

Supreme Court No. 93984-5

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

ANSWER OF RESPONDENT, ROGER STREET, TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AND TO
BRIEF OF AMICI CURIAE SEVEN STATEWIDE EMPLOYER ORGANIZATIONS

Jill A. Karmy, WSBA #34132
Karmy Law Office PLLC
PO Box 58
Ridgefield, WA 98642
(360) 887-6910
jillkarmy@karmylaw.com

Attorney for Roger Street

TABLE OF CONTENTS

	<u>Page</u>
1. AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION	1
2. AMICI CURIAE SEVEN STATEWIDE EMPLOYER ORGANZIATIONS	1
3. ARGUMENT	2
<i>A. Expert medical testimony is not required to prove distinctive conditions of employment.....</i>	2
<i>B. Business amici’s policy argument is at odds with the liberal construction mandate of the Industrial Insurance Act.....</i>	6
<i>C. Business amici and Weyerhaeuser ask for a remedy that has not been preserved in the record on appeal.....</i>	8
4. CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Bremerton v. Shreeve</i> , 55 Wn.App. 334, 777 P.2d 568 (1989).....	4
<i>Brothers v. Pub. Sch. Employees of Washington</i> 88 Wash.App. 398, 945 P.2d 208 (1997).....	8
<i>Dennis v. Department of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	passim
<i>Dept. of Labor & Indus. v. Kinville</i> , 35 Wash.App. 80, 664 P.2d 1311 (1983).....	4
<i>Dept. of Labor & Indus. v. Lyons</i> , 185 Wn.2d 721, 374, P.3d 1097 (2016).....	7
<i>Doty v. Town of South Prairie</i> , 155 Wn.2d 527, 120 P.3d 941 (2005).....	7
<i>Intalco Aluminum v. Department of Labor & Indus.</i> , 66 Wn.App. 644, 833 P.2d 390 (1992), review denied, 120 Wn.2d 1031 (1993).....	4, 5
<i>Johnson v. Rothstein</i> , 52 Wash.App. 303, 759 P.2d 471 (1988).....	8

<i>McClelland v. ITT Rayonier</i> , 65 Wn.App. 386, 828 P.2d 1138 (1992).....	2, 3
<i>Ruse v. Department of Labor & Indus.</i> , 90 Wn.App. 448, 966 P.2d 909 (1998); affirmed, 138 Wn.2d 1, 977 P.2d 570 (1999).....	5
<i>University Village Ltd Partners v. King County</i> , 106 Wash.App. 321, 23 P.3d 1090 (2001), review denied, 145 Wash.2d 1002, 35 P.3d 381 (2001).....	9
<i>Witherspoon v. Dept. of Labor & Indus.</i> , 72 Wn.App. 847, 866 P.2d 78 (1994).....	5, 6

STATUTES

RCW 51.12.010.....	7
--------------------	---

COURT RULES

Civil Rule 50.....	8
Civil Rule 56.....	8

**AMICUS CURIAE
WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION**

Mr. Street agrees with the arguments set forth in the brief of Amicus Curiae Washington State Association for Justice Foundation (WSAJF). In particular, Mr. Street agrees that medical testimony is not required to show that the particular job activities that proximately caused the disease or disease-based disability: 1) constitute distinctive conditions of employment sufficiently different from activities of everyday life and general employment; or 2) are conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace. WSAJF Br., page 6.

**AMICI CURIAE SEVEN STATEWIDE EMPLOYER
ORGANIZATIONS**

As discussed below, while not disputing that medical testimony is required to prove the causal connection between conditions of employment and his low back condition, Mr. Street disagrees with business amici's analysis of several appellate court cases and their policy argument that would gut the liberal construction requirements of the Industrial Insurance Act. Finally, Mr. Street asserts that the remedy sought by business amici and Weyerhaeuser have not been preserved in the record on appeal.

Argument

A. Expert medical testimony is not required to prove distinctive conditions of employment.

Business amici ask this Court to hold that the term “naturally” and “proximately” are “both concomitant elements of establishing a disease was proximately caused by employment.” Amici Br., at 7. Amici further elaborate that the legal standard should be that a worker must “show both employment generally, and distinctive conditions of employment specifically, gave rise to the disease.” *Id.*

While there may be some understandable overlap between the “naturally” and the “proximately” requirements, the arguments of business amici do not directly address the issue on appeal: whether a worker must present medical testimony to establish distinctive conditions of employment.

Business amici’s reliance on *McClelland v. ITT Rayonier*, 65 Wn.App. 386, 828 P.2d 1138 (1992) is misplaced, and frankly, proves the value of lay testimony when proving the “naturally” requirement. Robert McClelland filed a claim for mental stress after 25 years of pulp mill employment, where he worked in a series of jobs increasing in complexity and responsibility. *Id.*, at 387. He testified that he perceived himself as unable to handle the work and became

preoccupied with making a mistake. *Id.* However, his supervisor testified that his jobs were not unusually stressful or any more stressful than similar production-type jobs found generally in the industry, *to which McClelland agreed. Id.*, at 389. (emphasis added). Division 2 then held that “proof in our occupational cases has, in each instance, been objective in character; a condition in the plant or industry that someone else besides the claimant was aware of and could describe.” *Id.*, at 392.

Mr. Street’s case differs in significant ways: this is not a mental health claim where a worker’s subjective belief about his work conditions comes into play; Mr. Street’s son and co-worker also testified about the work conditions; Mr. Street’s supervisor agreed that there were times that Mr. Street’s job was very physical, involving manhandling paper rolls that were “800 to 1500 pounds” (CP, at 300); and Mr. Street did not agree with the testimony of his supervisor when he testified Mr. Street’s job duties were primarily light in nature. Business amici fail to inform this Court that the worker’s concession that “responsibility in general is stressful for him” was discussed at length by the court in *McClelland*, wherein it ultimately held that McClelland’s “stresses were, unfortunately, self-inflicted...” *Id.*, at 394.

Business amici also reference *Bremerton v. Shreeve*, 55 Wn.App. 334, 777 P.2d 568 (1989) and state that it was a post-*Dennis* decision. Amici Br., at 9. To the contrary, the jury instruction regarding the “naturally” prong in that case was based on a pre-*Dennis* decision requiring proof of a “greater risk” of contracting a disability-based disease. *Dept. of Labor & Indus. v. Kinville*, 35 Wash.App. 80, 664 P.2d 1311 (1983). *Dennis* subsequently rejected the “greater risk” test contained in *Kinville*. *Dennis*, at 338-339. Other than a disagreement over whether *Dennis* applied retroactively, the focus of the dispute in *Shreeve* was on the proximate cause requirement and sufficiency of evidence. In that case, the worker presented the testimony of “three doctors to support her contention that her kidney disease arose “proximately” out of her employment.” *Id.*, at 336. (emphasis added). While the court relied on medical evidence on the issue of proximate causation, it cited to non-medical lay testimony to find the claim compensable, holding that the condition of employment “did not exist solely in Ms. Shreeve’s imagination.” *Id.*, at 342.

Intalco Aluminum v. Dept. of Labor & Indus. is similarly distinguishable from Mr. Street’s case insofar as *Intalco* involved the sufficiency of evidence as to **proximate causation**, which is not

applicable to the issue on appeal. 66 Wn.App. 644, 647, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993). The “naturally” requirement is discussed in dicta briefly: “these claimants’ exposure to a variety of neurotoxins in the pot room is a distinctive condition of employment.” *Id.*, at 656. Similarly, business amici’s reliance on the court of appeal’s decision in *Ruse v. Dept. of Labor & Indus.*, is misplaced.¹ “The medical testimony before the Board did not establish that hard work or long term heavy labor **proximately caused** Mr. Ruse’s medical condition.” 90 Wn.App. 448, 454, 966 P.2d 909 (1998). The court of appeals found that his heavy labor was not distinctive, but this Court, after granting review, declined to address the issue of distinctive conditions because neither the Board nor trial court had issued findings related to the distinctive conditions issue. “[i]t was entirely unnecessary for the Court of Appeals to reach the issue because it found – as did the superior court – that Ruse failed to prove the causal connect between his disability and his employment.” *Ruse*, 138 Wn.2d 1, 8, 977 P.2d 570 (1999).

Finally, business amici cite to *Witherspoon v. Dept. of Labor & Indus.*, an airborne pathogen/meningitis case, to support their

¹ Business amici cite to the court of appeals decision solely, but *Ruse* was affirmed by this Court in *Ruse v. Department*, 138 Wn.2d 1, 977 P.2d 570 (1999).

argument. 72 Wn.App. 847, 866 P.2d 78 (1994). Witherspoon's claim was not rejected purely on the basis of medical testimony. Rather, the court found that being coughed on by a co-worker was merely coincidental to claimant's work. *Witherspoon* is factually distinguishable from Street. Mr. Street's heavy labor, including manhandling paper rolls, was not merely coincidental to his work; it was his work.

Mr. Street does not dispute that he must show that his disease was probably caused by distinctive conditions of employment. However, what constitutes a distinctive condition of employment is not a medical question related to proximate causation. Rather, it is a question of fact best left to the jury.

B. Business amici's policy argument is at odds with the liberal construction mandate of the Industrial Insurance Act.

Business amici's policy argument is at odds with the underlying purpose of the Industrial Insurance Act ("IIA"). Amici argue "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." Amici Br., page 15. While Mr. Street agrees that claims with no relationship to the work environment should be excluded from

coverage, amici's policy argument disregards the purpose of the IIA.

In a recent decision, *Dept. of Labor & Indus. v. Lyons*, this Court recited the policy behind implementation of the IIA:

The IIA was a “grand compromise” that granted immunity to employers from civil suits initiated by their workers and provided workers with a swift, no-fault compensation system for injuries on the job. *Dept. of Labor & Indus. v. Lyons*, 185 Wn.2d 721, 733, 374 P.3d 1097 (2016). Although the initial passage applied only to extrahazardous work, in 1971 the legislature amended the IIA to encompass *all* employments... within the legislative jurisdiction of the state.” *Id.* (emphasis added)(citing *Doty v. Town of South Prairie*, 155 Wn.2d 527, 531, 120 P.3d 941 (2005)). The IIA is broad in scope and contains a mandate of liberal construction for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Id.*, at 734; RCW 51.12.010. The liberal construction of the IIA necessitates that all doubts be resolved in favor of coverage. Further, the guiding principle when interpreting provisions of the IIA is that it is a remedial statute that is “to be liberally construed in order achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Id.* (citing *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

Business amici's argument, and Weyerhaeuser's argument, would take this state back to the era of coverage only for extrahazardous, or “greater risk.” employments. Given the stated legislative policy of liberal construction and coverage of *all* employments, amici's policy argument favoring cost-cutting and reduction in the number of occupational disease claims should fail.

C. Business amici and Weyerhaeuser ask for a remedy that has not been preserved in the record on appeal.

Business amici (and Weyerhaeuser) ask for a remedy that has not been preserved in the record on appeal. On May 8, 2015, Weyerhaeuser filed what it labeled a Motion for Judgment as a Matter of Law with the trial court, prior to empaneling of the jury. CP, at 445. In this motion, Weyerhaeuser asked the trial court to rule that Mr. Street had not made a prima facie case that his condition arose naturally from distinctive conditions of employment. CP, at 447. A CR 50 motion can only be made "...during trial..." and after "...a party has been fully heard with respect to an issue..." CR 50. Because the jury was not yet empaneled, Weyerhaeuser's pre-trial motion is properly classified as a Motion for Summary Judgment under CR 56. Generally, a denial of summary judgment motion is not reviewable by an appellate court following a jury verdict "if denial was based on a determination that material facts are disputed and must be resolved by the fact finder." *Brothers v. Pub. Sch. Employees of Washington*, 88 Wash.App. 398, 409, 945 P.2d 208 (1997); *Johnson v. Rothstein*, 52 Wash.App. 303, 304, 759 P.2d 471 (1988). However, such an order is subject to review if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of

law. *University Village Ltd Partners v. King County*, 106 Wash.App. 321, 324, 23 P.3d 1090, *review denied*, 145 Wash.2d 1002, 35 P.3d 381 (2001).

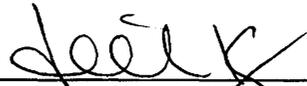
On August 3, 2015, the trial judge denied Weyerhaeuser's motion finding that Mr. Street presented sufficient expert medical testimony to present a jury question as to whether Mr. Street's low back condition arose naturally and proximately out of his employment with Weyerhaeuser. CP, at 477-479. This necessarily indicates that material facts as to causation were disputed, which is also clear from the record and briefing before this Court. Weyerhaeuser did not propose any jury instruction asking the jury to find that medical expert testimony was required to prove distinctive conditions of employment; Weyerhaeuser did not object to the jury instructions given by the court; and Weyerhaeuser did not file a post-verdict motion before appealing to the appellate court. As such, the issue raised by business amici, and Weyerhaeuser, has not been properly preserved on appeal.

Conclusion

As the court of appeals held, *Dennis* and the opinions that follow do not support the argument that occupational disease claimant's are required to present medical testimony showing that his

or her work conditions are distinctive to his or her particular employment. Mr. Street respectfully asks this Court to affirm the Court of Appeals decision finding that substantial evidence supports the verdict of the jury.

RESPECTFULLY SUBMITTED this 31st day of May, 2017.



Jill Karmy, WSBA #34132
Attorney for Respondent, Roger Street

CERTIFICATE OF FILING AND SERVICE

I certify that I caused to be served the foregoing ANSWER OF
RESPONDENT, ROGER STREET, TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AND
TO BRIEF OF AMICI CURIAE SEVEN STATEWIDE EMPLOYER
ORGANIZATIONS on the following persons by electronically mailing, each of
whom previously agreed to receive service via electronic service, on May 31,
2017:

Washington State Supreme Court
Supreme@courts.wa.gov

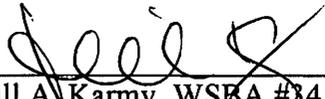
Craig Staples
craigstapleslaw@comcast.net

Anastasia Sandstrom, AAG
AnaS@atg.wa.gov

WSAJ Amicus Foundation
danhuntington@richter-wimberley.com
valeriemcomie@gmail.com

Amici Curiae Seven Statewide Employers
Attn: Kris Tefft
Kris.Tefft@WSIAssn.org

Dated this 31th day of May, 2017.



Jill A. Karmy, WSB# 34132
Attorney for Mr. Street