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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

ROGER A. STREET

Respondent,

v.

WEYERHAEUSER COMPANY,

Appellant,

BRIEF OF RESPONDENT

Respectfully Submitted By:
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I. INTRODUCTION

A jury in the Cowlitz County Superior Court, having heard all of the evidence and having been instructed on the appropriate law, rendered a verdict finding that claimant's low back condition arose naturally and proximately out of the distinctive conditions of his employment with Weyerhaeuser. Weyerhaeuser appeals that determination. This Brief of Respondent sets forth the facts and evidence showing that the jury's verdict was supported by substantial evidence and should be affirmed.

II. STATEMENT OF THE CASE

A. Statement of Procedure

Claimant agrees with the Statement of Procedure as set forth in Weyerhaeuser's Brief of Appellant.

B. Statement of Facts

Claimant takes exception to the argumentative nature of the Statement of Facts contained in Weyerhaeuser's Brief of Appellant. RAP 10.3(a)(5). The claimant specifically takes exception to the assertion in the Statement of Facts that claimant's testimony "addressed very little of the specific of such work" and "no medical testimony related claimant's low back condition to that work." Appellant Brief 4.

Claimant, a 59-year old man at the time of testimony, worked his entire career for Weyerhaeuser. CP 218-219. He first worked in the woods logging. CP 220-227. In 1991, claimant moved into a mill position with a paper company, Norpac, which is a Weyerhaeuser subsidiary. CP 227-228. In these mill positions, referred to as 6th hand, 5th hand, 4th hand and 3rd hand, claimant would perform a lot of twisting, turning, bending and stooping. CP 231. Claimant discussed having to bend over, pull, and sand up to 800 paper rolls per day. CR 233-234. He described "manhandling" these paper rolls dozens of times per day in the first ten years of his employment. CP 237. These rolls were estimated to weigh 1000 pounds. CR 261. Claimant went on to describe his job duties during machine breakdowns, which included being down on his hands and knees, manhandling rolls. CP 243-244.

Claimant acknowledged having back issues spanning most of his employment with Weyerhaeuser, but not having had any type of recreational accident outside of work that would have injured his back. CP 246. He also acknowledged that with the dawn of automation, the job became less physically demanding. However, the first ten years he was on the physically demanding winder job 90-percent of the time. CP 260.

Claimant's son, Jeffrey Street, a Washington State Trooper, also testified. CP 270. Jeffrey Street worked at Weyerhaeuser for a summer. He testified having observed one of the machine breakdowns and the physical demands involved in climbing up and down over the machines. CP 271-272. He also testified that these breakdowns required crawling on cement to get a roll back on the machine. CP 272-273.

Weyerhaeuser presented the testimony of Richard Moore who supervised claimant for "two to five, total" years. CP 279. Mr. Moore testified that during the years that claimant worked for him, he worked in a lighter demand stockroom helper position 75-percent of the time. CP 297. He acknowledged that during the early years, the paper machine was not running well and the paper would not go to the winder. He started to describe a process whereby the paper had to be cut by hand. CP 297. On cross-examination, Mr. Moore acknowledged that claimant would be manhandling rolls weighing between 800 pounds to 1500 pounds. CP 300.

Dr. Patricia Peterson, a board-certified internal medicine physician, testified on behalf of claimant. She has been his primary care physician for 20 years. CP 313-315. Dr. Peterson described claimant as a rough and tough guy who only came in when he had a particular

issue. CP 316. Dr. Peterson was familiar with claimant's jobs throughout the years, describing them as managing and moving huge rolls of paper, doing some computer work, all during a 12-hour shift, day after day. CP 319-321.

Dr. Peterson testified that the nature of claimant's work was at least a part of his current back problems, diagnosed as chronic low back pain related to degenerative arthritis and degenerative disc disease of the spine. CP 321, 323. Dr. Peterson explained that the degenerative disc disease by itself is not the problem; the problem arises when some type of trauma renders that condition symptomatic. CP 340. She further testified that his particular work contributed to the his painful back condition as opposed to "everyday wear and tear of just living." CP 322. Dr. Peterson testified that his condition at this point required treatment by way of physical therapy, neurosurgical consultation, pain specialist consultation and perhaps injections. CP 324. She was unwilling to state that aging alone causes the symptomatic degenerative conditions from which claimant suffers. CP 346-347.

Dr. Peterson gave all of her opinions on a more probable than not basis. CP 326.

Dr. Yuri Tsirulnikov also testified. He is a pain management specialist and saw the claimant about five to six times in 2013, including several visits to administer injections. CP 362-364, 372. He diagnosed claimant with chronic degenerative changes in the spine, inflammation of the nerve roots called radiculitis, spinal stenosis, lumbar spondylosis and facet arthopathy. CP 365-366. Dr. Tsirulnikov testified that, although he could not determine the extent of contribution, he believed claimant's work condition was at least, in part, the reason for his back conditions. CP 367-368.

On cross-examination, Weyerhaeuser asked the doctor to assume claimant's work involved only "occasionally lifting up to 25 pounds, not often he would lift up to 50, and very rarely more than that." CP 382. Dr. Tsirulnikov testified that claimant's work activities likely contributed to his back condition.

On cross-examination, Dr. Tsirulnikov reiterated that hard labor likely contributed to back problems, along with other factors. CP 384. He was then asked again on redirect "on a medically more probable than not basis, do you believe that the work he was doing was at least a factor in his back conditions?" The doctor answer, "Like I said, before, yes. But again, I don't know to what extent." CP 390.

Lastly, Dr. Thomas Rosenbaum, a neurosurgeon who examined claimant one-time in 2014 at the request of Weyerhaeuser's attorney, testified. CP 401. Dr. Rosenbaum's opinions were based on his belief that claimant's job did not involve hard labor and only occasionally required him to move paper rolls or address paper jams. CP 438. He testified that claimant's particular work probably had not contributed to his condition because it was fairly light in comparison to much of hard, physical labor. CP 427, 441-443. Dr. Rosenbaum testified that "everybody's work is distinctive, you know, and different." CP 425.

Dr. Rosenbaum acknowledged medical literature finding a relationship between degenerative disc disease and physical exertional activity, but he did not believe those studies to be convincing. CP 415. He also testified that if there was any contribution from exertional work activities, it was between two to three percent. CP 433-434.

III. STANDARD OF REVIEW

In an appeal of a Board of Industrial Insurance Appeals (Board) decision, the superior court holds a de novo hearing but does not hear any evidence or testimony other than that included in the Board record. *Grimes v. Lakeside Industries*, 78 Wn.App. 554, 560, 897 P.2d 431 (1995); RCW 51.52.115.

In all court proceedings under Title 51 RCW, the findings and

decisions of the Board are prima facie correct and the burden of proof is on the party challenging them. RCW 51.52.115. The Board's decision is prima facie correct and a party attacking the decision must support its challenge by a preponderance of the evidence. *Ravsten v. Department of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). On review, the superior court may substitute its own findings and decision for the Board's only if it finds " 'from a fair preponderance of credible evidence', that the Board's findings and decision are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wn.App. 386, 390, 828 P.2d 1138 (1992).

In this appeal, "review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Young v. Department of Labor & Indus.*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996); *Ruse v. Department of Labor & Industries,* 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R & G Probst v. Department of Labor & Indus.,* 121 Wn.App. 288, 293, 88 P.3d 413, *review denied*, 152 Wash.2d 1034, 103 P.3d 201 (2004).

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IV. ARGUMENT

RCW 51.04.010 assures "sure and certain for relief for workers injured in their work..." This Industrial Insurance Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. RCW 51.12.010; *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979).

A. The Trial Court's Ruling Is Supported By Substantial Evidence That Claimant's Low Back Condition Should Be Allowed As An Occupational Disease.

RCW 51.08.140 defines an occupational disease as "such disease or infection as arises naturally and proximately out of employment..." The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment. *Dennis v. Department of Labor & Indus.,* 109 Wn.2d 467, 477, 745, P.2d 1295 (1987). Further, the Court has held that an occupational disease can result from a symptomatic lighting up of a pre-existing condition.

Miller v. Department of Labor & Indus., 200 Wash. 674, 682-83, 94 P.2d 764 (1939).

It does not appear that Weyerhaeuser is challenging the sufficiency of evidence as to the proximate cause throng or lighting up of a pre-existing condition of this inquiry. As such, the main focus of Respondent's Brief will be on the "naturally" prong of this standard.

1. The worker established through testimony of his attending physician that his low back condition was proximately caused by the distinctive conditions of his employment with Weyerhaeuser.

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 her or her employment. *Dennis v. Department of Labor & Indus.,* 109 Wn.2d at 481. The Court held that this inquiry revolves around a showing that particular work conditions more probably caused his or her disease than conditions in everyday life or all employment in general; the disease or disease must be a natural incident of conditions of that worker's particular employment; and the conditions causing the disease must be

conditions of employment as opposed to conditions coincidentally occurring in his or her workplace. *Id.*

In *Dennis,* the Court held there was sufficient evidence to present the case to a jury where the record consisted of Dennis' attending physician's testimony that while all people are susceptible to osteoarthritis, some may be more susceptible than others; he stated the disease does not always become symptomatic; and that osteoarthritis is presumably related to wear and tear. The attending physician in that case also testified that more probably than not Dennis' repetitive use of tin snips made the osteoarthritis in his wrists symptomatic and disabling and that it was reasonable to assume that the localization of pain his wrists was related to his occupation. *Id.,* at 483.

The record in this case is similar to *Dennis.* The attending physician, Dr. Patricia Peterson, has treated claimant for 20 years. CP 315. She testified about her understanding of claimant's job, which included managing, lifting and moving huge rolls of paper. CP 319-320. She testified that claimant's work was "at least a part of his current condition." CP 321. Dr. Peterson was asked why claimant's work in particular was involved rather than everyday wear and tear

of life. CP 322. She discussed the role that repetitive heavy labor plays into the claimant's back condition. CP 323. Dr. Peterson further testified that extreme repetition of handling paper rolls throughout the long workday was a factor in claimant's back condition. CP 355.

Following this testimony, the jury was instructed properly on the elements required to prove an occupational disease claim. CP 495. The trial court also gave a separate instruction on the "naturally" element of an occupational disease claim. CP 496. Weyerhaeuser did not object to either of these jury instructions.

2. The trial court properly gave consideration to the attending physician regarding testimony as to causal connection of work activities and claimant's low back condition.

The testimony of an attending physician is to be given special consideration. *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). It was reasonable for the jury to infer from the testimony of the attending physician that the claimant met his burden of proof as it relates to the "naturally" element. On this ground alone, this case can be distinguished from the case cited by Weyerhaeuser involving heavy manual labor. *Ruse v. Department of*

Labor & Indus., 138 Wn.2d 1, 977 P.2d 570 (1999). Weyerhaeuser cites to the *Ruse* case for the proposition that "heavy labor" and "hard work generally" are found in numerous employments and life in general. Appellant Brief 18. The Court in *Ruse* specifically agreed that such an "analysis improperly suggests hard work or heavy labor could never constitute a distinctive condition." *Id.,* at 8. Nonetheless, the Court declined to address the distinctive conditions issues because it was not properly before the Court of Appeals. *Id.*

This case is distinguishable. Dr. Peterson, the attending physician, testified that claimant's condition was not due solely to age, but that his work activities were also a factor. The jury was properly instructed as to the attending physician consideration and no objection was made by Weyerhaeuser. CR 501.

3. Weyerhaeuser incorrectly asks this court to require expert testimony as to the term "distinctive conditions."

It appears from Weyerhaeuser's arguments made thus far that it seeks this courts ruling that a worker must bring in a medical expert to testify that his or her work conditions are distinctive. Washington law has never required such a threshold determination. Weyerhaeuser argues that a determination as to what constitutes a distinctive condition of employment must be a medical determination.

Appellant Brief at 16. Determining whether work conditions are distinctive to a particular employment is not a medical determination. Rather, it a question of fact to be determined by the trial court.

In reviewing whether a claimant has met the "naturally" requirement of the test in prior cases, the courts have looked at testimony from the workers about their actual job duties. For instance: whether remodels were particular to just law offices; whether a cough resulting in meningitis was particular to a slaughterhouse; and whether needle pricks in a hospital resulting in hepatitis were commonly seen in non-work settings. *Potter v. Department of Labor & Indus.*, 172 Wn.App. 301, 289 P.3d 727 (2012); *Witherspoon v. Department of Labor & Indus.*, 72 Wn.App. 847, 866 P.2d 78 (1994); *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 600 P.2d 1015 (1979). Certainly, in the *Dennis* case, there was no medical testimony stating that snipping was a distinctive condition. Rather, the actual conditions of claimant's employment in *Dennis* were derived from claimant's own testimony.

In the present case, there was a plethora of testimony regarding claimant's job duties with Weyerhaeuser. Claimant testified that his job was very physically demanding and involved manhandling one-thousand pound paper rolls. CP 237, 261. The job also involved

significant twisting, turning, bending, and stooping. CP 231. Claimant's supervisor, on the other hand, diminished the amount of heavy labor the claimant's job required. Importantly, Mr. Moore only directly observed claimant's job for "two to five years" out of his entire career with Weyerhaeuser. CP 279. The jury clearly chose not to believe the testimony of the claimant's supervisor. This court is not in a position to make credibility determinations on appeal.

Weyerhaeuser further assumes that because its one-time reviewing medical witness, Dr. Rosenbaum, was willing to say that claimant's job was not distinctive, claimant has not met his burden of proof. This argument is a mixing of the "proximately" and "naturally" requirements. Regardless, Dr. Peterson's testimony that claimant's "particular work as opposed to everyday wear and tear of just living" is more than sufficient medical testimony to allow a jury to infer the requisite proof, if such medical connection was required.

Claimant does not suggest medical testimony is not required to establish entitlement under the "naturally " prong of the test. Rather, no Washington court has required medical testimony to define the word "distinctive." If such expert testimony was required, it can certainly be said that the worker is an expert as to the conditions of

his or employment. In this case, claimant adequately and thoroughly addressed the heavy labor portions of his job. His attending physician then addressed the role those activities played into his current back condition. As in *Dennis,* this testimony was sufficient to allow a jury to infer that claimant's disabling back condition arose naturally and proximately out of his employment.

B. <u>Claimant Is Entitled To Fees And Costs Before The Superior Court</u>

RCW 51.52.130 authorizes attorney fees and costs when a claimant prevails on appeal. This section holds that "on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary...a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court." The section goes on to further require payment of fees of medical and other witnesses.

The claimant prevailed on appeal before the superior court. As such, the award of attorney fees and costs should be affirmed.

C. <u>Claimant Is Entitled To Fees And Costs Before This Court.</u>

RCW 51.52.130 also authorizes attorney's fees and costs when a claimant prevails on appeal to this court. This section states in relevant part, "...in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to

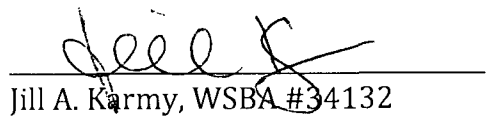
relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court." The claimant asserts his right to submit a cost bill for reasonable fees and costs should the trial court verdict be upheld and his right to relief is sustained.

V. CONCLUSION

The verdict of the jury finding that claimant's low back condition arose naturally and proximately out of his employment should be affirmed. There was sufficient evidence to submit this case to the jury and the jury was instructed properly on the law. Based on the testimony as a whole, the jury properly inferred facts at issue in this case and arrived at a verdict that flows from those facts.

The claimant requests the attorney fees and costs awarded at the trial court be upheld, as well as an award be granted for attorney fees and costs before this court.

Dated this 26th day of May, 2016.



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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have made service of the, Brief of Respondent by causing the same to be deposited in the United States Parcel Service, postage prepaid, in Ridgefield, Washington on Thursday, May 26, 2016, addressed to:

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