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No. 93984-5

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

**WEYERHAEUSER'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION**

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Weyerhaeuser submits the following in reply to the brief of Amicus Curiae Washington State Association for Justice Foundation (WSAJF).

A. ARGUMENT

1. WSAJF’s Position Disregards the Causation Issue Created by the “Arises Naturally” From “Distinctive Conditions” Requirement.

WSAJF states the liberal construction doctrine provides the “guiding principle” for interpreting provisions of the Industrial Insurance Act (IIA) and suggests this doctrine is the primary interpretive lens through which the issues in this matter should be resolved. (Amicus 6). The primary purpose of the court’s inquiry is to determine and implement the legislature’s intent in enacting RCW 51.08.140. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). Where the intent of the legislature is clear, the liberal construction doctrine does not apply. *Johnson v. Department of Labor and Industries*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949).

As discussed previously, the legislature’s inclusion of the “arises naturally” language in the occupational disease definition demonstrates the intent not to provide coverage for all conditions that bear a proximate causal relationship to the employment. (CofA,

BR 12-13). If the legislature had intended proximate causation to be determinative of coverage, it very easily could have effectuated that intent by defining “occupational disease” solely by the “arises proximately” element. *Higgins v. Department of Labor and Industries*, 27 Wn.2d 816, 821, 180 P2d 559 (1947). Instead, the legislature determined to place a limitation on coverage by also requiring that the claimed condition “arise[] naturally...out of employment.” In doing so, the legislature adopted terms that were widely understood to present an issue of causation and, more specifically, to address whether the disease was connected to a particular risk in the employment. Larson §§ 6.00, 6.10, at 3-1 to 3-3 (1997). (PFR 10-12).

Neither WSAJF nor claimant has offered any other explanation for what type of issue “arises naturally... out of employment” was intended to address, much less provided any authority for such an alternative interpretation. On the contrary, WSAJF acknowledges that this court’s interpretation of these terms in *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987) “assumes the presence of a causation element in the ‘naturally’ prong.” (Amicus 8-9). In short, it is clear

the legislature intended the “arises naturally” prong to create a causation requirement in addition to proximate causation. The liberal construction doctrine may not appropriately be applied to frustrate that intent. *Johnson, supra*. The questions, then, are what kind of causation issue these terms present and the type of evidence that is necessary to prove such causation.

Despite briefly noting that “arises naturally” deals with causation, the remainder of WSAJF’s argument essentially disregards this fact. WSAJF acknowledges that the terms “arises naturally” add a proof requirement to the occupational disease definition that is distinguishable from proximate causation. (Amicus 8-9). But, WSAJF’s analysis and conclusions do not address the nature of this proof requirement, or comport with it being one of causation.

Similarly, WSAJF concedes that the requirement of “distinctive conditions” necessitates a showing that the worker’s employment conditions were “sufficiently different from activities of everyday life and general employment.” (Amicus 10). And yet, WSAJF does not address or explain in what respect the worker’s

employment conditions must be different or distinct, or what the legislature's purpose was in requiring such distinctiveness.

WSAJF wrongly asserts that the *Dennis* court's rejection of the "peculiar-risk" and "increased-risk" tests reflected a conclusion that the "arising naturally" language has nothing to do with causation, or the causal risks in the employment, and operated as a rejection of a distinctive risk analysis. (Amicus 14-15). As the court noted, the "arising out of" requirement has been implemented "in a number of ways" by various tests. 109 Wn. 2d. at 480. The court addressed only the "peculiar-risk" and "increased-risk" tests in *Dennis*. *Id.* The court's analysis suggests these tests were rejected because they were not compelled by the "arises naturally" language and their application was too restrictive. 109 Wn.2d at 482. The court did not state or imply that the "arises naturally" requirement had nothing to do with causation.

Indeed, as WSAJF initially acknowledged, the court's analysis, and the terms it employed, "assumes the presence of a causation element in the 'naturally' prong." (Amicus 8-9). As discussed previously, the ordinary meaning of the phrases "as a matter of course" and "natural consequence or incident" implicates

a causal risk that would be expected to result in the claimed disease. 109 Wn.2d at 481. (PFR 13-14). The statement that the disease “came about” from “distinctive conditions” of [the worker’s] particular employment” addresses the source or causal factors in the employment and whether those factors are distinguishable from those existing generally in other employments. *Id.* Similarly, the court’s statement that the claimant’s “particular work conditions more probably caused his or her disease...than conditions in everyday life or all employments in general,” reflects a comparison of the causative elements in the claimant’s work conditions with those existing in other employments generally and everyday life. *Id.* Each of these analytical elements reflects a causation analysis and, more specifically, a focus on whether the causal risk in the employment is distinctive to that particular employment.

WSAJF nevertheless asserts that the requirement of “distinctive” work conditions does not involve the causal risk in the employment. (Amicus 15). But, WSAJF does not explain how the employment conditions must be “distinctive” if not with respect to causation, or how any other type of distinctiveness would be

relevant to the statutory terms or the legislature's intent in establishing the "arises naturally" requirement.

WSAJF also erroneously contends that a "distinctive cause" or "distinctive risk" requirement is "no different" than the increased risk test that this court rejected in *Dennis*. (Amicus 15). The "increased risk" test is narrower and therefore more restrictive than the "distinctive risk" test. "Increased risk" addresses only those risks that are *quantitatively* distinct from those existing in daily living and employment generally. A "distinctive risk" includes not only those risks that are quantitatively distinct, but also those that are qualitatively distinct; that is, of a different nature or kind than risks that exist in daily life and employment generally. Further, a "distinctive risk" need not be quantitatively or qualitatively distinguishable to such a high degree as to be "peculiar" or "unique" to the employment. *Dennis, supra*. However, a causal risk is not distinctive if it is common to employment generally or daily life. *Witherspoon v. Department of Labor and Industries*, 72 Wn. App. 847, 851, 866 P.2d 78 (1994); *Gast v. Department of Labor and Industries*, 70 Wn. App. 239, 243, 852 P.2d 319, *rev den* 122 Wn.2d 1024 (1993); *Wheeler v. Catholic Archdiocese*, 65 Wn. App,

552, 567, 829 P.2d 196 (1992), *reversed in part on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994).

The requirement of a distinctive causal risk in the worker's particular employment implements the legislature's purpose not to provide coverage for all diseases having any causal connection to the employment. Instead, coverage is limited to those diseases that have a distinctive causal relationship to employment, so that they can properly be viewed as "occupational" diseases, even if they are not distinctive in such a manner or degree as to be "peculiar" or "unique" to the employment.

WSAJF's contrary analysis and conclusions are inconsistent with the terms of RCW 51.08.140 and this court's analysis in *Dennis*. There, the court stated that "in construing the term 'naturally' in its ordinary sense, the meaning of the term must be tied to the 'arising out of employment' language." 109 Wn.2d at 481. This is also true in determining what proof is required to show the workplace conditions were "distinctive" because the requirement of distinctiveness is derived from the terms "arises naturally."

WSAFJ's treatment of the "distinctive conditions" requirement violates the court's interpretative admonition because it has no analytical connection to the meaning of the terms "arises naturally." WSAFJ's analysis and conclusions essentially propose a nebulous, free-floating concept of "distinctive conditions" that is untethered from its statutory underpinning, so that its meaning is subjectively determined in the eyes of the beholder. This approach defies any objective, consistent application and provides no guidance to fact-finders and litigants. WSAFJ's conception of the "distinctive conditions" test thus creates no more of a standard than Court of Appeals' "logical relationship" test in *Dennis*, which this court rightly rejected. 109 Wn.2d. at 479.

In summary, the requirement that the claimed disease "arise naturally" from the worker's particular employment presents no less an issue of causation than the requirement of proximate causation. As Amici Associated General Contractors *et al.* have noted, the "naturally and proximately" elements of RCW 51.08.140 are considered separately for analytical purposes, but they are interconnected parts of a unitary occupational disease definition. (Amici 7). Both elements are tied to the requirement that the

disease “arise...out of employment,” and therefore both address an issue of causation. Proximate causation requires a “but for” cause and the “naturally” element requires a cause that is “distinctive” compared to employment generally and everyday life.

2. WSAJF’s Conclusion That a Lay Person Can Determine Whether a Medical Condition Arose From Distinctive Employment Conditions Ignores the Complex, Causal Nature of That Issue.

WSAJF acknowledges that expert medical testimony is required on matters involving complex questions of medical causation. (Amicus 11-12). WSAJF appears to conclude, however, that the issue whether a worker’s claimed disease “arose naturally” from “distinctive conditions” of his particular employment does not involve such an issue. (Amicus 13). This conclusion is at odds with WSAJF’s statement that this court’s analysis in *Dennis* “assumes the presence of a causation element in the ‘naturally’ prong.” (Amicus 8-9). WSAJF does not explain how an issue involving “a causation element” could be resolved without any expert medical testimony that addresses the issue.

The facts here illustrate this point. Claimant filed this claim for his low back condition, which has been diagnosed as lumbar spondylosis, a label that encompasses various degenerative

processes in the lumbar spine. There is no dispute that claimant needed to present expert medical testimony to prove his employment was a proximate cause of his condition because only a medical expert is competent to address the many potential non-industrial causes together with the activities in the employment to determine whether claimant's spondylosis would not have developed "but for" the employment exposure.

The question whether the same activities were "distinctive" or distinguishable from exposures in employment generally and everyday life presents no less of a complex issue of causation. The analysis needed to determine whether the activities in a particular employment were causally distinguishable in nature or degree from potential causes in employment generally and everyday life is at least as complex as the issue of proximate causation. WSAJF does not explain how a lay person could possibly be competent to determine whether employment conditions were "distinctive" in this respect.

WSAJF's conclusion that expert testimony is not generally required to prove distinctiveness rests on the unstated premise that the "arises naturally" from "distinctive conditions" question does not

involve medical causation in any respect. As discussed, the statutory language and its interpretive case law refute that premise. To the extent WSAJF has implied medical testimony merely was not necessary here, it's position also is inconsistent with Jury Instruction No. 13, which expressly required expert testimony to prove claimant's condition "*arose naturally* and proximately out of the employment." (Emphasis added) (CP 526).

Finally, WSAJF also suggests that requiring expert testimony to prove the "arises naturally" element would violate the concern this court has expressed about burdensome proof requirements. *Dennis, supra*, 109 Wn.2d at 482, *citing Sacred Heart Medical Center v. Department of Labor and Industries*, 92 Wn.2d 631, 600 P.2d 1015 (1979). (Amicus 16, n. 6). The need to prove natural causation through medical testimony is not appreciably more difficult than proving proximate causation. However, *at a minimum*, a medical expert's testimony must provide some comparison of the causal risks in the claimant's employment with those existing in employment generally and everyday life for a lay trier-of-fact to competently conclude the claimed disease arose from "distinctive conditions" of the particular employment.

Most medical witnesses in workers' compensation hearings are occupational medicine physicians, orthopedists or other practitioners who have many patients who work in a wide variety of employment settings. These providers typically have a general understanding of the types of work activities that their workers' compensation patients perform, and it is not uncommon for them to contrast the claimant's particular work exposure with daily life or other types of employment in explaining their opinions on proximate causation. Such providers are therefore competent to also address whether a particular exposure presented a distinctive causal risk, and requiring such testimony would not be unduly burdensome.

Similarly, claimant's counsel often retain specialists or forensic experts to provide opinions and testimony on the issue of proximate causation when the attending provider is unable or unwilling to do so. It is no more burdensome for them to do so when the attending provider is unable to address the natural causation requirement.

3. WSAJF's Position Regarding the Sufficiency of Dr. Peterson's Testimony Disregards its Fatal Flaws.

WSAJF concludes that Dr. Peterson's testimony was sufficient to satisfy the requirements of RCW 51.08.140 because

she said she was familiar with claimant's particular work conditions and believed that those conditions, rather than everyday wear and tear, contributed to his condition and proximately caused his disability. (Amicus 13). Dr. Peterson's testimony was not sufficient because it was based on a fundamentally flawed understanding of claimant's work activities, and she addressed only the potential causes in claimant's life, not those generally present in other employments.

Dr. Peterson believed that "a lot of [claimant's] work [was] lifting and hefting and moving these huge paper rolls." (CP 319-20). Her testimony was premised on the assumption that every shift claimant worked with 200 to 2500 completed paper rolls that were 40 to 50 inches in diameter, and that he regularly had to manually roll or manhandle these very large rolls. (CP 320). However, claimant conceded on cross-examination that most of the paper cores with which he worked weighed only 2 to 10 pounds, and that heaviest cores were only 25 pounds, which he used only occasionally. (CP 253). And, although claimant initially testified he had manhandled the large completed rolls "dozens of times a day" for many years, he conceded on cross-examination that he did so

only during shut downs that occurred less than daily. (CP 42-43). Claimant's concessions thus refuted the history on which Dr. Peterson (and Dr. Tsirolnikov) relied and therefore destroyed its probative value. *Thiel v. Department of Labor and Industries*, 56 Wn.2d 259, 352 P.2d 185 (1960).

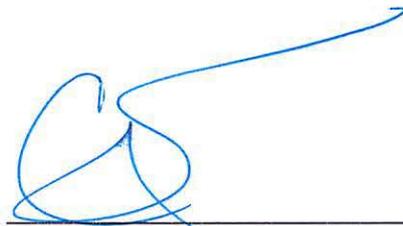
More important, Dr. Peterson never addressed, directly or indirectly, whether claimant's particular work conditions were distinctive to his employment. She addressed only the role of "everyday wear and tear of just living" *in claimant's life* solely in addressing the proximate causation issue. (CP 321-22). Dr. Peterson's testimony neither states nor reflects a comparison of the risks of developing spondylosis from claimant's work conditions with the risks that are common to activities found in employment generally or daily living. As the Board stated, her testimony therefore provides the trier-of-fact no medical basis for finding that claimant's spondylosis arose naturally from distinctive conditions of his particular employment. *RCW 51.08.140; Dennis, supra*. (CP 53, lines 25-27).

B. CONCLUSION

The court should hold that a claimant seeking to establish an

occupational disease must present medical testimony that demonstrates the disease arose naturally out of distinctive causal conditions of his or her employment. The court should conclude that Mr. Street presented no such evidence and therefore reverse the decisions of the Court of Appeals and trial court. The associated awards of attorney fees and costs must also be reversed. The Board's decision, which affirmed rejection of this claim, should be reinstated.

DATED: May 31, 2017.



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CERTIFICATE OF FILING/SERVICE

I certify that I caused to be served the foregoing ANSWER TO BRIEF OF AMICUS CURIAE WSAJF on the following persons by email and by mailing to each of them on May 31, 2017 by first class mail a true copy contained in a sealed envelope, with postage prepaid, and addressed to:

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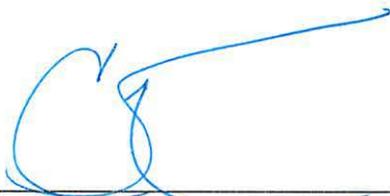
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