

Supreme Court No. 93984-5

Court of Appeals, Division One, No. 75644-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT, ROGER STREET

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Issue for Review

According to this Court's website¹ as of April 27, 2017, the issue on which review was granted is as follows:

Whether a worker seeking industrial insurance benefits for a claimed occupational disease must present expert medical testimony that the disease "arises naturally" out of employment within the meaning of RCW 51.08.140.

Mr. Street agrees with this Court's tentative statement of the relevant issue, though (as discussed *infra*) he also believes that this question was answered in the negative in *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 600 P.2d 1015 (1979).

Statement of the Case

Mr. Street respectfully refers this Court to the Statement of the Case in his Court of Appeals Brief of Respondent.

Standard of Review

This Court's review in a workers' compensation case is limited to examining the record to see whether substantial evidence supports the superior court's findings of fact and whether the superior court's conclusions of law flow from these findings. *Ruse v. Department of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The record is viewed in the light most favorable to the party who prevailed in

¹ Mr. Street acknowledges that the issue listed on the Court's website is subject to change and is not binding.

superior court: here, Mr. Street. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn.App. 475, 485, 40 P.3d 1221 (2002).

Supplemental Argument

A. The “arises naturally” requirement of the occupational disease statute presented an issue of causation under unchallenged Jury Instruction No. 12.

Although Weyerhaeuser argues at length about this issue, Jury Instruction No. 12, to which neither party objected, paraphrases portions of the analysis in *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987):

“Arises Naturally” means that a worker must show that his particular work conditions more probably than not caused or aggravated his physical condition that did activities in everyday life or all employments in general.

CP 524. This instruction is the law of the case, resolving Weyerhaeuser’s first issue.

B. Mr. Street proved that his low back condition “arose naturally” from the distinctive conditions of his employment.

1. “Arose naturally” does not always require medical testimony.

This Court has already rejected Weyerhaeuser’s argument that “arose naturally” always requires medical testimony in the context of an occupational disease. See *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 636-7, 600 P.2d 1015

(1979):

[C]ausation is usually shown by the eliciting of medical opinions upon the particular issue, but we do not read our cases as requiring in every case and under any and all circumstances the production of a medical opinion upon the ultimate issue. It is sufficient if the medical testimony shows the causal connection. If, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that the causal connection exists, we know of no principle which would forbid the drawing of that inference.

Sacred Heart thus resolves the question presented. *Weyerhaeuser* has not asked this Court to overrule it, and it is both correct and helpful.

In addition, Mr. Street urges this Court not to adopt a bright line test that would always require medical testimony to prove that a condition “arose naturally” from the distinctive conditions of employment, for several reasons. The Industrial Insurance Act (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; *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635. The Act declares that “sure and certain relief for workers...is hereby provided ...to the exclusion of every other remedy.” RCW 51.04.010. This Court has previously examined the history of the Act, which was the result of a compromise between

employers and workers. Workers gave up common law remedies and would receive less, in most cases, than they would have received in a civil action. In exchange, the worker would be sure of receiving the lesser amount without having to fight for it. *Dennis*, at 469, citing *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916).

And under Washington Evidence Rule 702,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In all other circumstances, the trier of fact is deemed qualified to render ultimate findings.

Finally, a Court is required, whenever possible, to give effect to every word in a statute. *Hanson v. Tacoma*, 105 Wn.2d 864, 871, 719 P.2d 104 (1986). The term “naturally” is not defined in the Act. In such cases, the term must be given its plain and ordinary meaning unless a contrary intent appears. *In re: Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). Unlike the term “proximately,” the word “naturally” is not a legal term of art. “Naturally” is defined, “as might be expected from the circumstances.” WEBSTER’S THIRD NEW IN’L DICTIONARY 1507 (1993).

Taking Mr. Street's case as an example, it defies logic to suggest that a jury cannot determine, factually, that manhandling paper rolls weighing 1,000 pounds and repetitively loading "cores" weighing 1.5 to 15 pounds are distinctive conditions of work beyond those required in everyday life, or of employments in general. Further, these activities *might be expected from the circumstances* to cause, aggravate, or contribute to a low back condition. Such a finding is well within the ken of the average juror, requiring no expert opinion.

One negative consequence of Weyerhaeuser's bright-line rule would be that all treating physicians must become experts as to job duties that exist in all employments in general, or testify as to what constitutes activities of daily living, versus distinctive job duties. Many claimants would be barred from filing allowable occupational disease claims because their treating physicians would balk at such onerous requirements. Such questions fall outside the usual scope of their medical expertise. One must remember that a treating physician's primary goal is to diagnose and heal.

While one-time defense medical examiners may be perfectly comfortable issuing opinions as to what constitutes a distinctive condition of employment, that is not always a medical issue:

It is generally held that the evidence in a workmen's

compensation case will be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue or provide a basis from which they reasonably may be inferred.

Sacred Heart, 92 Wn.2d at 635 (citing 82 Am.Jur. 2d Workmen's Comp. § 533 (1976)). This Court should reject Weyerhaeuser's unworkable and ill-advised bright-line rule.

2. Mr. Street presented expert medical testimony that his low back condition arose naturally and proximately out of the distinctive conditions of his employment.

In the unlikely event that this Court overrules *Sacred Heart*, Mr. Street did present expert testimony on the issue, and so must still prevail. Occupational disease is defined as, "such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. *Dennis* is the leading case:

[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.

Dennis v. Department of Labor & Indus., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

In *Dennis*, this Court found sufficient evidence to present the case to a jury, where Dennis' attending physician testified that while all people are susceptible to osteoarthritis, some may be more susceptible than others; that the disease does not always become

symptomatic; that osteoarthritis is presumably related to wear and tear; 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 in his wrists was related to his occupation. *Id.*, at 483.

The record here is quite similar. Mr. Street's attending physician, Dr. Patricia Peterson, is board-certified in internal medicine and has been Mr. Street's primary care physician for 20 years. CP 313-315. Dr. Peterson described him as a "rough and tough" guy who came in only when he had a particular issue. CP 316. She was familiar with his jobs throughout the years, describing them as managing and moving huge rolls of paper, and doing some computer work, all during a 12-hour shift, day after day. CP 319-321.

Dr. Peterson was asked her opinion as to the causal connection between Mr. Street's work with Weyerhaeuser and his low back condition:

Q: ...Doctor, do you believe that the nature of Mr. Street's work is at least a part of his current condition?

A: Yes, I do.

Q: And why is that?

A: Well, degenerative disc disease occurs in many, many, many, many people. And he has

degenerative disk disease in a number of places...but he doesn't have pain everywhere that he has disk disease. He has pain localized to his low back... Why doesn't it all hurt? I believe it hurt in the areas where he'd had injury, whether or not it was, you know, one huge injury or whether it was cumulative, small things...[a]nd I believe that these multiple insults certainly can accumulate over time, much the same as you think of carpal tunnel... [i]t's a repetitive use sort of thing that comes from the buildup of cartilage and the bone, and to the point where it finally pinches the median nerve to cause symptoms. The same kind of thing can occur in other sorts of – parts of the body. Spinal stenosis is something else that can occur over time.

Q: And why in particular the kind of work he did as opposed to everyday wear and tear of just living?

A: Well, he's using a lot of his body weight. If you're pushing these rolls off, you're using your abdominal muscles. **You're using your back.** You're using all of yourself in that. I'm sitting in a chair probably half the time that I'm doing my work. I'm not doing physically strenuous work. **And people who use the body parts that are required in their job tend to wear those parts out, or they start becoming injured or painful just because of repetitive use.** We see chronic bursitis, for example, more people in their dominant arm than their nondominant arm, unless they happen to have a job where they're using their arms equally. But most of the time you see things in the dominant side in extremity issues.

CP 321-23 (emphases added). Dr. Peterson gave all of her opinions on a more probable than not basis (CP 326):

Q: ...Doctor, has all of your testimony today been given on a medically more probable than not basis?

A: Yes, sir.

And Dr. Peterson reiterated her opinions on cross (CP 337-38):

Q: Now, it's my understanding that you relate Mr. Street's condition to his work on the basis just of a cumulative wear and tear over the years doing heavy labor per your understanding at work; is that right?

A: Yes.

Q: When you say that he engaged in heavy labor, is it your understanding from him that he was lifting things in the 50 plus pound range?

A: Not necessarily lifting. Moving things. Moving heavy things.

Dr. Peterson's testimony is like the testimony described in *Dennis*. It has long been the practice in this state to give the testimony of a treating physician special consideration because that doctor is not merely a hired expert. *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Intalco Aluminum v. Department of Labor & Indus.*, 66 Wn.App. 644, 654, 833 P.2d 390 (1992). The treating physician's opinion is itself sufficient evidence to support a determination of causation. *Intalco*, 66 Wn.App. at 654-55. Recently, this Court held that it was reversible error for the trial court to refuse to give the "attending physician" instruction in certain circumstances. *Clark County v. McManus*, 185 Wn.2d 466, 476, 372 P.3d 764 (2016).

The jury in this case was given this “attending physician” instruction, to which neither party objected. CP 529. The jury can and did believe Dr. Peterson over Weyerhaeuser’s defense medical examiner, Dr. Rosenbaum, a one-time medical examiner hired by Weyerhaeuser, who based his opinions on his belief that Mr. Street’s work fell into the “light” category. CP 442.

Mr. Street also presented the testimony of a second treating physician, Dr. Yuri Tsurulnikov. He is a pain management specialist who saw Mr. Street about five to six times in 2013, including several visits to administer injections. CP 362-364, 372. He diagnosed Mr. Street with chronic degenerative changes in the spine, inflammation of the nerve roots called radiculitis, spinal stenosis, lumbar spondylosis and facet arthropathy. CP 365-366. Dr. Tsurulnikov testified that, although he could not determine the extent of contribution, he believed this claimant’s work conditions were (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. Tsurulnikov testified that this claimant’s work activities likely contributed to his back condition. Dr. Tsurulnikov

reiterated that hard labor likely contributed to his 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 answered, “Like I said, before, yes. But again, I don’t know to what extent.” CP 390.

The trier of fact made a credibility determination and chose to accept Mr. Street’s description of his job duties and his attending physician’s opinion over Weyerhaeuser’s alternative facts. These types of credibility determinations should not be disturbed on appeal.

3. Weyerhaeuser is tacitly asking this Court to reconsider its prior abandonment of a “greater-risk” test.

Weyerhaeuser’s argument is akin to the “greater risk” test that this Court has already abandoned. *Dennis*, at 482-83. It argues that Dr. Rosenbaum’s opinion provides the requisite proof needed to defeat an occupational disease claim. Weyerhaeuser cites to two specific statements made by Dr. Rosenbaum. First, that he testified Mr. Street’s work was not distinctive in terms of its potential for causing or aggravating lumbar spondylosis. CP 425-27; Weyerhaeuser PFR at 21. Second, he testified that because the claimant’s work was not particularly physical, it was less likely to

contribute to lumbar spondylosis. CP 427; Weyerhaeuser PFR at 21. *Dennis* rejected, outright, reading a “greater risk” requirement into the statute. *Id.*, at 483. The Court specifically held that claimants are not required to prove an increased risk of disease-based disability due to conditions of his or her employment.” *Id.*, at 482.

For this same reason, Weyerhaeuser’s briefing regarding Professor Larson’s interpretations of the “arising out of employment” requirement is not persuasive. *See* Weyerhaeuser PFR at 10-12. Weyerhaeuser’s arguments rest heavily on Larson’s discussions of the “arising out of employment” burden of proof. The *Dennis* Court specifically rejected Professor’s Larson’s “arising out of” and “particular risk” tests. The *Dennis* Court found that Larson’s proposed test did not apply in Washington because “our Industrial Insurance Act is unique and the opinion of other state courts are of little assistance in interpreting our Act.” *Id.*, at 482-83. It further held that “our statute...does not contain any language requiring an increased risk in the worker’s particular employment.” *Id.*, at 483. It appears that Weyerhaeuser’s attorney, having filed the amicus brief in the *Dennis* case on behalf of Washington Self-Insurers Association, is now re-raising this decades-old rejected argument. The Court should refuse to revisit this incorrect standard.

C. Mr. Street is entitled to attorney fees and costs on appeal pursuant to RCW 51.52.130.

Should this Court sustain Mr. Street's right to relief, he asks this Court to award fees and costs at all stages, from the trial court, to the court of appeals, to this Court. RAP 18.1.

a. Trial Court

RCW 51.52.130 states, "[i]f, 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."

Mr. Street was the appealing party before the superior court and he was successful in reversing the rejection order issued by the Board of Industrial Insurance Appeals.

b. Court of Appeals and Supreme Court

RCW 51.52.130 also authorizes fees and costs to the worker if his or her right to relief is sustained. "If on appeal...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." *Id.* In this case, Weyerhaeuser was the appealing

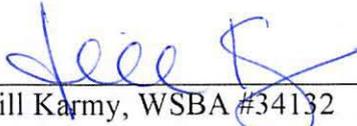
party before the Court of Appeals and is the appealing party to this Court. The Court of Appeals granted Mr. Street reasonable attorney fees and costs, but has not entered a final decision on that issue pending this Court's review.

This Court should award Mr. Street his fees and costs on appeal.

Conclusion

For the reasons discussed above, Mr. Street respectfully asks this Court to affirm the Court of Appeals decision. Further, Mr. Street respectfully asks this Court to grant his request for attorney's fees and costs under RCW 51.52.130.

RESPECTFULLY SUBMITTED this 28th day of April, 2017,



Jill Karmy, WSBA #34132
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CERTIFICATE OF FILING AND SERVICE

I certify that I caused to be served the foregoing Supplemental Brief of Respondent Roger Street on the following persons by electronically mailing, each of whom previously agreed to receive service via electronic service, on April 28, 2017:

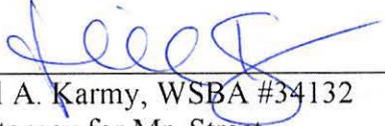
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