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No. 93984-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET, et al.,

Respondents,

v.

WEYERHAEUSER COMPANY,

Petitioner.

BRIEF OF AMICI CURIAE SEVEN STATEWIDE EMPLOYER ORGANIZATIONS: ASSOCIATED GENERAL CONTRACTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, WASHINGTON FARM BUREAU, WASHINGTON RETAIL ASSOCIATION, WASHINGTON FOOD INDUSTRY ASSOCIATION, and WASHINGTON SELF-INSURERS ASSOCIATION

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ASSOCIATION

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I. INTRODUCTION

This brief is filed by seven statewide associations, identified below, who together represent tens of thousands of employers -- small and large, public and private sector -- in Washington State, and whose members in turn employ as many as a million Washington workers. Amici organizations' members and their employees are all covered by Washington's Industrial Insurance Act ("IIA"), Title 51 RCW, and either pay premiums to the state for coverage under the State Fund, or have been granted status to self-insure their workers' compensation programs. All seven amici actively represent their members in the legislative, executive, and judicial branches, seeking fairness in the rules that drive coverage, benefits, and outcomes in workers' compensation.

Amici are fully aligned in their concern over the Court of Appeals' thorough misapprehension of the IIA's coverage provisions for occupational disease. The trial court and Court of Appeals turned a generation's worth of understanding about the basic adjudication of occupational disease claims on its head with the novel holding that claimants may demonstrate that distinctive conditions of employment caused an occupational disease without expert medical evidence. Amici thus urge the court to reverse the Court of Appeals and reinstate the order of the Board of Industrial Insurance Appeals.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

The Washington Chapter of Associated General Contractors ("AGC") is a professional association representing over 600 member companies involved in all aspects of commercial and industrial construction in the state. AGC members include large and small contractors who are covered by the State Fund and self-insurance. AGC also sponsors a workers' compensation retrospective ratings program as a safety incentive and service to its State Fund members.

B. BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington ("BIAW") is the voice of Washington's residential homebuilders, representing over 8,200 member companies involved in the housing industry. Almost all BIAW members are covered by Washington's State Fund for workers' compensation, and BIAW also sponsors a workers' compensation retrospective ratings program as a service to its members.

C. NATIONAL FEDERATION OF INDEPENDENT BUSINESS

The National Federation of Independent Business ("NFIB") is the nation's leading advocate for small business owners representing hundreds of thousands of members and protecting their right to own, operate, and

grow their small business. In Washington State, NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member in Washington employs ten people and reports gross sales of about $500,000 a year, and is covered by Washington's State Fund for workers' compensation.

D. WASHINGTON FARM BUREAU

The Washington Farm Bureau ("WFB") is an independent membership federation representing more than 46,000 farm and ranch families across the state, serving as the voice of the agriculture industry at all levels of government. Washington Farm Bureau member farms and ranches include both State Fund and self-insured operations, and the Washington Farm Bureau sponsors a retrospective ratings and safety program on behalf of its State Fund members.

E. WASHINGTON FOOD INDUSTRY ASSOCIATION

In continuous operation since 1899, the Washington Food Industry Association ("WFIA") represents independent grocery operators and their suppliers in Washington, including approximately 500 supermarkets, convenience stores, and coffee houses in communities around the state. WFIA members are typically insured by the State Fund, and WFIA

sponsors a retrospective ratings program to provide safety incentives to its members.

F. WASHINGTON RETAIL ASSOCIATION

The Washington Retail Association ("WRA") represents over 3,500 member storefronts in Washington, in all parts of the state, including the largest national chains and the smallest independent retailers. WRA members include both State Fund insured and self-insured employers, and WRA sponsors a retrospective ratings program for its members in the State Fund.

G. WASHINGTON SELF-INSURERS ASSOCIATION

The Washington Self-Insurers Association represents the interests of the roughly 365 Washington employers who self-insure their workers' compensation programs under the same laws and rules as State Fund employers. These self-insured employers are both public and private sector employers, from cities, counties, public schools, hospitals, charities to some of Washington State's most iconic home-based employers. WSIA members employ over 900,000 people in Washington.

III. ISSUE OF CONCERN TO AMICI CURIAE

Must a workers' compensation claimant present expert medical testimony to establish that a contended occupational disease arose from

the distinctive conditions of his or her particular employment? *Cf. Pet. for Rev.* at 1 (Issues 1, 2).

IV. STATEMENT OF THE CASE

For brevity's sake, amici adopt the statement of the case set forth in Weyerhaeuser's petition for review at 1-6.

V. ARGUMENT

A. EXPERT MEDICAL TESTIMONY IS REQUIRED TO ESTABLISH AN OCCUPATIONAL DISEASE AROSE "NATURALLY AND PROXIMATELY" FROM EMPLOYMENT.

To be covered under the IIA, a contended occupational disease must "arise[] naturally and proximately out of employment," RCW 51.08.140. At least since *Dennis v. Dept. of Labor & Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987), section .140 has been understood to mean that a contended occupational disease must come about (a) "as a matter of course as a natural consequence or incident of distinctive conditions of [a claimant's] particular employment," *id.* at 481 (construing "naturally . . . out of employment) *and* (b) the disease must be "probably, as opposed to possibly, caused by the employment." *Id*. at 477 (construing "proximately out of employment").

Dennis was explicit that the caused-by-employment requirement of section .140 "must be established by competent medical testimony." *Id*.

The *Dennis* court left unsaid whether the distinctive-conditions-of-employment causal requirement must also be established by competent medical testimony, and hence the confusion below:

> The supreme court focused on the 'naturally' language of the governing statute after considering the 'proximately' language. In the context of the statute, this word 'naturally' is linked to the requirement that the occupational disease must 'arise out of employment.'
>
> After discussing, at length, this requirement, the court held:
>
> [A] worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than [did] conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Street v. Weyerhaeuser Company, Court of Appeals No. 75644-3-I (Nov. 28, 2016) slip op. at 6 (quoting *Dennis*, 109 Wn.2d at 481). The Court of Appeals reasoned:

> Nowhere in the last passage from [*Dennis*], quoted earlier in this opinion, did the court state any such requirement [that competent

> medical testimony is required to show a condition "arises naturally" from employment]. Nowhere in the jury instructions in this case is there any statement of such a requirement. The requirement does not, in our view, exist on the basis of any of the authorities that Weyerhaeuser argues.

Id. at 8. This represents an unusual *expressio unius est exclusio alterius* reading of the causation holding in *Dennis*: if *Dennis* stated medical testimony is required to show proximate cause in general, but did not state it is required to show distinctive conditions specifically, no such requirement must exist. But that does not follow.

Amici submit that a more faithful and accurate reading of *Dennis* and its progeny is that there is no artificial bifurcation of "naturally and proximately" in section .140, and that while both terms are analytically distinct, they are both concomitant elements of establishing a disease was proximately caused by employment. Insofar as the cause of a disease is naturally a medical question, it follows that competent medical testimony should be required to show both employment generally, and distinctive conditions of employment specifically, gave rise to the disease.

Such a reading would best accord with the day-to-day treatment of occupational disease cases since *Dennis*, where the courts have found both sufficient and insufficient evidence of causation – entirely on the basis of whether or not there was sufficient medical evidence in the record.

For example, in *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992), the Court of Appeals rejected a claim for stress-based occupational disease by a claimant whose employment in a pulp mill spanned 25 years in a series of progressively more complex jobs. *Id*. at 387. The employer presented testimony of a supervisor to explain the distinctive conditions of employment, and a psychiatrist who examined the claimant to opine whether the distinctive conditions of his employment caused his condition. The claimant, meanwhile, relied on his treating psychiatrist's testimony to establish causation.

Finding insufficient medical evidence of causation, the court noted:

> The doctor's opinion does not create an issue of fact here, however, because of the longstanding requirement that there must be objective proof of the relationship between the employment and the occupational disease. In discussing when a disease arises "naturally" out of employment, the more recent *Dennis* case uses different words but requires the same kind of evidence: "We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of d*istinctive conditions of his or her particular employment*." Clearly, that is an objective test, not a license for a claimant to rely solely on his subjective impressions of the conditions at his place of employment. Dr. Rice had only his patient's subjective impressions to go on. We have no doubt that Mr. McClelland suffered depression caused in part by stresses he experienced at work, but those stresses were, unfortunately, self-inflicted and not objectively caused by the work.

McClelland, 65 Wn. App. at 393-94 (emphasis in original) (internal citation omitted). Two lessons are notable from *McClelland* – first, the extended gloss on *Dennis* that this court meant to require "clearly" an "objective test" to prove distinctive conditions of employment, and secondly, the entirely routine and unremarkable fact that it was conflicting medical testimony offered by the two sides to litigate that objective test.

Similarly, in *Bremerton v. Shreeve*, 55 Wn. App. 334, 777 P.2d 568 (1989), another post-*Dennis* case, the Court of Appeals upheld a disability claim premised on a kidney infection by a claimant who was unable to use the restroom at work for protracted periods. Again, it was on the basis of the claimant's medical testimony that the court found sufficient evidence to support that distinctive conditions of employment caused her occupational disease:

> Dr. Corn testified that the mayoral policy which kept Ms. Shreeve from urinating when she found it necessary was the cause of her kidney infection. . . . there was ample evidence presented by the medical testimony that Ms. Shreeve's kidney was infected . . .

Shreeve, 55 Wn. App. at 342.

Likewise, in *Intalco Aluminum Corp. v. Dept. of Labor & Industries*, 66 Wn. App. 644, 833 P.2d 390 (1992), another post-*Dennis* causation case, the Court of Appeals upheld claims due to neurotoxin exposure at an aluminum smelting plant. While the central holding of

Intalco is that claimants need not prove causation by pinpointing the specific toxins to which they were exposed, *id*. at 658, the entire case proceeded strictly on the basis of conflicting medical testimony as to whether the distinctive conditions of employment at the smelter caused the contended diseases:

> Drs. Longstreth and Rosenstock did extensive neurologic testing on these patients over a 2-year period. In systematically ruling out all other non-work-related possible causes for the patients' conditions, the physicians used only methods and techniques that are generally accepted in the scientific community. Further, their ultimate conclusion was completely consistent with the toxin-induced model of neurologic disease. In addition, Intalco had the opportunity to, and did, present its own expert medical testimony to challenge the theories on which the attending physicians based their conclusion.

Id. at 662.

Ruse v. Dept. of Labor & Industries, 90 Wn. App. 448, 966 P.2d 909 (1998), is also on point. Not unlike this case, a claimant sought occupational disease coverage for degenerative changes leading to severe back pain over the course of a long career in heavy labor. Finding insufficient medical testimony to support causation, the court reasoned, following *Dennis*:

> Mr. Ruse must show his disability was a natural incident of the distinctive conditions of his particular employment. Additionally, those distinct conditions must be proven to be the proximate cause of his disability. A worker who alleges an occupational disease is ***required to present competent medical evidence that the disability resulted from distinctive work conditions***. . . . The connection

> between the work and the disability must be made ***through the use of medical evidence*** showing more probably than not, the condition would not have occurred but for the conditions of employment.

Ruse, 90 Wn. App. at 454 (emphasis added). The court then went on to describe the purely medical testimony both sides offered in the record.

Finally, in *Witherspoon v. Dept. of Labor & Industries*, 72 Wn. App. 847, 966 P.2d 78 (1994), a worker's occupational disease claim for meningitis was rejected purely on the basis that the medical testimony presented failed to meet the *Dennis* standard for what arising "naturally" from employment means:

> Jury instruction 12 quotes the *Dennis* definition of "naturally" almost verbatim. IBP does not quarrel with the definition; it argues that, as a matter of law, the evidence here fails the Dennis test.
>
> We agree with IBP. Mr. Witherspoon's meningitis did not come about "as a matter of course as a natural consequence or incident of distinctive conditions of his . . . employment" at IBP. ***Rather, the medical testimony*** was that meningitis is spread by contact with airborne droplets from the mouth and the nose of an infected person. There was no showing that the conditions of Mr. Witherspoon's employment caused him to be in contact with the bacteria any more than he would be in ordinary life or other employments.

Witherspoon, 72 Wn. App. at 851-52 (emphasis added).

Plainly, neither this court in *Dennis* nor the lower courts in the cases that followed, nor the Department, nor the Board of Industrial Insurance Appeals, interpret section .140 or *Dennis* the way the Court of

Appeals interpreted it in this case. Just as is in this case at the Board below, both aspects of section .140's definition of occupational disease, naturally and proximately, while analytically distinct under *Dennis*, are nevertheless routinely proved together only by recourse to competent medical testimony. That is because disease causation is necessarily a medical question under the *Dennis* line of cases. It would be entirely incongruous if medical evidence were required to show a disease was probably caused by employment generally, but not required to show a disease was probably caused by distinctive conditions of the employment specifically.

A consequence of adopting the Court of Appeals holding, then, would be to allow a finding of causation on a claimant's subjective impressions of his or her work conditions, as was rejected in *McClelland*, or as was the case here, on the basis of attending provider testimony where the medical witness admittedly was unfamiliar with the distinctive conditions of employment. *In re Roger A. Street*, BIIA Nos. 1310786, 1421882 (2014) at 3 ("We note that Dr. Peterson acknowledged she had only a general understanding of Mr. Street's work. Dr. Peterson did not opinion directly whether distinctive conditions of Mr. Street's work were different than those in his everyday activities."). The Court of Appeals holding allows and encourages claims to proceed where "[t]here is no

evidence of probative value to remove the question of causal relation from the field of speculation and surmise," *Simpson Logging Co. v. Dept. of Labor & Industries*, 32 Wn.2d 472, 478, 202 P.2d 448 (1949) (quoting *St. Paul & Tacoma Lumber Co. v. Dept. of Labor & Industries*, 19 Wn.2d 639, 642, 144 P.2d 250 (1943)).

Rather, this court should hold that insofar as arising "naturally and proximately" is a causal requirement, and insofar as the cause of a disease is naturally a medical question, then competent medical testimony should be required to show both employment generally, and distinctive conditions of employment specifically, have caused a contended occupational disease.

B. ALLOWING OCCUPATIONAL DISEASE CLAIMS ON LAY TESTIMONY OF CAUSATION THWARTS THE PUBLIC POLICY OF OCCUPATIONAL DISEASE COVERAGE.

That an occupational disease must be demonstrated to arise "naturally and proximately from employment" represents a public policy judgment on the part of the Legislature that diseases that arise outside of work, and outside of a claimant's particular work, are not covered by the workers' compensation system and must be addressed through other disability or health care systems. Because disease causation is inherently a medical question, it supports this public policy to require, as has been the

case since *Dennis*, competent medical testimony to demonstrate that distinctive conditions of employment caused a contended occupational disease. It thwarts this legislative purpose to hold, as the Court of Appeals here, that medical testimony is unnecessary to prove a key element of medical causation.

As representatives of the primary funders of Washington's workers' compensation system, amici employer organizations are very concerned about broadening occupational disease coverage through loosened evidentiary standards in the absence of the give-and-take of the legislative process. For example, according to amici NFIB's Research Foundation 2016 Problems and Priorities Survey of its membership, worker's compensation rates (and associated issues) are a top concern for small business owners, ranking No. 13 out of 75 potential concerns. Holly Wade, *Small Business Problems & Priorities* (NFIB Research Foundation, 2016) at 16, *available at* http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf.

According to a recent comprehensive study of occupational disease claims in Washington ordered by the Legislature, Laws of 2011, 1st Spec. Sess., ch. 37, § 901, it was brought to light that over the last couple decades, despite an overall reduction in the number of workers' compensation claims filed overall, occupational disease claims have risen

as a share of all claims, result in higher benefit payments, keep workers on disability longer, and are more likely to result in orders of total permanent disability, preventing workers from ever working again. Kevin Hollenbeck, et al., *A Study of Occupational Disease Claims Within Washington's Workers' Compensation System* (W.E. Upjohn Institute for Employment Research, 2013) at 82-99 *available at* http://research.upjohn.org/projects/93/.

Unsurprisingly, then, the issue of occupational disease coverage has been typical of legislative "battles engendered by controversies between labor and business over industrial insurance," *Cockle v. Dept. of Labor & Industries*, 142 Wn.2d 801, 833, 16 P.3d 583 (2000) (Talmadge, J., dissenting), with bills introduced nearly every legislative session this decade by advocates of employers or workers to either expand or contract the coverage and causation standards for occupational disease claims. "These issues are bruising in nature." *Id*.

Against this public policy backdrop, amici submit it is important for courts to maintain standards of causation that prevent, or minimize, the risk of cost-shifting from non-occupational factors and conditions into the workers' compensation system. Accordingly, the court should reverse the Court of Appeals' erosion of the evidentiary standards required to show a disease arose naturally and proximately from employment.

VI. CONCLUSION

Consistent with *Dennis* and the lower court decisions since, this court should hold that competent medical testimony is required to demonstrate that a contended occupational disease arose *both* "naturally" *and* "proximately" from employment. Such a holding would align with the understanding of causation requirements by the Department and Board of Industrial Insurance Appeals, as seen in this case below, and would support the public policy judgment of the Legislature that occupational disease coverage exclude conditions that arise outside the distinctive characteristics of one's work.

The Court of Appeals decision should be reversed.

Respectfully submitted this 1st day of May, 2017.

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CERTIFICATE OF SERVICE

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I reside in the State of Washington, am over the age of eighteen, and not a party to this action. My business address is 828 7th Avenue SE, Olympia, Washington, 98501. On May 1, 2017, I served the following:

MOTION FOR LEAVE TO SUBMIT BRIEF OF AMICI CURIAE SEVEN STATEWIDE EMPLOYER ORGANIZATIONS; and

BRIEF OF AMICI CURIAE SEVEN STATEWIDE EMPLOYER ORGANIZATIONS

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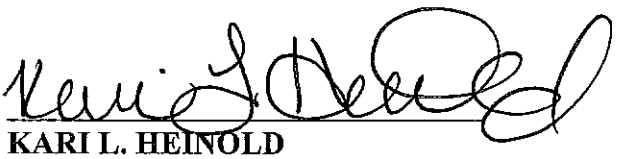
I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed on this 1st Day of May, 2017, at Olympia, Washington.



KARI L. HEINOLD