massive quantities of aluminum and aluminum oxide, etc. at Alcoa. RP 58. In fact when Dr. Cox did his IME report he indicated that he had not been provided an "Occupational Work Disease History" so he could not answer the question, "Have you discussed with the Claimant the work activities of all jobs listed in the work history (including the discussion of protective equipment and engineering controls?" RP 60. Dr. Cox had previously testified in the deposition that if he needs more information he asks for it before he writes his report. RP 63.

Dr. Cox also admitted that he didn't recall Neil Hornsby testifying about the following issues: 1) That he was exposed to aluminum fumes; and 2) That substantial amounts of aluminum powder in various forms is floating around the pot rooms. RP 66. Dr. Cox did not review the other workers testimony in front of the Board. RP 66-67.

Dr. Cox also admitted that he did not know what Neil Hornsby was exposed to when he did tapping, cleaning pots, grinding, chipping, pot tending, or rolling bridges. RP 67-68.

Dr. Cox has never done an IME at the request of an injured worker. RP 69-71.Dr. Cox admitted that he was not aware of any studies linking DIP to aluminum smelter workers. RP 71.

Dr. Cox's IME report was completed before Neil Hornsby was seen by Dr. Raghu and before Dr. Abraham analyzed his lung biopsies. RP 71-72. His IME was not for the purpose of treating Neil Hornsby. RP 73. Dr. Cox's review of Alcoa's records showed that as of 8-8-07 Alcoa's pulmonary function tests taken of Neil Hornsby showed a mild restriction as of 8-8-07. A mild restriction was also found on 9-5-07. RP 74.

Dr. Cox in his IME stated that he had done a complete medical literature search and found no instances of this disease in aluminum workers or aluminum smelter workers. RP 75. Dr. Cox admitted that he had not read a number of articles pertaining to adverse pulmonary effects on pot room workers. RP 76.

He also did not do a medical literature search for the pulmonary fibrosis issue. RP 78-89. Dr. Cox did not recall that Neil Hornsby testified that he was around aluminum fumes in the work that he did at Alcoa. RP 92.

Dr. Cox also admitted that a "nodule" is nonspecific and it could indicate many of several possibilities. Pulmonary fibrosis does not generally appear as a nodule on a chest x-ray. RP 4. Dr. Cox was not aware of the research Dr. Abraham reviewed such as Mineralogical Analysis of the Respiratory tract in Aluminum Oxide-Exposed Workers. RP 80. Neither was he familiar with the Shaver and Riddell study. (RP 84) He also wasn't sure if he had all of Alcoa's health records. (RP 73). He had not reviewed the article called "Human Health Risks Assessment for Aluminum, Aluminum Oxide, and Aluminum Hydroxide. (RP 79.)

Dr. Simons' Testimony

Hornsby's counsel objected on the basis of "lack of personal knowledge" to Dr. Simons' testimony that Mr. Hornsby's smoking history would bring about the diagnosis of DIP. RP 31. Referring to Dr. Abraham's report, Dr. Simons admitted that a pathologist can make a pathologic diagnosis. RP 5.

Dr. Simons didn't know if he had reviewed all of Neil Hornsby's medical records. RP 40. Dr. Simons did not see any lung function reports between 2007 and 2011. RP 41. Dr. Simons

did not know what kind of cigarettes Neil Hornsby smoked. He had no idea of the composition of different toxins in the particular brand of cigarettes Neil Hornsby smokes. RP 42.

Dr. Simons testified that he was aware some aluminum had been found in cigarettes, originating in the filter, but he admitted he did not know whether Neil Hornsby ever smoked filtered cigarettes or which specific brands he smoked, or even any specific information as to the analysis done on any specific brands. RP 42.

Dr. Simons also admitted that he did not know whether the nodules seen in 2000 caused Neil Hornsby's DIP. RP 45. Dr. Simons had not analyzed the air quality at Wenatchee Alcoa Works. RP 46. He had never had another case involving a person who worked in the pot rooms of an aluminum plant. RP 46. He also admitted a person could have more than one disease at a time. RP 46.

E. ARGUMENT

1. The Court of Appeals, Div. III erred in finding that Dr. Abraham did not give an opinion about the aluminum in the pot rooms at Alcoa Wenatchee Works causing Neil Hornsby's lung diseases DIP and interstitial fibrosis and Dr. Abraham also opined that the aluminum in the lungs may have aggravated the respiratory bronchiolitis.

The Petition for Discretionary Review should be granted under RAP 13.4(4), which provides: "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Here, the Court of Appeals, Division III upheld the trial court's decision, which was not supported by substantial evidence. The Court of Appeals erred in failing to properly review the board transcript, and therefore, the Court of Appeals decision jeopardizes other Labor and Industries claimants by denying a valid claim for an industrial disease.

The Industrial Insurance Act is to be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and or death occurring in the place of employment. RCW 51.12.010. All doubts as the meaning of the Act are to be favored towards the injured worker. Kilpatrick v Department of Labor and Industries, 25 Wash. 2d 222; 230, 883 P.2d 1370, 915 P. 2d 519 (1995).

In this case, the Court of Appeals did not give the proper weight to resolve all doubts in favor of the injured worker. This case involves substantial suffering to Mr. Hornsby and his family because the denial of the labor and industries claim, where Mr. Hornsby is facing a double lung transplant. The decision by the Court of Appeals was not done with the purpose of minimizing suffering and economic loss arising out of the Alcoa workplace causing Mr. Hornsby's life threatening pot room diseases. The Court of Appeals Div. III stated as follows:

> Neil Hornsby contends that the trial court erred in concluding that Dr. Jerrold Abraham gave an unconvincing answer to the question of causation. Hornsby argues that Dr. Abraham gave an answer, on a more probable than not basis, as to the cause of each diagnosis. Nevertheless, Abraham did not specifically state whether aluminum dust caused a disease, but rather testified that the exposure to dust is associated with one of Hornsby's types of diseases. Abraham provided no conclusive response required to establish causation.

This conclusion is not supported by the evidence. Dr. Abraham not only gave a conclusive opinion that two of Mr. Hornsby's lung diseases--the DIP and interstitial fibrosis-- were caused by the aluminum in Neil Hornsby's lungs, but Dr. Abraham went on for five pages explaining his response and the studies

which supported his response. Dr. Abraham and also explained that the aluminum found in Mr. Hornsby's lungs was not normal for the background population. Dr. Abraham went on in detail explaining how often what is referred to as idiopathic pulmonary fibrosis, is not really idiopathic if the workers exposures are evaluated. RP 35 - 36. Dr. Abraham also explained that if there is fibrosis in smokers it is directly related to the amount of dust detected in the lungs, and not related to smoking history. Page 36, lines 18 - 21.

Dr. Abraham explained that *respiratory bronchiolitis* is usually related to the amount of smoking and less related to the amount of dust that could be detected by light microscopic or scanning electron microscopic. Page 38, lines 23-25; page 37, lines 1 -3. He went on to explain that studies on this issue attempted to separate out the respiratory bronchiolitis from the fibrosis. He also indicated that a study he participated in called " Inorganic Dust Exposure Causes Pulmonary Fibrosis In Smokers," found that there was interstitial fibrosis that was associated with occupational exposures to aluminum oxide abrasive's, like sandpaper and sanding wheels and that no other exposures demonstrated explain the fibrosis. Page 37, lines 22-25; Page 39 lines, 1-3. Page 38, lines 1- 25;

Dr. Abraham then went on to explain another study called "Desquamative Interstitial Pneumonia In An Aluminum Welder" where an aluminum welder developed Desquamative Interstitial Pneumonia (DIP), finding a link between aluminum and interstitial fibrosis. Dr. Abraham also testified on page 42, lines 5 -13, that he was relying on another physician's summary for Neil Hornsby's historical basis of exposure. One physician, when rendering

opinions, may rely on the medical records of another physician. ER 703; In Re Personal Restraint of Young, 122 Wn. 2d 1, 58, 857 P. 2d 989 (1993). Thus, contrary to what is stated in the Court of Appeals Div. III of opinion in this case, Dr. Abraham did consider the issue of whether or not Neil Hornsby had been exposed to aluminum in the Alcoa environment.

The fact that Mr. Hornsby has been exposed to aluminum at the Alcoa plant is not denied by Alcoa. Alcoa's sole defense was its theory that *smoking* had caused *all three* of Mr. Hornsby's lung diseases.

Dr. Abraham also indicated on page 42 lines 21-25 that he had reviewed some information regarding Mr. Hornsby's occupational exposures from the other doctors. He also reviewed Mr. Hornsby's first and second responses to interrogatories indicating exposures from 2000 to 2008 at Alcoa. Abraham deposition, Page 43, lines 7 through 17. Thus, Dr. Abraham *did* take into account Neil Hornsby's work exposures into consideration when giving his opinion regarding aluminum causing Hornsby's interstitial fibrosis and DIP. Thus, the Court of Appeals erred when it indicated that "Abraham provided no conclusive response required to establish causation." On the contrary, Dr. Abraham's response was lengthy and detailed, explaining the studies which supported his opinions.

Finally, the Court of Appeals erred when it stated on page 11 that "Hornsby's experts provided no verification that his lung diseases were probably caused by his employment and not

exposures in his everyday life." As explained above, Dr. Abraham indicated that from his initial evaluation of the glass slides that Mr. Hornsby's lungs had an *abnormal amount of aluminum in his lungs, not normally found in the background population.*

Dr. Abrahams's initial report was based just on glass microscope slides he initially received. Page 8, lines, based on his review under the glass microscope. Dr. Abraham found that Neil Hornsby's biopsies were abnormal, Page 8, lines 23-25. Dr. Abraham saw the filling of air spaces with macrophage cells. And he saw some inflammatory white blood cells that are called leukocytes and plasma cells. Page 8, lines 23-25; Page 9, lines 12-3. "There was dust visible, *much more than one would be expect from the general background population."* Page 9, lines 1-3 "Some of it was consistent with smoking and some consistent with other exposures that did not come from smoking." Page 9, lines 3-5.

As explained above, Dr. Abraham indicated that <u>two</u> of Mr. Hornsby's lung diseases, the interstitial fibrosis and the DIP, were caused by the aluminum, and not by smoking. He also testified that the respiratory bronchiolitis may have been aggravated by the aluminum exposure.

2. <u>Dr. Simons Testimony Was Discredited And Should Not Have Been Used In To Uphold The Trial Court Decision.</u>

Dr. Simons never examined Mr. Hornsby. His testimony was discredited in the following ways: 1) counsel objected that he had no personal knowledge that Mr. Hornsby smoking history would bring about the diagnosis of DIP; 2) Dr. Simons didn't know whether he had reviewed all of Neil Hornsby's medical records; 3) Dr. Simons admitted that he did not see any Hornsby lung function reports between 2007 and 2011; 4) Dr. Simons didn't know what kind of cigarettes Neil

Hornsby smoked, nor did she have any idea about the composition of different toxins in the particular brand of cigarettes Neil Hornsby smokes; 5) Dr. Simons admitted that he did not know whether the nodules seen in 2000 caused Hornsby's DIP; 6) Dr. Simons had not analyzed the air quality at Wenatchee Alcoa works; 7) Dr. Simons admitted that he had never had another case involving a person who worked in the pot rooms of an aluminum plant; 8) Dr. Simons admitted that a person could have more than one disease at a time.

Based on the above, Dr. Simons' testimony should not have outweighed Dr. Abrahams's testimony.

3. Dr. Cox's testimony was Discredited, and Should not have been used by the Court of Appeals, Div. III to Uphold the Trial Court Decision.

Dr. Cox admitted that he "did not recall" much of the evidence testified by Neil Hornsby and his lay witnesses at the hearing. Dr. Cox admitted that he may not have all the records – in fact that he had not been provided Neil Hornsby's Occupational History form. Dr. Cox clearly had no foundation or qualifications to testify about the contents of cigarettes, yet testified about this over Hornsby's objection.

Neither doctor had the qualifications to dispute Dr. Abraham's conclusions that Neil Hornsby's occupational exposure to aluminum caused his DIP and pulmonary fibrosis. Neither doctor was familiar with the research Dr. Abraham was involved in and they were not aware the diseases caused by occupational exposure to aluminum and aluminum fibrosis.

Based on Dr. Cox's admitted lack of knowledge about key issues involving exposures at Alcoa and his lack of knowledge regarding the type of cigarettes Neil Hornsby smoked or the contents of those cigarettes, Dr. Cox's' testimony should not of been used by the Court of Appeals

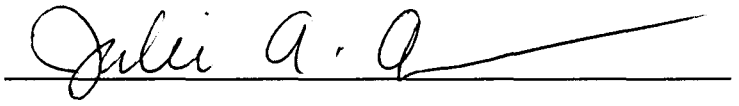
to uphold the trial court decision. To the extent that the Court of Appeals relied on Cox's opinion, it was error.

F. CONCLUSION

The Washington state Supreme Court should grant discretionary review because the Court of Appeals, Div. III should not have affirmed the trial court decision, where the Court of Appeals erred in disregarding Dr. Abrahams's stated opinions and in relying on the testimony of Dr. Cox and Dr. Simon, whose testimony should been discredited. By ignoring testimony of Dr. Jerrold Abraham, even though the transcript indicates that the gave specific opinions about which of the Hornsby's diseases were caused by the aluminum, and by relying of the testimony of discredited doctors Cox and Simons, the Court of Appeals decision affected a substantial public interest because it did not give due deference to case law resolving all doubts in favor of the injured worker, and it does not minimize suffering and economic loss to Neil Hornsby.

Respectfully submitted this 9th day of September, 2016

LAW OFFICES OF JULIE A ANDERSON, P LLC



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WASHINGTON STATE COURT OF APPEALS

DIVISION III

NEIL HORNSBY **Plaintiff,** **v.** **ALCOA INC.** **Defendant.**	**Appellate Court No. 331229** **PROOF OF SERVICE**

TO: THE CLERK OF THE ABOVE-NAMED COURT
AND TO: LAWRENCE E. MANN
AND TO: ANASTASIA SANDSTROM, ASSISTANT ATTORNEY GENERAL

The undersigned declares: I am a resident of the State of Washington, over the age of eighteen years and not a party interested in the above-entitled action. On the 9th day of September , 2016, I deposited with United States Postal service, two day service, the following document: APPELLANT'S MOTION FOR DISCRETIONARY REVIEW in the above-entitled action to the following:

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Dated this 9th day of September 2016

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FILED
JUNE 21, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re:	)	
	)	No. 33122-9-III
Neil Hornsby.	)	
	)	
	)	UNPUBLISHED OPINION
	)	
	)	
	)	

FEARING, C.J. — Neil Hornsby appeals from the superior court's ruling affirming the Board of Industrial Insurance Appeals' (Board) denial of his claim for benefits for an occupational disease. Because facts support the superior court's ruling, we affirm the superior court.

FACTS

On July 31, 2000, Neil Hornsby commenced employment with Alcoa, Inc., at its Wenatchee smelter. According to Hornsby, he had no health problems when he began work for Alcoa. Nevertheless, a preemployment screening chest x-ray showed small nodules in his lung. At the time, Hornsby reported to Alcoa that he smoked one pack of cigarettes each day.

At the Alcoa plant, Neil Hornsby performed many duties, including inserting and removing carbon rods from crucibles of molten ore. Other duties included tasks near coal tar pitch pots that emit black, green, and yellow smoke and scrubbing pigeon feces from the facility. According to Hornsby, his Alcoa employment exposed him to dust from aluminum oxide, alumina, soda ash, and asbestos.

When performing all duties at Alcoa, Neil Hornsby wore a paper respirator. While working around the smelter crucibles, he also wore a protective Tyvek suit, although the suit was not airtight. A Tyvek suit is a DuPont trademarked white one-piece, disposable garment composed of flashspun high-density polyethylene.

During a 2001 health screening, Neil Hornsby reported that he smoked between one and one-half packs per day. On July 2, 2001, during a production curtailment, Alcoa released Hornsby, and Hornsby journeyed to work at a Colorado coal mine. A preemployment screening chest x-ray for the coal miner's job detected black lung. Due to a broken hand, Hornsby left mine employment after three weeks.

On July 21, 2003, Neil Hornsby returned to work at Alcoa's Wenatchee smelter. During another health screening, Hornsby reported that he smoked three quarters of a pack per day. Because the plant remained on curtailment, Hornsby cleaned and vacuumed smelter crucibles until aluminum production restarted in December 2004.

In 2005, Neil Hornsby began use, during Alcoa job duties, of a face mask cartridge respirator, which provided better protection than a paper respirator. During the

same year, Hornsby developed health problems. A 2007 breathing test showed mildly restricted breathing.

On May 1, 2008, Neil Hornsby left Alcoa employment because of fatigue. He worked on an Alaskan pipeline from July to November 2008. He then retired due to health difficulties and has not worked since. He returned to Washington State in 2009.

Medical providers thereafter diagnosed Neil Hornsby with desquamative interstitial pneumonia (DIP), interstitial fibrosis, and respiratory bronchiolitis. DIP involves an abnormal amount of macrophages filling the lung air spaces. A macrophage is a cell that surrounds and ingests smaller cells, dust particles, or bacteria. A high number of macrophages precludes air from reaching the capillaries in the walls of lung air sacs resulting in a lack of oxygen and shortness of breath. Interstitial fibrosis entails scar tissue occupying the lung's interstitium, which supports the lung with air spaces and airways. Fibrosis means the formation of collagen or scar tissue. Respiratory bronchiolitis involves inflammation of the bronchioles, passageways from the nose and mouth carrying air to the lungs.

PROCEDURE

On September 9, 2011, Neil Hornsby applied for Department of Labor & Industries benefits for an occupational disease. He claimed he sustained damage to his lungs in the course of employment at Alcoa. The department denied his claim and wrote:

> [1.] That the claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws.
>
> [2.] That the claimant's condition is not an occupational disease as contemplated by section 51.08.140 RCW.

1 Admin. Record (AR) at 176.

Neil Hornsby appealed his denial of benefits to the Board of Industrial Insurance Appeals. The Board conducted an evidentiary hearing, during which it reviewed many physician depositions conducted over a period of months. A synopsis of each medical witness's testimony follows.

Saba Lodhi

Saba Lodhi is a Wenatchee pulmonologist who treated Neil Hornsby. Lodhi did not testify in the Board of Industrial Insurance Appeals hearing, but the Board entered her medical records as exhibits. Many testifying physicians referred to her records.

Stephen B. Knox

Stephen Knox is a Wenatchee general surgeon. On June 17, Dr. Knox, at the request of Dr. Saba Lodhi, performed a lung biopsy on Neil Hornsby because Lodhi found interstitial lung disease on x-rays. Knox removed two biopsies from an area where a computed tomography (CT) scan showed scarring and concluded that the biopsies confirmed nonspecific interstitial pneumonitis.

Ganesh Raghu

Ganesh Raghu is a professor of medicine at the University of Washington, an

attending physician at the University of Washington Medical Center, and director of The Center for Interstitial Lung Disease. Raghu specializes in pulmonary disease, lung transplantation, and interstitial lung disease. Dr. Raghu, at the request of Saba Lodhi, first examined Neil Hornsby on September 21, 2012, for interstitial lung disease. Raghu compared earlier pulmonary function tests to the ones he conducted during the September visit, and the comparison showed a deterioration in Hornsby's lung capacity. Dr. Raghu recommended Dr. Jerrold Abraham, a pulmonary pathologist in New York, review Hornsby's biopsies to determine whether work exposures may have contributed to the pulmonary fibrosis.

Dr. Ganesh Raghu saw Neil Hornsby again on January 18, 2013. Raghu then conducted a breathing and walking test that detected Hornsby's lung capacity had declined since earlier tests. Dr. Raghu saw Hornsby for a third time on May 1, 2013. He conducted the same walking and breathing tests on Hornsby and found minimal decline.

During his deposition, Ganesh Raghu testified that smoking causes desquamative interstitial pneumonia. Raghu further testified that he lacked knowledge of protective gear that Hornsby wore at Alcoa and the chemicals or toxins to which Hornsby was exposed. Dr. Raghu did not provide a medical conclusion as to whether Neil Hornsby's lung disease was caused by exposures at Alcoa or smoking.

Robert E. Cox

Robert Cox works in pulmonary critical care at Swedish Edmonds Hospital and has knowledge of aluminum respiratory issues. Dr. Cox saw Neil Hornsby for a pulmonary evaluation on October 24, 2011, at the request of Alcoa. Cox performed a spirometry and pulmonary function test on Hornsby, tests required for department claims. Cox also interviewed Hornsby about his work history.

Before testifying in the Labor & Industries appeal, Robert Cox reviewed Board testimony from Neil Hornsby regarding his exposures at Alcoa. Cox also reviewed medical records prepared by Drs. Houghland, Lodhi, Raghu, Abraham, and Knox.

Based on his examination of Neil Hornsby and review of medical records, Dr. Robert Cox diagnosed Neil Hornsby with DIP and attributed the DIP to cigarette smoking. Cox further opined that respiratory bronchiolitis is the first sign of lesions in the lung caused by cigarette smoking. Dr. Cox believed the small nodules found in Hornsby's July 2000 preemployment chest x-ray evidenced the onset of DIP and bronchiolitis. He concluded that Hornsby's lung diseases were not caused by the working conditions at Alcoa.

Jerrold L. Abraham

Jerrold Abraham is an anatomic pathologist at State University of New York, who focuses on occupational lung disease. Jerrold Abraham received Neil Hornsby's lung biopsies, which he examined using a scanning electronic microscope energy dispersive

x-ray spectroscopy SEM/EDS. Abraham determined Neil Hornsby suffered from a high level of dust in his lungs. The level was consistent with both smoking and other exposures. Dr. Abraham detected many metal particles in the biopsies, which did not result from smoking.

During Board testimony, Neil Hornsby asked Dr. Jerrold Abraham to opine on the diagnosis and cause of his lung diseases:

> Q Do you have an opinion on a more probably than not basis to a reasonable degree of medical certainty whether the aluminum found in Mr. Hornsby's biopsies caused him to have lung diseases, DIP, pulmonary fibrosis, interstitial fibrosis and respiratory bronchiolitis?
>
> A Well, I have to take those different descriptions one at a time. Certainly the aluminum exposure that is reflected in his biopsy is of the type that has been previously seen to cause DIP, and to be associated with interstitial fibrosis. The respiratory bronchiolitis, part of it is more likely related to smoking but could also be contributed to by the aluminum. But smoking is the major cause for the respiratory bronchiolitis which is different from the fibrosis or the DIP pattern itself.
>
> Q If Mr. Hornsby had not been exposed to aluminum, would smoking cigarettes alone ha[ve] caused the abnormal findings you discussed?
>
> A It wouldn't have caused all of them, but it would have probably caused the respiratory bronchiolitis. But it wouldn't have caused interstitial fibrosis as far as I am aware.

10 AR (Mar. 18, 2013) at 32-33.

Steven M. Simons

Steven Simons is a pulmonologist and a professor of medicine at the University of California Los Angeles Medical School. Simons never examined or treated Neil

Hornsby. Alcoa asked Dr. Simons to provide medical opinions based on Board testimony and the records of other physicians.

Steven Simmons diagnosed Neil Hornsby with DIP secondary to smoking and respiratory bronchiolitis, inflammation characteristic of smoking. He concluded that smoking more likely caused all of Hornsby's lung diseases. Dr. Simons further opined that Hornsby did not suffer from idiopathic pulmonary fibrosis.

After reviewing all evidence, the Board of Industrial Insurance Appeals upheld the Department of Labor & Industries' denial of Neil Hornsby's occupational health claim. The Board adopted the following relevant findings of fact:

> 3. Mr. Hornsby's exposure to aluminum dust and aluminum fumes constitutes distinctive conditions of employment.
>
> 4. Mr. Hornsby's conditions diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis did not arise naturally and proximately out of the distinctive conditions of his employment.

1 AR at 76. The Board entered the following conclusion of law:

> 2. Mr. Hornsby's conditions diagnosed as desquamative interstitial pneumonia, respiratory bronchiolitis, and interstitial fibrosis is [sic] not an occupational disease within the meaning of RCW 51.08.140.

1 AR at 76.

Neil Hornsby appealed to the superior court. The trial court reviewed the record of the Board of Industrial Insurance Appeals and affirmed the Board's decision. The superior court commented: "what the court has to determine . . . are two questions. One,

whether the aluminum in Mr. Hornsby's lungs came from Alcoa and if it did, did that cause any of his lung problems." Report of Proceedings (RP) at 56. The trial court determined that more likely than not some of the aluminum in Neil Hornsby's lungs resulted from his work at Alcoa. Nevertheless, the court ruled that the evidence did not show a causal relation between DIP, interstitial fibrosis, and respiratory bronchiolitis, on the one hand, and work exposure, on the other hand. Smoking caused most of the diseases. The court considered Dr. Simons' testimony convincing and the testimony of Dr. Cox less persuasive. The trial court determined Dr. Abraham's passive response to specific questions and lack of peer reviewed work on DIP troubling. The court also cited Dr. Raghu's lack of testimonial support for Neil Hornsby's occupational health claim as a factor in its decision.

LAW AND ANALYSIS

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. We answer in the affirmative.

This court's review of a superior court's decision is limited to whether substantial evidence supports the superior court's factual findings, and then we review de novo whether the superior court's conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999); *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Watson v. Dep't of Labor & Indus.*,

133 Wn. App. 903, 909, 138 P.3d 177 (2006). Even though we may view the evidence presented at trial differently from the trier of fact, we cannot substitute our judgment for his. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 378, 670 P.2d 246 (1983); *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986). 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).

Neil Hornsby contends that the trial court erred in determining that his lung diseases were not occupational diseases. Hornsby argues that the evidence overwhelmingly showed that his DIP, interstitial fibrosis, and respiratory bronchiolitis arose naturally and proximately from the distinctive conditions of his employment at Alcoa.

A worker shall receive benefits under the Industrial Insurance Act, Title 51 RCW, for disabilities resulting from occupational diseases. RCW 51.32.180; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). To establish an occupational disease an employee must show that his disease arose both "naturally" and "proximately" from his employment. RCW 51.08.140; *Dennis*, 109 Wn.2d at 481. To meet the "naturally" prong, the employee need prove that his condition came about "as a natural consequence or incident of distinctive conditions" of his particular employment.

Dennis, 109 Wn.2d at 481; *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 315, 289 P.3d 727 (2012). The employee carries the burden of showing that the conditions of employment gave rise to his occupational disease and not that the disease is common to his particular employment. *Dennis*, 109 Wn.2d at 481; *Potter*, 172 Wn. App. at 315. To meet the "proximately" prong, the worker must establish by "competent medical testimony" that his claimed condition was probably, not merely possibly, caused by his employment. *Dennis*, 109 Wn.2d at 477; *City of Bellevue v. Raum*, 171 Wn. App. 124, 140-41, 286 P.3d 695 (2012); *Potter*, 172 Wn. App. at 311.

Neil Hornsby's trial court thoroughly weighed the evidence and testimony of all testifying physicians. Drs. Robert Cox and Stephen Simons averred that smoking more probably caused Neil Hornsby's lung diseases. Hornsby called two doctors, Drs. Ganesh Raghu and Jerrold Abraham, to testify on his behalf. Hornsby's experts provided no verification that his lung diseases were probably caused by his employment and not exposures in his everyday life. Raghu provided no testimony as to the causation of Hornsby's ailments.

Neil Hornsby contends that the trial court erred in concluding that Jerrold Abraham gave an unconvincing answer to the question of causation. Hornsby argues that Dr. Abraham gave an answer, on a more probable than not basis, as to the cause of each diagnosis. Nevertheless, 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 types of diseases. Abraham provided no conclusive response required to establish causation. We agree with the trial court's comment in its oral decision:

> Counsel asked just the go-to question, the perfect question, but he [Dr. Abraham] doesn't answer it. He's nonresponsive. And no one really pushes him. And I suspect had he been pushed, he would have admitted, well, it's possible, but—and I've seen it so it's possible but I'd have to know a whole lot more before I could opine whether or not in this particular case his DIP was caused by the aluminum.

RP at 59.

Neil Hornsby asserts that the testimony of Dr. Jerrold Abraham should be given significant weight because he was an attending physician. In workers' compensation cases, the court must give special consideration to the opinion of the attending physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Intalco Alum. Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 654, 833 P.2d 390 (1992). This is because an attending physician is not an expert hired by a party to give a particular opinion. *Intalco*, 66 Wn. App. at 654. Nevertheless, Hornsby's argument fails because the law only considers one an attending physician if the doctor personally meets with the patient. *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947). Anyway, Dr. Abraham uttered no opinion that Hornsby's lung disease was probably caused by work exposures.

Neil Hornsby contends the trial court erred by relying on the opinion of Dr. Saba Lodhi. Hornsby argues that Lodhi did not testify before the Board thereby taking away

his right to cross-examination. Alcoa contends that the trial court did not rely on Dr. Lodhi's opinion. Alcoa argues that Lodhi's medical records and opinion were admitted evidence that was reviewed by each of the four doctors.

Neil Hornsby did not object to the admission of Dr. Lodhi's medical opinions at any point in the procedural history. We do not address objections raised for the first time on appeal. RAP 2.5(a). The trial court did not rely on the medical opinion of Dr. Lodhi. The court relied on the testimony of the four testifying doctors. One physician, when rendering opinions, may rely on the medical records of another physician. ER 703; *In re Pers. Restraint of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); *Engler v. Woodman*, 54 Wn.2d 360, 363, 340 P.2d 563 (1959); FED. R. EVID. 703 advisory committee's note, 56 F.R.D. 183, 283-84 (1973); 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 703.5, at 231 (2007).

Neil Hornsby may argue that his constitutional right to confront witnesses was violated by the use of Saba Lodhi's records without the opportunity to cross-examine her. The confrontation clause of the United States Constitution provides: "[i]n all *criminal* prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI (emphasis added); *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Washington has adopted a similar confrontation clause, providing that: "In *criminal* prosecutions the accused shall

have the right . . . to meet the witnesses against him face to face. . . ." WASH. CONST. art. I, § 22 (emphasis added). No court has applied either the state or federal clause outside the context of a criminal proceeding.

CONCLUSION

We affirm the superior court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.