

**No. 45478-5.**  
**IN THE COURT OF APPEALS**  
**FOR THE STATE OF WASHINGTON**  
**DIVISION II**

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STATE OF WASHINGTON

**Ederi Haggemiller, Pro Se Appellant,**

**v.**

**DEPARTMENT OF LABOR AND INDUSTRIES,**

**STATE OF WASHINGTON Respondent.**

**ON APPEAL FROM THE**  
**SUPERIOR COURT OF JEFFERSON COUNTY**

**Before**

**The Honorable Keith Harper, Judge**

**OPENING BRIEF OF APPELLANT**

**Ederi Haggemiller Pro Se**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS.....i, ii**

**TABLE OF AUTHORITIES.....iii, iv, v**

**I. INTRODUCTION.....1**

**II. ASSIGNMENTS OF ERROR .....4**

**III. ISSUES .....9**

**IV. STATEMENT OF THE CASE .....13**

**V. ARGUMENT.....29**

**VI. STANDARD OF REVIEW.....29**

**A. California Anti-SLAPP Cases is Persuasive .....30**

**B. California Anti-SLAPP Law Protects Pre-Litigation  
Communication.....31**

**C. Haggemiller's pre-litigation letters and threats  
to sue are protected petition activity and are both  
actions involving public participation and petition  
under RCW 4.24.525.....35**

**D. The Department failed to produce any evidence  
much less show by clear and convincing evidence,  
a probability of prevailing on the claims.....39**

**E. The core of venue: protecting defendants  
against unfair locations for trial.....39**

**F. The erroneously admitted or excluded  
evidence might have affected the Decision.....40**

**G. Haggemiller is entitled to compensation for  
his permanent partial disability according to the  
schedule of benefits in effect on the date of his**

**June 5, 2012 valid audiogram.....41**

**H. Haggenmiller’s tinnitus is a separate condition from his hearing loss as it occur at 6,000 Herz a separate award as a portion of total bodily impairment to be paid as mental category 4, WAC 296-20-340 (CABR at 23 line 1) rated on the 2011 schedule pursuant to WAC 296-20-220(1)(o).....41**

**I. Haggenmiller is entitled to Attorney's Fees and Costs under the Appeal.....44**

**VII. CONCLUSION .....46**

**VIII. Exhibits**

**Copies of these cases are included in Appendix hereto**

**EX 1.- Harry v. Buse Timber & Sales, Inc.  
... ..No. 79613-1. 201 P.3d 1011 (2009)**

**EX 2.- In re: Robert Lenk, Sr., BIIA Dec., 91 6525 (1993)**

**EX 3.- In re: Catherine Schmidt, BIIA Dec., 57,001 (1981)**

**EX 4.- In re: Harold Sells, BIIA Dec., 95 4334 & 95 4547 (1996)**

## II. Table of Authorities

<b>Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988).....</b>	<b>3</b>
<b>Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)...</b>	<b>5</b>
<b>Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991).....</b>	<b>41</b>
<b>Aronson v. Dog Eat Dog Films, 738 F. Supp.2d 1104, at 1109 (2010).....</b>	<b>30</b>
<b>Beilenson v. Superior Court, 44 Cal.App.4th 944, 949 (1996); 32 Bostain, 159 Wn.2d at 723 (citing Hansen, 107 Wn.2d at 472).....</b>	<b>48</b>
<b>Castello v. Department of Seattle, 2010 U.S. Dist. LEXIS 127648; 39 Media L. Rep. 1591; 2010 WL 4857022.....</b>	<b>30</b>
<b>Chapman v. California, 386 U.S. 18, 24 (1967); Kotteakos v. United States, 328 U.S. 750, 765 (1946).....</b>	<b>40</b>
<b>Cockle v. Dep't of Labor &amp; Indus., 142 Wn.2d 801, 811, 16 P.3d 583 (2001).....</b>	<b>1</b>
<b>Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801,825,828 P.2d 549 (1992).....</b>	<b>45</b>
<b>Dennis v. Dep't of Labor &amp; Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).....</b>	<b>1</b>
<b>Dove Audio, Inc. v. Rosenfeld, Meyer &amp; Susman, 54 Cal.Rptr.2d 830, 47 Cal.AppAth 777 (1996).....</b>	<b>33</b>
<b>Equilon Enterprises, LLC v. Common Cause 124 Cal.Rptr.2d 507, 29 Ca1.4th 53 (2002).....</b>	<b>31</b>
<b>Erwin v. Cotter Health Ctrs. , 161 Wn.2d 676, 687, 167 P.3d 1112 (2007).....</b>	<b>29</b>
<b>Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986).....</b>	<b>48</b>
<b>Harry v. Buse Timber &amp; Sales, Inc. No. 79613-1. 201 P.3d 1011 (2009).....</b>	<b>6</b>

***Hash v. Children's Orthopedic Hospital*, 49 Wn. App. 130, 133-135 (1987), affirmed, 110 Wn.2d 912, 915-916 (1988)....8, 12**

**Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988).....13**

**Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence v 103[08] (1986 & Supp. 1991).....41**

***Martinez v. Department a/Tacoma*, 81 Wn.App. 228 at 245-46, 914 P.2d 86 (1996).....46**

**Rose v. Clark, 478 U.S. 570, 579 (1986);.....41**

**McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 256, 26 P.3d 903 (2001).....1**

***Navarette v. Holland*, 134 Cal.Rptr. 2d 403 109 Cal. App.4th 13 (2003).....32**

**BOARD INDUSTRIAL INSURANCE APPEALS CASES BIIA**

**In re: Harold Sells, BIIA Dec., 95 4334 & 95 4547 (1996).....44**

**In re: Robert Lenk, Sr., BIIA Dec., 91 6525 (1993).....12, 21, 28, 37, 42, 43, 44**

**In re: State Roofing & Insulation, Inc., BIIA Dec., 89 1770 (1991).....42**

**in re: Conrad, Docket No. 92 0602;.....21**

**in re: Shellum, Docket No. 99 12154.....21**

**REVISE CODE OF WASHINGTON**

**Administrative Procedures Act, Ch. 34.05 RCW.....42**

**Industrial Insurance Act (IIA), Title 51 RCW.....1**

RCW 2.08.240.....	5, 11
RCW 4.12.030.....	3, 6
RCW 4.24.525.....	29, 30, 35, 36, 39, 45, 46
RCW 4.24.525(1)(a).....	36
RCW 4.24.525(2).....	35,36, 37
RCW 4.24.525(4)(a).....	4, 29
RCW 4.24.525(4)(b).....	9, 10, 11, 29,39
RCW 4.24.525(5)(c).....	4, 5
RCW 4.24.525(6)(a).....	44, 45, 46
RCW 4.24.525(6)(b).....	11
RCW 42.20.040.....	48
RCW 51.04.010.....	1
RCW 51.12.010.....	1
RCW 51.32.080.....	12, 37
RCW 51.32.080(1).....	43
RCW 51.32.080(2).....	42
RCW 51.52.070.....	7, 8, 12
RCW 51.52.100.....	6
RCW 51.52.102.....	3
RCW 51.52.130.....	49
RCW 51.52.135.....	48
<b>Strategic Lawsuits Against Public Participation or "SLAPPs,"</b> .....	<b>3, 29</b>
<b>WAC 296-20-220(1)(o).....</b>	<b>2,8, 12,37, 41, 42, 43</b>
<b>WAC 296-20-340.....</b>	<b>2, 41</b>
<b>Washington Act Limiting Strategic Lawsuits Against Public Participation" [2010 c 118 § 4.].....</b>	<b>11</b>
<b>Washington State Constitution Article IV Section 20.....</b>	<b>5, 11</b>

**COURT RULES**

CR11.....	2, 49
RAP 2.4(b)(1).....	11
RAP 18.1(a).....	45
RAP 18.1(b).....	45
RAP 18.1(d).....	46

## **1 I. INTRODUCTION**

**The Industrial Insurance Act (IIA), Title 51 RCW, was designed to provide "sure and certain relief" to injured workers while limiting employer liability for industrial injuries. RCW 51.04.010; Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker in order to minimize "the suffering and economic loss" that may result from work-related injuries. RCW 51.12.010; McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 256, 26 P.3d 903 (2001); Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 811, 16 P.3d 583 (2001) ("[W]here reasonable minds can differ over what Title 51 RCW provisions mean..., the benefit of the doubt belongs to the injured worker.").**

**By way of the merit part of this consolidated appeal, Haggemiller seeks to have his permanent partial disability award increased to 20.94 percent plus 5 percent for his tinnitus as part of total hearing loss of 25.94 percent rated on the 2011 schedule found by Dr. Kessler's June 5, 2012 valid audiogram.**

**Haggenmiller seeks a separate award for tinnitus as a portion of total bodily impairment to be paid as mental category 4, WAC 296-20-340 rated on the 2011 schedule pursuant to WAC 296-20-220(1)(o). In this section the Department directs physicians to rate impairments not otherwise covered by the adopted rules as a percentage of total bodily impairment. Haggenmiller also requests to have his medical examinations and test for the purpose of diagnosis paid.**

**Haggenmiller requests a CR11 penalty for his time and mileage as well as bridge toll for travel to and from his home in Jefferson County to the place of hearing in Olympia on the principle that it is unfair to allow litigants to be scheduled into far-away tribunals when the litigants and the litigation have little or nothing to do with the location of such courts, or being forced to litigate in a location where they would be unfairly disadvantaged. Due Process is related to a fair location for trial in the personal jurisdiction doctrine. Haggenmiller drove 190 miles and this procedure prejudiced him, by not having his own medical witness physically present.**



**This change of venue was not in compliance with RCW 51.52.102 and RCW 4.12.030 and was unsupported by affidavit or other satisfactory proof.**

**Consolidated in this appeal are a series of irregularities of Due Process that Haggemiller claims raise to the level of Fraud upon the Court hence making the Judgment void or voidable. The trial court's "Order Vacating Judgment Denied" was appealed and is part of this action.**

**As a final point in this appeal is the consolidation of four special motions to strike claims made by the Department, brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but not before Haggemiller was put to great expense, harassment, and interruption of his productive activities.**

**An expedited judicial review would avoid the potential for abuse and this case should receive priority.**

## II. ASSIGNMENT OF ERROR

- A. The trial court erred as a matter of law in its order of January 10, 2014 (*CP 864-5*) by denying, striking and awarding cost in opposition to Haggenmiller's RCW 4.24.525(4)(a) "Special Motion to Strike Ms. Kilduff's, claims" filed, December 23, 2013, (*CP 738-761*) in the exact opposite of that which is specified in RCW 4.24.525 (5)(c). The statute requires that: ...any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section.
  
- B. The trial court erred as a matter of law in its order of January 10, 2014 (*CP 864-5*) by denying, striking and awarding cost in opposition to Haggenmiller's RCW 4.24.525(4)(a) "Special Motion to Strike Mr. Mills', claims" filed, December 24, 2013, (*CP 763-779*) in the exact opposite of that which is specified in RCW 4.24.525 (5)(c). The statute requires that: ...any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section.
  
- C. The trial court erred as a matter of law in its order of January 10, 2014 (*CP 864-5*) by denying, striking and awarding cost in opposition to Haggenmiller's RCW 4.24.525(4)(a) "Second Special Motion to Strike Mr. Mills', claims" filed, January 8, 2014, (*CP 813-832*) in the exact opposite of that which is specified in RCW 4.24.525 (5)(c). The statute requires that: ...any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section.
  
- D. The trial court erred as a matter of law in its order of January 10, 2014 (*CP 864-5*) by denying, striking and awarding cost in opposition to Haggenmiller's RCW 4.24.525(4)(a) "Second Special Motion to Strike Ms. Kilduff's, claims" filed, January 8, 2014, (*CP 833-862*) in the exact opposite of that which is specified in RCW

**4.24.525 (5)(c). The statute requires that: ...any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section.**

- E. The trial court erred as a matter of law in denying to hear and decide the merits of Haggenmiller's "Motion and Declaration for Entry of Default and For Entry of Default Judgment or In the Alternative Entry of Partial Default Judgment" (CP 675-719) and "Motion and Declaration of Sanctions" (CP 721-3) Filed December 3, 2013 as in under Washington State Constitution Article IV Section 20 Decisions, When to Be Made. Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a hearing. RCW 2.08.240; the Superior Court may not delay indefinitely its decision regarding this matter. (CP 729) RP December 13, 2013 at 5**
- F. The trial court erred as a matter of law in its order of October 28, 2013 (CP 565-6) by denying to hear the merits of Haggenmiller's "Motion for Order to Show Cause" (CP 520-563) filed October 28, 2013 where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) This violated Haggenmiller's constitutional right to due process because it was issued on an ex parte basis, without notice and hearing, Ex-Parte Action with Order JDG0001**
- G. The trial court erred as a matter of law in its order of November 4, 2013 (CP 570) by denying to hear the merits of Haggenmiller's "Motion for Reconsideration"**

**(CP 567-8) filed October 31, 2013 as it violated Haggenmiller's constitutional right to due process because it was issued on an ex parte basis, without a hearing or a reason. Ex-Parte Action with Order JDG0001**

- H. The trial court erred as a matter of law in its September 30, 2013 "Order Granting Departments Motion" (CP 477-91) and "Memorandum Opinion and Order" (CP 492-4) because the granted Judgment as a Matter of Law is in disagreement with the record and involves an issue in which there is a conflict or an inconsistency with a decision of the Supreme Court. [Harry v. Buse Timber & Sales, Inc. No. 79613-1. 201 P.3d 1011 (2009)] Furthermore the trial court cannot enlarge the lawful scope of the proceedings, which is limited strictly to the issues raised by the notice of appeal namely Hearing loss and Tinnitus. Mental health was never identified as an issue and neither was the date of manifestation. Such findings are without legal effect as they exceeded their jurisdiction and it violated Haggenmiller's constitutional right to due process as they were issued on an ex parte basis. RP September 27, 2013. Ex-Parte Action with Order JDG0001 EX 1**
- I. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that essentially created a common law exception to RCW 51.52.100 and RCW 4.12.030. Hearings shall be held in the county of the residence of the worker or beneficiary, or in the county where the injury occurred (CABR at 4, line 33 et seq.) (CABR at 48, 75, 76) and (CABR October 1, 2012 Pg. 75, 76)**

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**The (CABR) is the Certified Appeals Board Record, is numbered from page 1 through 132 and so designated. The CABR two hearing transcripts will be designated by date, either (CABR October 1, 2012) or (CABR October 8, 2012)**

- J. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that Haggemiller's conditions were fixed and stable as of December 8, 2011. "Finding of Fact No. 3" (CABR at 39) (CABR at 25) such findings are without legal effect as they exceeded their jurisdiction essentially creating a common law exception to RCW 51.52.070**
- K. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that Haggemiller suffered from a bilateral hearing loss of 20.83 percent, and an increase of bilateral hearing loss caused by tinnitus of 4 percent, resulting in a total bilateral hearing loss of 24.83 percent. "Finding of Fact No. 4" (CABR at 39) (CABR at 14 line 29 et seq.) (CABR at 15 line 1 et seq.) (CABR October 1, 2012 at 66 line 23 et seq.) (CABR October 1, 2012 at 54 line 13-15)**
- L. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that Haggemiller had a permanent partial disability proximately caused by the combined bilateral hearing loss and tinnitus equal to 24.83 percent. "Finding of Fact No. 5" (CABR at 39) (CABR at 21 line 38 et seq.) EX 2**
- M. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that Haggemiller failed to present the necessary evidence to prove the Department's determination of an October 9, 2009 date of manifestation was incorrect. No medical opinion was introduced during the hearing that proved that Haggemiller's bilateral hearing loss and tinnitus was made manifest on another date. "Finding of Fact No. 6" (CABR at 39). Such findings are without legal effect as they exceeded their jurisdiction essentially creating a common law exception to RCW 51.52.070. EX 3**

- N. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that Haggenmiller failed to present the necessary evidence to prove his bilateral hearing loss and tinnitus caused a mental health condition. No medical opinion was introduced during the hearing to prove Haggenmiller was suffering from a mental health condition. No medical opinion was introduced that stated a diagnosis, a cause of any mental health condition, or a permanent partial disability rating for any mental health condition. "Finding of Fact No. 7" (CABR at 39). Such findings are without legal effect as they exceeded their jurisdiction essentially creating a common law exception to RCW 51.52.070.**
- O. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that excluded an entire line of proof due to a misconception of the governing law; was not a mistake about the applicable substantive law. WAC 296-20-220(1)(o) In cases of injury or occupational disease of bodily areas and/or systems which are not included in these categories or rules and which do not involve loss of hearing, loss of central visual acuity, loss of an eye by enucleation or loss of the extremities or use thereof, examiners shall determine the impairment of such bodily areas and/or systems in terms of percentage of total bodily impairment. (CABR October 1, 2012 at 55-58) (CABR at 19 line 29 et seq.) EX 4**
- P. The trial court erred as a matter of law in its order of September 30, 2013, (CP 477-494) affirming the determination that admitted evidence, in which the medical expert testimony concludes, without the requisite supporting specific facts showing the basis for those opinions. (CABR October 8, 2012 at 15, 19, 59, 60, 83, 84) Contrary to *Hash v. Children's Orthopedic Hospital*, 49 Wn. App. 130, 133-135 (1987), affirmed, 110 Wn.2d 912, 915-916 (1988). (CABR 12-14)**

### **III-ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**1.- Is it not a reversible trial court error that found as a matter of law; (CP 864-5) that Haggemiller's December 23, 2013, "Special Motion to Strike Kilduff claims" (CP 738-761) has not carried his initial burden under RCW 4.24.525(4)(b) by a preponderance of the evidence that the November 5, 2013, "Department's Motion to Strike" (CP 572-600) is based on actions involving public participation and petition?**

**YES. The fact is that Haggemiller's October 28, 2013, "Motion for Order to Show Cause" (CP 520-563) and his October 31, 2013, "Motion for Reconsideration" (CP 567-8) are overwhelming examples of public participation and petition made in furtherance of his rights of free speech on an issue of public interest. Furthermore the Department failed to establish by clear and convincing evidence a probability of prevailing on the claim to strike them. RCW 4.24.525(4)(b) (Assignment A)**

**2.- Is it not a reversible trial court error that found as a matter of law, (CP 864-5) that Haggemiller's December 24, 2013, "Special Motion to Strike Mills' claims" (CP 763-779) has not carried his initial burden under RCW 4.24.525(4)(b) by a preponderance of the evidence that the December 12, 2013, "Mills' papers filings requesting relief" (CP 727-8) are based on actions involving public participation and petition?**

**YES. The fact is that Haggemiller's December 3, 2013, "Motion for Entry of Default and for Entry of Default Judgment or in the Alternative Entry of Partial Default Judgment" (CP 675-719) and "Motion and Declaration for Sanctions" (CP 721-3) are overwhelming examples of public participation and petition made in furtherance of his rights of free speech on an issue of public interest. Furthermore the Department failed to establish by clear**

**and convincing evidence a probability of prevailing on the claim. RCW 4.24.525(4)(b) (Assignment B)**

**3.- Is it not a reversible trial court error that found as a matter of law, (CP 864-5) that Haggemiller's January 8, 2014, "Second Special Motion to Strike Mills' Claims" (CP 813-832) has not carried his initial burden under RCW 4.24.525(4)(b) by a preponderance of the evidence that the January 3, 2014, "Department's Response to Plaintiff's Special Motions, Department's Second Motion to Strike and Request for Cost" (CP 782-806) are based on actions involving public participation and petition?**

**YES. The fact is that Haggemiller's December 24, 2013, "Special Motion to Strike Mills' claims" (CP 763-779) are overwhelming examples of public participation and petition made in furtherance of his rights of free speech on an issue of public interest. Furthermore the Department failed to establish by clear and convincing evidence a probability of prevailing on the claim to Strike and Request for Cost.. RCW 4.24.525(4)(b) (Assignment C)**

**4.- Is it not a reversible trial court error that found as a matter of law, (CP 864-5) that Haggemiller's January 8, 2014, "Second Special Motion to Strike Kilduff's claims" (CP 833-862) has not carried his initial burden under RCW 4.24.525(4)(b) by a preponderance of the evidence that the January 3, 2014, "Department's Response to Plaintiff's Special Motions, Department's Second Motion to Strike and Request for Cost" (CP 782-806) are based on actions involving public participation and petition?**

**YES. The fact is that Haggemiller's December 23, 2013; "Special Motion to Strike Kilduff claims" (CP 738-761) are overwhelming examples of public participation and petition made in furtherance of his rights of free speech on**



**an issue of public interest. Furthermore the Department failed to establish by clear and convincing evidence a probability of prevailing on the claim to Strike and Request for Cost. RCW 4.24.525(4)(b) (Assignment D)**

**5.- Doesn't the SLAPP statute RCW 4.24.525(6)(b) require the trial court to explain specifically why the special motion to strike is frivolous or is solely intended to cause unnecessary delay, before it can award Cost of litigation? (CP 864-5)**

**YES. The Washington Act Limiting Strategic Lawsuits Against Public Participation" [2010 c 118 § 4.] would otherwise be meaningless if it can be defeated by simply filing a "Motion to Strike and Request for Cost." (CP 782-806) (Assignment A-D.)**

**6.- Is it not a reversible trial court error that Haggemiller's "Motion and Declaration for Entry of Default and For Entry of Default Judgment or In the Alternative Entry of Partial Default Judgment" (CP 675-719) and "Motion and Declaration of Sanctions" (CP 721-3) both filed December 3, 2013 are still waiting for an Order? (CP 729) RP December 13, 2013 at 5**

**YES. Every case submitted to a judge of a superior court for his or her decision shall be decided by him or her within ninety days from that submission. (RP December 13, 2013 at 5) RCW 2.08.240. Decisions, when to be made: State Constitution Art. 4 § 20. RAP 2.4 (b)(1) The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice (Assignment A-P)**

**7.- Is it not a reversible trial court error to exclude an entire line of proof due to a misconception of the governing law? (CABR at 19 line29 et Seq.) (CABR October 1, 2012 at 55-58 and 70-74)**

**YES. The applicable substantive law in RCW 51.32.080, WAC 296-20-220(1)(o), and the Board's published Significant Decision In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993) calls for Haggemiller's permanent impairment due to his tinnitus proximately caused by his employment, to be categorized and expressed as a percentage of total bodily impairment. (CABR at 22 line 28 et seq.) (Assignment A-P)**

**9.- Is it not fraud on the court to influence the Trier of fact to decide the outcome of the trial by enlarging the lawful scope of the proceedings, which are limited strictly to the issues raised by the notice of appeal namely Hearing loss and Tinnitus to procure a Mental health and date of manifestation legal findings that were never identified as issues. "Finding of Fact No. 6" "Finding of Fact No. 7" (CABR at 39). Such findings are without legal effect as they exceeded their jurisdiction essentially creating a common law exception to RCW 51.52.070. (Assignment H)**

**YES. The issues in front of the court are the amount of Permanent Partial Disability hearing loss and tinnitus. Permanent Partial Disability tinnitus as category under WAC 296-20-220(1)(o).**

**Is it not fraud on the court to influence the Trier of fact to decide and rely upon medical expert testimony that concludes, without the requisite supporting specific facts showing the basis for those opinions. (CABR October 8, 2012 at 15, 19, 59, 60, 83, 84) Contrary to Hash v. Children's Orthopedic Hospital, 49 Wn. App. 130, 133-135 (1987), affirmed, 110 Wn.2d 912, 915-916 (1988). (CABR 12-14)**

**Is it not fraud on the court to influence the Trier of fact to make a rating based on expert testimony of what percentage of**

**hearing loss is and any additional amount for tinnitus. That's the subject of this appeal. Sleep disorder is beyond the order. (CABR October 1, 2012 at 57, 58)**

**YES "... when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988); see also Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988) (to warrant reversal for abuse of discretion, it must "plainly appear[ ]that the court below committed a meaningful error in judgment")?(Assignment A-P)**

#### **IV STATEMENT OF CASE**

##### **A. Facts in the court record relevant to the issues on appeal.**

**This appeal is filed by the injured worker, Ederi Haggemiller who on February 3, 2012 (CABR at 42) from an order of the Department of Labor and Industries dated December 8, 2011; (CABR at 45) in which the Department affirmed an order dated October 6, 2011 (CABR at 44) which accepted the claim filed by Haggemiller concerning occupational hearing loss; determined that the covered medical condition was stable; ordered that the State of Washington pay a permanent partial disability award equal to 10.32% percent for the loss of hearing in both ears with no**

**additional rating for tinnitus according to the 2009 schedule of benefits and held that the State of Washington would remain responsible for the purchase and maintenance of hearing aids, and closed the claim. This order allowing his claim was based on the results of an audiogram dated January 26, 2011 performed by Gerald G. Randolph (CABR October 8, 2012 at 14 line 7-9).**

**Related to Venue:**

**The Board of Industrial Insurance Appeals on their February 23, 2012 Order Granted Haggemiller's appeal, (CABR at 47)**

**A March 23, 2012 Conference and Assignment of Judges was schedule to be held at Jefferson County Courthouse, Port Townsend, Washington. Notice dated March 7, 2012 (CABR at 48)**

**A May 23, 2012 Interlocutory Order Establishing Litigation Schedule, changed the location from Port Townsend, Jefferson County to Olympia, Thurston County and assigned two dates for the hearings, September 17, 2012 for Haggemiller, one lay witness and one medical witness and**

**October 1, 2012 for the Department's two lay witnesses and one medical witness. (CABR at 63-65)**

**A July 11, 2012. Pro Se Motion for Continuance of Hearing. (CABR at 69)**

**A July 13, 2012 Amended Interlocutory Order Establishing Litigation Schedule, to change October 1, 2012 for the Department's two lay witnesses and one medical witness to October 8, 2012 leaving October 1, 2012 (Reserved Alternative Date) (CABR at 70-72)**

**A July 25, 2012 Haggemiller's designation of witnesses correspondence. (CABR at 74)**

**An August 6, 2012 Haggemiller's correspondence that complains of the change of location from Port Townsend, Jefferson County to Olympia, Thurston is not the proper county.**

**Dear Judge Straume and Ms. Kilduff,**

**Please correct line 27, page 1, of the Amended Interlocutory Order Establishing Litigation Schedule from "Whether the claimant was a totally and permanently disabled worker" to "a permanent partially disabled worker" as we discussed on June 1, 2012.**

**I request all hearings be conducted in Poulsbo, WA. or Port Townsend, WA. as originally discussed. This is closer to my home and also the location of my injury. I will object to any**

**other venue for the hearings. I have no objections to any telephone testimony.**

**Please amend the order to reflect the new date of October 1 instead of September 17 for presentation of evidence.  
(CABR at 75-76)**

**A September 7, 2012 Second Amended Interlocutory Order Establishing Litigation Schedule, to change September 17, 2012 for Haggemiller, one lay witness and one medical witness to October 1, 2012 and changed it from Olympia to Poulsbo. (CABR at 77-79)**

**JUDGE STRAUME: Next, we will be convening again on October 8. My recollection is your expert can be with us on that day.**

**MS. KILDUFF: Yes, Dr. Randolph, correct.**

**MR. HAGGENMILLER: Why it has to be in Olympia?**

**JUDGE STRAUME: We have --**

**MR. HAGGENMILLER: This is my venue right here. I live around here, I work around here.**

**JUDGE STRAUME: Where is Dr. Randolph located?**

**MS. KILDUFF: He's primarily in the Olympia area.**

**JUDGE STRAUME: We're going with where the witnesses are, and he's in Olympia.**

**MS. KILDUFF: He did see --**

**MR. HAGGENMILLER: Bremerton.**

**MS. KILDUFF: -- you in Bremerton, but his offices are primarily -- He does most of his work, is my understanding, out of Olympia. So I guess, you know, I would have to pay to have him drive, which costs the taxpayers, I don't know, another hour. It's \$400.00 an hour.**

**MR. HAGGENMILLER: The Department has more money than me. I have to pay for myself to Olympia.**

**JUDGE STRAUME:** Mr. Haggemiller, the witness is located in Olympia. As an officer of the court, I accept Ms. Kilduff's representation that she needs it there for cost purposes.

And so we'll reconvene in Olympia.

**MR. HAGGENMILLER:** So that's it? I have to be to out of cost with another obstruction of my claim, because that's what the Department is doing, obstructing my claim.

**JUDGE STRAUME:** I've made my ruling.

**MR. HAGGENMILLER:** Thank you.

**JUDGE STRAUME:** Are we also going to hear from two lay witnesses or just the doctor?

**MS. KILDUFF:** No, Your Honor, just the doctor. Unless, of course, we reach some sort of resolution before next week, we'll be seeing you then. (CABR October 1, 2012 Page 75-76)

### **Related to Hearing Loss:**

#### **CROSS-EXAMINATION BY MS. KILDUFF:**

**Q.** I work for the Attorney General's Office, Doctor. I'm an assistant attorney general and I represent the Department in this case.

It sounded to me, sir, is that your audiogram that was done of Mr. Haggemiller was done on June 5, 2012, in your office; is that correct?

**A.** Yes, it is.

**Q.** And that was the same day as your examination of him; correct?

**A.** Correct.

**Q.** And the history you took from Mr. Haggemiller included a history of him working in the construction carpentry industry, if you will; is that correct?

**A.** Correct. (CABR October 1, 2012 at 59)

**Q.** Doctor, in that audiogram that was done in your office by – it looks like an audiologist; correct?

**A.** Yes.

**Q.** That showed on the right ear, talking about the different frequencies, at the 500 level in the right hearing he was at the 20 decibel level; is that correct?

**A. Yes.**

**Q. And I'm looking, Doctor, at the audiogram, the bottom left-hand section, the "Comment" section. Do you have that in front of you?**

**A. Yeah. That's the one -- I wrote those in.**

**Q. Okay. So, again, on the right ear at the 1,000, I call it the hertz level, he was at the 30 decibel level?**

**A. Correct.**

**Q. And at the 2,000 hertz level he was at the 40 decibel level in the right ear?**

**A. Yes.**

**Q. And then right ear, 3,000 hertz level, he's at the 60 decibel level; correct?**

**A. Correct.**

**Q. And then in the left ear, if we go down from 500, 1,000, 2,000, and 3,000, I'll read the corresponding decibel levels all at once and see if you agree. He's at the 25, 35, 55, and 70 decibel levels; correct?**

**A. Yes, I agree.**

**Q. And then the formula that you spoke of for determining his hearing impairment, did you draw that, sir, from the American - the "Guides to Impairment" put out by the AMA or American Medical Association? (CABR October 1, 2012 at 62-63) Relate to Hearing Loss and tinnitus rated on the threshold 500, 1,000, 2,000, and 3,000. (CABR October 1, 2012 at 62-63)**

**Q. Specifically, 20.94 percent?**

**JUDGE STRAUME: Just wait until the doctor answers.**

**A. Yes, I agree with that.**

**Q. And to be more specific, I don't know if you heard me, but 20.94 percent bilateral hearing loss based upon your audiogram of June 5, 2012? (CABR October 1, 2012 at 66)**

**EXAMINATION BY JUDGE STRAUME:**

**Q. In this particular case, how did you rate Mr. Haggemiller, as far as his tinnitus goes?**



**A. Well, he has provided me with a fair amount of written testimony about how much this tinnitus bothers him. So I would rate him in the 4 to 5 percent range (CABR October 1, 2012 at 54)**

**Related to schedule of benefits in effect on the date occupational noise last contributed to the disability for which a worker seeks compensation.**

**EXAMINATION BY MS. KILDUFF:**

**Q. Your husband, is he currently working?**

**A. No.**

**Q. When did he last work?**

**A. A few weeks ago.**

**Q. And that's in the construction industry?**

**A. Yes.**

**Q. And he's been in the construction industry for many years; correct?**

**A. Yes.**

**Q. And he's a union member?**

**A. Yes.**

**Q. And as union jobs come up, he's dispatched to a workplace and goes and works at a particular site for a period of time?**

**A. Right.**

**Q. And he's done that over the years?**

**A. Right. Off and on. Off and on.**

**Q. And then off and on, bearing in mind, the ups and downs of the construction industry, he's gone to work between 2004 and 2012?**

**A. Yes.**

**Q. On that off-and-on basis?**

**A. Yes.**

**Q. And he's been able to show up and work at the job site as far as you know; correct?**

**A. Yes. (CABR October 1, 2012 at 12, 13)**

**EXAMINATION BY MR. HAGGENMILLER:**

**Q. Question No. 3: What kind of work have you customarily performed over the last three years?**

**A. I'm a union finish carpenter installer. My job from the last three years has been installing architectural woodworks and to finish the buildings, like the store fixtures, medical offices, commercial buildings, everything is on finished work.**

**What degree of permanent partial disability best describes the two physical aspects of this case Hearing loss and Tinnitus?**

**The Department is represented by the Office of the Attorney General, per Christine Kilduff, Assistant.**

**\* \* \* \* \***

**JUDGE STRAUME: Mr. Haggemiller, I wanted to let you know that the Board of Industrial Insurance Appeals is an independent state agency entirely separate from the Department of Labor and Industries. It is the function of the Board to adjudicate appeals taken by workers or other interested parties from orders of the Department of Labor and Industries.**

**Do you have any questions, sir?**

**MR. HAGGENMILLER: No, I do not.**

**JUDGE STRAUME: Given that this is about hearing loss, if for some reason I say something that you don't quite understand, please ask for clarification.**

**I also spoke with the parties off the record about the legal issues. They may have comments. But I'm going to read those issues into the record right now.**

**No. 1, whether the claimant's condition proximately caused by his occupational disease with a date of manifestation of October 9, 2009, required further proper and necessary medical treatment as provided by RCW 51.36.010.**

**No. 2, what degree of permanent partial disability best describes the claimant's residual impairment proximately caused by his October 9, 2009, occupational disease. Mr. Haggemiller, first of all, you also wanted to clarify that the two physical aspects of this case was hearing loss and tinnitus.**

**Are those the issues before us?**

**MR. HAGGENMILLER: Yes.**

**JUDGE STRAUME: Now, you wanted to bring to the Board's attention some significant decisions and make comments about that. Please go ahead.**

**MR. HAGGENMILLER: I'm priding myself as a Lenk situation. My situation is the same as Lenk. I expect the resolution to be similar to it.**

**JUDGE STRAUME: Just for the record, Mr. Haggemiller was kind enough to share with Ms. Kilduff and I before the hearing began three significant decisions that he'll be relying upon. One is in re: Conrad, Docket No. 92 0602; in re: Lenk, Docket No. 91 6525; and in re: Shellum, Docket No. 99 12154. (CABR October 1, 2012 at 3, 4)**

## **Related to Tinnitus**

**Q. By Haggemiller:**

**Dr. Kessler, in your report you mention that I have tinnitus in a high frequency. Could you please explain what "frequency" means on that tinnitus?**

**A. Well, frequency is a sound. We measure sounds in frequencies. And the human ear hears vibrations in the air at a certain frequency of wave that hit the eardrum. So low frequencies is typically in music. We call those low pitches. So on a piano it would be way down on the bass left side. And higher frequencies are way up toward the right side, what we would call treble. So when you said my tinnitus is really high frequency and the lady tried to match it there, Dr. Nightingale in Poulsbo, you were matching at that 6,000 hertz. And that's a real typical tinnitus matching frequency. 6,000 cycles would be an equivalent of a very, very high pitched tuning fork. Almost like a violin in an orchestra, and it would be the violin nearly as**

high as it goes, for those who are, you know, musically inclined. (CABR October 1, 2012, at 72-3)

**Q. Doctor, can you tell me in your audiograms report the frequency this time in the 6,000 pitch, the decibels handicap I have?**

**A. You'll have to ask me that question again.**

**Q. Okay. In the audiogram --**

**A. It's really hard to answer these questions because I find it a disability to be on a phone because I can't see your face or anything. So give it to me again a little more slowly.**

**Q. Okay. In the audiogram, the one you took in your office, you mentioned the 500, 1,000, 2,000, and 3,000, which are part of the regular hearing loss spectrum. But can you please tell me which are the resource for the 4,000, 6,000, and 8,000 results in that audiogram?**

**A. We can, but remember, all of the L&I and all your ratings and everything are on the 1s, 2, and 3s. Honestly, sir, it doesn't matter what you are higher than that or lower than that.**

**Q. That's correct.**

**A. You still want to know it? You want that on part of your record or something here?**

**Q. Yes, I do want to know.**

**A. 4,000 hertz -- I'm looking at your test. 4,000 hertz on the right ear you're at 60 decibels, left ear 70 decibels. 6,000 hertz it's 70 in the right and 75 on the left. 6,000 you want?**

**Q. Yes, 6,000 and 8,000.**

**A. Okay. 6,000 in your right ear is 70 decibels, in your left ear it's 90 decibels.**

**At 8,000 hertz you're 65 decibels on the right, 85 decibels on the left.**

**Q. Doctor, is that theory that the tinnitus happens on the frequency that you have the most hearing loss? Is that what you would agree with?**

**MS. KILDUFF: I think it's a little leading, Your Honor. But I know --**

**A. I guess, Mr. Haggemiller, I don't want to be adjudicating a portion of this. But as long as all this questioning is okay with the judge I'll continue to answer it.**

**JUDGE STRAUME:** Well, let's put it this way. He asked you if you agreed with his premise or not. That is leading. But if you answer it yes or no it could put an end to this.

**A.** Tinnitus and the degree of hearing loss is another area that is not a black-and-white issue, okay? So what he's saying or intimating here is, in general, where you have your worst hearing loss, I would say probably over half the time that will be where you're going to find your tinnitus match. But many, many people, it does not happen where their worst hearing is. But I'm only confused how this is germane to where we're going with all of this. (CABR October 1, 2012 at 73-74)

**A.** It's based on the plaintiff, Mr. Haggemiller, basically saying all the things he's been trying to say in front of you guys that I've overheard, and I know it's not part of the record, but issues about sleep disturbances and depression and whatnot. (October 1, 2012 at 70 line 10-13)

**Dr. Randolph Testimony:**

**Judge Straume:** -- I think you need to -- Doctor, what is his greatest hearing loss at, the frequency, please?

**A.** In the left ear at 6 and 8,000 cycles; in the right ear at 8,000 cycles.

**Judge Straume:** And how does that match to your understanding of the frequencies that the tinnitus was pinpointed at?

**A.** The tinnitus is matched to 6,000 cycles, bilaterally, which means both ears on her testing.

**Judge Straume:** Okay. I think we have gotten there, Mr. Haggemiller.

**Haggemiller:** That's good.

#### **TESTIMONY PRESENTED AT HEARING**

**Haggemiller, his wife Annie, Dr. Kessler and Dr. Randolph all testified at hearing. Both Dr. Randolph and Dr.**

**Kessler were expert witnesses; the Haggemiller's provided lay testimony.**

**The testimony of Haggemiller was that he was born in Lima Peru and has no history or prior ear infections, head injuries or sinus infections. He has a 30 year history of working as a carpenter working in noisy environments with power tools, including impact wrenches and table saws. His testimony was that despite wearing hearing protection, his hearing has steadily deteriorated and that in 2005, 2006 he began to notice that he was having difficulty hearing his children perform at their plays. Socially this impacted him because he constantly had to ask people to repeat themselves when speaking with him. He has also noticed that people don't want to have conversations with him because he gets impatient and frequently will be tempted to say disrespectful or bad things about them because he cannot understand them. Sometime around the same time he began to notice that he was having a ringing in his ears that he has since learned was associated with tinnitus. The ringing in his ears has caused him to have problems with sleeping and this tinnitus fully**

awake him every night, alarmed, has caused him to be short tempered and irritable and also has caused him on two (2) occasions to fall asleep driving. Socially he believes that he is more impatient and easily annoyed because of the lack of sleep occasioned by the tinnitus than by the underlying hearing loss itself. He also forgets things because of the lack of sleep caused by the tinnitus rather than the hearing loss and gave the example of missing or forgetting his daughter's birthday, something that would have never occurred before 2005. Haggemiller testified that he has experienced some depression due to the lack of sleep caused by the tinnitus (and not the hearing loss) and that while this has not led him to contemplate suicide, he does have depression related issues that are caused by the lack of sleep and the associated social isolation he feels as the result. (CABR October 1, 2012 at 16, 17,19-24, 26, 30, 34, 38,39)

The testimony of Annie Haggemiller was that she has lived with the claimant for 24 years and has been married to the claimant for 22 years. When she first met him he was outgoing, friendly and easy to get along with but that starting in 2004- he

**began first to have problems with hearing people and then began to have problems with social interactions with others outside the family. Haggemiller told her about the ringing in his ears sometime in 2008 and she had already noticed some substantial changes in his sleep pattern; previously he had been a deep sleeper but now he tends to wake up frequently during the night, which also disturbs her sleep pattern so that she notices it. According to Ms. Haggemiller, due to his hearing loss Ederi frequently has to ask people to repeat themselves but that due to the lack of sleep associated with the ringing in his ears he frequently is irritable and less patient with people who he interacts with. She notices that he is in what she described as a "bad mood" when he does not get enough sleep and is both short tempered and harder for her to deal with as the result. (CABR October 1, 2012 at 7, 8, 9)**

**The testimony of the attending physician, Dr. Kessler was that he has been in practice for 25 years with a specialty in Otolaryngology. He is a treating physician and sees approximately 100 patients per week, 400 patients per month and approximately 4,000 patients per year. Although he has**



testified before the Board on a few previous occasions, he has appeared on the behalf of injured workers who are his patients. Dr. Kessler testified that he examined Haggenmiller for the purpose of evaluating him on June 5, 2012. According to Dr. Kessler he evaluated Haggenmiller's loss as equivalent to 20.94 percent of binaural hearing loss plus he found that he has an additional 4-5 percent hearing loss due to the effects of the tinnitus. Dr. Kessler found that Haggenmiller's hearing loss and tinnitus were caused by occupational exposures on a more probable than not basis. (CABR October 1, 2012 at 47-50, 54, line 15; 66, 71)

Dr. Randolph testified about the findings of his examination of Haggenmiller which took place on January 26, 2011. Dr. Randolph testified that he did not recall questioning Haggenmiller about his tinnitus or recall the questions that were asked or Haggenmiller's responses. (CABR October 8, 2012 at 63, 70)

JUDGE STRAUME: Okay. Do you recall the question, Doctor.

A. I believe so.

JUDGE STRAUME: Okay. Please answer.

A. Basically, the same as I answered before. It has to interfere with the aspects of normal daily living. It can affect what's

called the speech discrimination which is the discrimination scores that we have talked about, and you can only add it if there is a rateable hearing loss, and you can add up to 5 percent in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities daily living.

Q. (By Mr. Haggenmiller) That's the only -- is that the only way

--

A. That's the bottom line.

Q. Is that the only way that tinnitus is rated according to the AMA Guidelines?

A. According to my understanding, yes.

JUDGE STRAUME: Mr. Haggenmiller, do you have knowledge of another way it's rated?

MR. HAGGENMILLER: Total body impairment as a mental condition.

MS. KILDUFF: And, again, Your Honor, I think that's the legal argument that is drawn from the Lenk decision that is over 20 years old at this point.

MR. HAGGENMILLER: Still --

JUDGE STRAUME: Okay. Hold on just a second. Doctor, is there an alternative to rating just hearing loss alone in the AMA guides?

A. Yes.

JUDGE STRAUME: And what is that means?

A. That is taking the frequencies that we use for rating hearing loss off the audiogram and that is rated separately.

If we do find a rating for tinnitus, then according to the guides here in the state of Washington we add that to the rating of the hearing loss. It gets more complicated than that, because if the ringing is only one ear and hearing loss is only one ear, the rating is only going to affect one ear.

JUDGE STRAUME: Is, in your expertise, Doctor, are you familiar with the AMA Guides as rating of total bodily impairment?

A. Yes.

JUDGE STRAUME: And how is that done?

A. It's a separate calculation. And that, you can take the rating that we have to give for hearing loss rating, such as in my case where his instance I rated it 10 point something percent. Then also another section of the book that tells you how you can put this into a total bodily impairment. In the state of

Washington they don't have us do that from the aspect of my independent medical evaluation. If they do that at all, that would have to be in the L&I section itself. Currently, that's not what we are asked to do. They wouldn't even want it if I gave it to them. (CABR October 8, 2012 at 71-74)

## V. ARGUMENT

VI. STANDARD OF REVIEW. Anti-SLAPP law. There are no disputed issues of material fact; rather, the issue is the legal characterization of how the Anti-SLAPP law applies to the facts of this case, which is a question of law to be reviewed de novo. See, e.g., *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (application of law to the facts of a case is a question of law reviewed de novo).

The Department's pleading requesting relief against Haggemiller amounts to a Strategic Lawsuit Against Public Participation (SLAPP), barred by Washington's 2010 Anti-SLAPP statute RCW 4.24.525.

RCW 4.24.525(4)(a) party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section." RCW 4.24.525(4)(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation

and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

There are few cases interpreting Washington's Anti-SLAPP statute; but case law interpreting the California Anti-SLAPP statute IS persuasive precedent as to guidance for application of Anti-SLAPP law for public participation because the Washington statute was patterned after the California statute.

#### **A. CALIFORNIA ANTI-SLAPP CASE LAW IS PERSUASIVE.**

The 2010 amendments to Washington's Anti-SLAPP law are "patterned after California's Anti-SLAPP Act" Aronson v. Dog Eat Dog Films, 738 F. Supp.2d 1104, at 1109 (2010).

"[P]arties cite to California law as persuasive authority for interpreting the Washington amendments" Aronson, at 1110.

"RCW 4.24.525 is of such recent vintage that there have been few cases construing it in the months since it was enacted.... This court looks to California precedent as persuasive authority concerning the new Anti-SLAPP statute." Castello v. Department of Seattle, 2010 U.S. Dist. LEXIS 127648; 39 Media L. Rep. 1591; 2010 WL 4857022.

## **B. CALIFORNIA ANTI-SLAPP LAW PROTECTS PRE-LITIGATION COMMUNICATION**

California has nearly 20 years of anti-SLAPP case law and over 300 published decisions, compared with a handful in Washington State. The California cases include a number of cases where the Anti-SLAPP statute applied to claims against defendants based upon statements made in anticipation of litigation, including statements of intent to sue.

In *Equilon Enterprises, LLC v. Common Cause* 124 Cal.Rptr.2d 507, 29 Ca1.4th 53 (2002) the Defendant, Common Cause had served the Plaintiff, Shell and Texaco oil companies, a notice of its intent to sue for violations of a California health and safety statute alleging the Plaintiff had polluted ground waters in Southern California. Rather than request clarification, the oil companies served Common Cause a claim for declaratory and injunctive relief. *Id.* This prompted Common Cause to bring a motion to dismiss the suit under California's anti-SLAPP statute. *Id.*

The oil companies argued that to prevail on the Anti-SLAPP motion, Common Cause should have to show that the

request for declaratory and injunctive relief was filed with the intent to chill Common Cause's exercise of constitutional speech or petition rights. *Id.* The California Supreme Court disagreed and stated "[w]hile it may well be [that the oil companies] had pure intentions when suing Common Cause such intentions are ultimately beside the point." *Id.* at 67.

Common Cause was not required to prove the oil companies' subjective intent. *Id.* Furthermore, the Court found that the oil companies' suit arose from Common Cause's activity in furtherance of its constitutional rights of speech or petition, *i.e.* the sending intent to sue notice that was served on the oil companies. *Id.* Since the oil companies failed to establish a probability of prevailing in their claim, the Anti-SLAPP motion was properly granted. *Id.*

California case law makes it clear that pre-litigation letters and threats to sue are protected petition activity. "[The Anti-SLAPP] does not limit its application to certain types of petition activity." *Beilenson v. Superior Court*, 44 Cal.App.4th 944, 949 (1996); *See also Navarette v. Holland*, 134 Cal.Rptr.2d 403 109 Cal. App.4th 13 (2003) (even a police report filed by

plaintiff's ex-wife, alleged to have been false, was regarded as public participation and petition.) "The pleadings and the affidavits submitted by the parties establish that Equilon's action for declaratory and injunctive relief is one arising from Common Cause's activity in furtherance of its constitutional rights of speech or petition - viz., the filing of Proposition 65 intent-to-sue notices." *Equilon*, at 518.

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal.Rptr.2d 830, 47 Cal.AppAth 777 (1996), Audrey Hepburn and 13 other celebrities had recorded an album where a portion of the royalties from the sale of the record were supposed to go to the celebrities' charity of choice. After Ms. Hepburn's death, her estate became aware that her designated charity had not received virtually any of the royalties that it was entitled to from Dove Audio. *Id.* Ms. Hepburn's estate retained a law firm, and the law firm sent letters to the other celebrities and the other charities, informing them of the situation and stating it intended to file a legal complaint with the State Attorney General's Office. *Id.* Once the recording company became aware of these letters it filed a law suit against the law firm claiming libel and interference with an

economic relationship. *Id.* The law firm countered by bringing an anti-SLAPP motion. *Id.*

The court ruled that the law firm's letter announcing an intention to take legal action was covered by the anti-SLAPP law because it was an act in furtherance of the law firm's constitutional right of petition. *Id.* The letter raised a question of public interest and was in connection with an official proceeding authorized by law; *i.e.* a proposed complaint to the Attorney General seeking an investigation. *Id.* "The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action." *Id.* at 784. "Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of [California's litigation privilege law] we hold that such statements are equally entitled to the benefits of [California's Anti-SLAPP law]." *Id.*

In both the *Equilon* and the *Dove Audio* cases, the Defendant had met its initial burden of establishing that the pleading requesting relief was based on public participation (namely conduct in furtherance of petition rights), and the burden was shifted to the Plaintiff to establish the merits of its



case. Neither plaintiff in *Equilon* nor *Dove Audio* was able to establish prima facie evidence that they would prevail on their claims. Hence, the plaintiffs' actions were dismissed under Anti-SLAPP law.

**C. Haggemiller's pre-litigation letters and threats to sue are protected petition activity and are both actions involving public participation and petition under RCW 4.24.525**

When determining if the Anti-SLAPP law applies to the present matter, the Court must first examine whether Haggemiller's actions constitute "public participation and petition under RCW 4.24.525(2).

All these subsections apply to the present case. Haggemiller's pre-litigation letters and Motions on October 28, 31, 2013, (CP 520-63) (CP 567-8) or November 6, 12, 25, 2013, (CP 601, 602) (CP 606—652) (CP 663-4) or December 3, 20, 23, 24, 2013, (CP 675-719) (CP 729) (CP 738-61) (CP 763-79) and January 8, 2014, (CP 813-862) plus RP 12-13-2013 constitute lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue

**of public concern, and/or in furtherance of the exercise of the constitutional right of petition. Those letters and Motions were lawful and are obviously a matter of utmost public concern. These are all classical examples of "public participation and petition." Accordingly, Haggenmiller's Notice of Appeal to Court of Appeals on October 15, 2013 and November 26, 2013 are both actions involving public participation and petition under RCW 4.24.525.**

**RCW 4.24.525(1)(a) states that a "claim" as used in the section "includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." The Department's Motions to Strike, relief, court call cost, are each one a "claim" under RCW 4.24.525(1)(a).**

**Besides RCW 4.24.525(2)(c), (d) and (e) basis for finding the pleading requesting relief was based on Haggenmiller's "public participation," sections (a) and (b) also apply. Haggenmiller herein argues that the claim is based upon a "written statement, or other document submitted, in a ... judicial proceeding or other governmental proceeding authorized by law," and also based upon a "written statement**

or other document submitted, in connection with an issue under consideration of review by a ... judicial proceeding or governmental proceeding authorized by law." And directed to Haggemiller, an injured worker whose case should be labeled as of *first impression* as it sets forth a completely original issue of law for decision by the court, in the interpretation of RCW 51.32.080, WAC 296-20-220(1)(o), as on the Board's published Significant Decision In re Robert Lenk, BIIA May, 91 6525 (1993).

"This section applies to any claim, however characterized, that is based on an action involving public participation and petition." see RCW 4.24.525(2).

The language, however characterized, establishes that the legislature understood that SLAPP suits may be characterized as not just about statements made, but may include claims about "documents submitted" or "other lawful conduct ... in furtherance of the exercise of the right of free speech in connection with an issue of public concern, or in furtherance of the constitutional right of petition." RCW 4.24.525(2)( d) and (e).

The legislature's mandate against SLAPP suits is deliberately broad. Whether characterized as not a claim involving First Amendment rights exercised by Haggemiller, but characterized as merely resolving an issue of documents submitted, the Department cannot be seen to have filed the claim against Haggemiller in a vacuum, and Haggemiller has plainly established more likely than not that the Department's claim is based on Haggemiller's public participation, "however characterized."

The pleading requesting relief was filed to pre-empt Haggemiller's ability to seek relief from a court (or petition) at a time of his own choosing.

Rather than be free to contemplate whether or not to pursue legal action over the trial court's denial of his petition, Haggemiller was forced to immediately defend against the suit, or simply not respond to the pleading requesting relief, lose by default, and forgo a lawful workmen's compensation claim. This creates an undue burden on Haggemiller that he did not anticipate when making the initial claim for compensation. Furthermore, the fact that the Department filed a suit against Haggemiller for making a permanent partial

**disability claim creates a chilling effect on all citizens who are contemplating making a permanent partial disability claim to the Department.**

**D. The Department failed to produce any evidence much less show by clear and convincing evidence, a probability of prevailing on the claims.**

**Haggenmiller has fulfilled his burden by demonstrating by a preponderance of evidence how his pre-litigation letters and Motions accordingly, Haggenmiller's Notice of Appeal to Court of Appeal on October 15, 2013 and November 26, 2013 are both actions involving public participation and petition under RCW 4.24.525.**

**Under RCW 4.24.525(4)(b), after Haggenmiller has met this burden, "the burden shifts to the [Plaintiff] to establish by clear and convincing evidence a probability of prevailing on the claim."**

**E. The core of venue: protecting defendants against unfair locations for trial.**

**On appeal from trial on the merits, improper venue shall in no event be harmless error. The appellate court shall consider the entire record recognizing the trial court has no**

discretion to transfer venue on its own motion, even to a county of proper venue. The constitutional nature of venue will ensure a basic measure of due process to the defendants whose cases are prejudiced by having to defend themselves in gravely unfair locations. See (CABR at 4 line 33 et seq.)

**F. The erroneously admitted or excluded evidence might have affected the Decision.**

In the case of constitutional error, the courts use a higher standard. The error must be harmless beyond a reasonable doubt and the burden is on the prosecution to show that error did not result, rather than on the appellant to demonstrate that the error affected his or her substantial rights. See *Chapman v. California*, 386 U.S. 18, 24 (1967); *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Recent Supreme Court opinions have, however, eroded some of the distinction between constitutional and non-constitutional error. *Chapman* appeared to require courts to reverse, even if overwhelming evidence had been presented, if the erroneously admitted or excluded evidence might have affected the verdict. Now, however, constitutional error is nevertheless harmless as long as the reviewing court is persuaded that "the record

developed at trial establishes guilt beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 579 (1986); see also *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991) ("[Evidence] may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."). In both constitutional and non-constitutional error cases, therefore, the focus may be more on whether the evidence against appellant is overwhelming rather than on the nature of the error. See Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence v 103[08]* (1986 & Supp. 1991).

**G.-Haggenmiller is entitled to compensation for his permanent partial disability according to the schedule of benefits in effect on the date of his June 5, 2012 valid audiogram.**

**20.94 percent plus 5 percent for his tinnitus as part of total hearing loss of 25.94 percent rated on the 2011 schedule found by Dr. Kessler's June 5, 2012 valid audiogram.**

**H.-Haggenmiller's tinnitus is a separate condition from his hearing loss as it occur at 6,000 Herz a separate award as a portion of total bodily impairment to be paid as mental category 4, WAC 296-20-340 (CABR at 23 line 1) rated on the 2011 schedule pursuant to WAC 296-20-220(1)(o).**

**In re Harold Sells, BIIA Dec., 95 4334 & 95 4547 (1996) EX 4**

**The Department has never adopted for publication in the Washington Administrative Code a regulation that describes the method for rating and providing awards for permanent impairment due to tinnitus. Indeed, the Department did not acknowledge workers' potential entitlements to such awards until our published Significant Decision, In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993). The Department's continuing failure to adopt such regulations, by continuing to address these issues only in the form of a policy, is contrary to the explicit direction of our Legislature, concerning the rating of permanent impairments. The Legislature has directed the Department to "... enact such rules having the force of law." (Emphasis supplied.) RCW 51.32.080(2). The lack of formal rules on the issue of rating impairment due to tinnitus is also contrary to the requirements of our state Administrative Procedures Act, Ch. 34.05 RCW. We discussed the agency rule making requirements of the Administrative Procedures Act in In re State Roofing & Insulation, Inc., BIIA Dec., 89 1770 (1991). Further, the Department's Policy 14.40, in directing physicians rate tinnitus as a percentage of hearing loss, appears in**



conflict with its regularly adopted regulation in WAC 296-20-220(1)(o). In this section the Department directs physicians to rate impairments not otherwise covered by the adopted rules as a percentage of total bodily impairment. We recognize WAC 296-20-220(1)(o) appears to except from its purview permanent impairments that “involve the loss of hearing” as well as other bodily areas already included in the list of specified disabilities contained in RCW 51.32.080(1). However, we found in Lenk that Mr. Lenk’s tinnitus was a separate condition from his hearing loss. We held it was, therefore, appropriate to rate permanent impairment due to tinnitus as a percentage of total bodily impairment under WAC 296-20-220(1)(o). As yet there has been no judicial or legislative determination, or other rule making act of the Department that would supersede our conclusion. In re Harold Sells, BIIA Dec., 95 4334 & 95 4547 (1996) EX 4

In his Special Additional Statement following the body of our unanimous decision in Lenk, the Employer Member then on this Board urged a greater standardization in evaluation of relative severity of tinnitus, “to arrive at greater consistency

**and fairness in administrative adjudication of all cases of occupational noise-induced tinnitus.” Lenk, at 16. As we have emphasized, the Department has yet to adopt a regulation to this end having the full force of law as directed by the Legislature and as required by the Administrative Procedures Act. We, again, note that a formal rule addressing the impairment issues would supersede our evaluations of how to compute awards for tinnitus. Therefore, when confronted with the question of rating impairment for tinnitus we are left with our stated determination as set forth in Lenk. Under the principle of stare decisis we are inclined to follow our decisions. In re Harold Sells, BIIA Dec., 95 4334 & 95 4547 (1996) EX 4**

**I. Haggemiller is entitled to Attorney's Fees and Costs under the Appeal**

**RCW 4.24.525(6)(a) states that:**

**( a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:**

**(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;**

- (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and**
- (iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.**

**Haggenmiller requests this Court to instruct the Trial Court to award him his reasonable cost as attorney fees for the proceedings below, and to award him the statutory amount of \$10,000 for each violation of RCW 4.24.525. Not only would the award of fees and the \$10,000 be reasonable under the applicable statute, the penalty is necessary to prevent the Department from filing similar motions of relief against other workers who may be also brazen enough to make a permanent partial disability claim to the Department.**

**RAP 18.1(a) provides that a party may recover its reasonable attorneys' fees on appeal if "applicable law" permits recovery of attorneys' fees. A party must devote a separate section of its brief to the request for reasonable attorneys' fees. RAP 18.1(b).**

**As shown in the previous section of this brief, RCW 4.24.525(6)(a) provides for the award of attorney fees and**

costs to the prevailing defendant (Haggenmiller). To the extent that Haggenmiller recovers attorneys' fees with respect to the proceedings below, applicable law also supports an award of attorneys' fees on appeal. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,825,828 P.2d 549 (1992). The point of the present appeal is to rectify the error made by the trial court not finding Haggenmiller to be the prevailing party under RCW 4.24.525 and thus not awarding him fees or sanctions. Therefore, in addition to this Court remanding the case for entry of an order awarding fees, fees should be awarded to Haggenmiller for his appeal.

Haggenmiller respectfully requests that the Court grant his request for costs and reasonable attorneys' fees on appeal. This Court should determine those fees. *Martinez v. Department a/Tacoma*, 81 Wn.App. 228 at 245-46, 914 P.2d 86 (1996). Haggenmiller will submit an affidavit to document his fees on appeal. RAP 18.1(d).

## VII. CONCLUSION

The trial court's rejection of Haggenmiller's four Anti-SLAPP claims should be reversed. The case should be

remanded with instructions to the Trial Court to enter an order recognizing that Haggemiller has prevailed under RCW 4.24.525 and to award attorney fees, a \$10,000 sanction each and costs under that statute. And under RCW 4.24.525 (6)(a) (iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated. Each of these failures to establish by clear and convincing evidence a probability of prevailing on their claims warrants reversal of the trial court and vacation of the order granting Department's Motion for Judgment as a Matter of Law. This Court should make an award of fees for Haggemiller's successful appeal. The relief sought is as follows.

This case is about Total Bodily Impairment under the Permanent Partial Category Awards (TBI) for award year 2011. Haggemiller is claiming an award for category 4 Mental, (45 percent of \$183,900.42) equals to \$82,755.18.

Plus Dr. Kessler's findings of 25.94 percent Permanent Partial Disabilities (PPD) for award year 2011, (25.94 percent of

**88,272.33) equals to \$22,897.84 minus an original payment of \$8,985.15 equals \$13,912.69**

**The Department has made a payment of \$3,648.06 towards this award on March 8, 2013. CP 467-76.**

**That the Court award Plaintiff in accordance with RCW 51.52.135: Worker or beneficiary entitled to interest on award ...the worker or beneficiary shall be entitled to interest at the rate of (12 percent) twelve percent per annum on the unpaid amount of the award. Courts award prejudgment interest when claims are liquidated. Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). A liquidated claim exists when the amount of prejudgment interest can be determined from the evidence with exactness and without reliance on opinion or discretion.? Bostain, 159 Wn.2d at 723 (citing Hansen, 107 Wn.2d at 472). ?? A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated.?? Id. (quoting Hansen, 107 Wn.2d at 472).**

**Payment Order date: October 6, 2011. (CABR at 44)**

**That the Court adjudges and decrees that defendants have engaged in the conduct complained of herein RCW 42.20.040- "fraud on the court" which fails to succeed only**

**because of the diligence and perseverance of Haggemiller and because the offending litigant, Kilduff despite being willful, was inept. That cheaters should not be allowed to prosper has long been central to the moral fabric of our society and one of the underpinnings of our legal system. Sanctions, as in this case of “substantive fraud” as when defendant, Ms. Kilduff gave false testimony and deliberately omitted relevant information. This is sufficiently serious and egregious to come within the definition of fraud on the court. These actions merit default to preserve the integrity of a civil proceeding and she should not be permitted to continue to employ the very institution she has subverted to achieve her ends.**

**That the Court make such orders so that plaintiff, shall have and recover from defendants the costs of this action, in accordance with RCW 51.52.130 .**

**That the Court award Plaintiff the actual damages sustained as a result of Defendant's action complained of herein. Under CR 11 Haggemiller is asking for sanction, four hours drive at \$400.00/hr., plus \$0.555/mile for 190 miles plus, \$5.00 toll for a total of \$1710.45**

**That the Court orders such other relief to fully and effectively dissipate the effects of the conduct complained of herein, or which may otherwise seem proper to the Court.**

**I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.**

**Signed at Jefferson County, Washington**

**May 16, 2014**

*Ederi Haggemiller*

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## APPENDIX

**EXHIBIT 1**

**Harry v. Buse Timber & Sales, Inc.**

**No. 79613-1. 201 P.3d 1011 (2009)**

**HARRY v. BUSE TIMBER & SALES, INC.No. 79613-1. 201 P.3d 1011 (2009)**

**Donald HARRY, Respondent,  
v.  
BUSE TIMBER & SALES, INC., and the Department of Labor  
and Industries, Petitioners.**

**Supreme Court of Washington, En Banc.**

**Argued January 22, 2008.**

**Decided February 26, 2009.**

**As Corrected March 10, 2009.**

**Anastasia R. Sandstrom, Attorney General's Office, Kathryn Kunkler, Keehn Kunkler PLLC, Seattle, WA, for Petitioners.**

**William D. Hochberg, Nicole Alys Hanousek, Amie Christine Peters, Law Office of William D. Hochberg, Edmonds, WA, for Respondent.**

**Terri Lynn Herring-Puz, Attorney at Law, Tacoma, WA, Amicus Curiae on behalf of Aerospace Machinists District Lodge 751, Teamsters Joint Council # 28, Washington State Building & Constructions Trade Council, and Washington State Labor Council.**

**Gilbert M. Stratton, Bernadette Marie Pratt, Marne J Horstman, Craig Jessup & Stratton PLLC, Tacoma, WA, Amicus Curiae on behalf of Washington Self-Insurers Association.**

**MADSEN, J.**

¶ 1 This case requires us to determine when occupational hearing loss becomes "partially disabling" for the purpose of determining the appropriate rate of compensation for a permanent partial disability award. Petitioners Buse Timber and Sales, Inc. (Buse) and Department of Labor and Industries (Department) contend Donald Harry's 2001 claim for 38.13 percent binaural hearing loss

is compensable according to the benefit levels in effect in 1974, when he experienced a 5.6 percent unilateral hearing loss. The Court of Appeals disagreed, holding that Harry's occupational hearing loss became "partially disabling" on multiple dates, entitling him to compensation according to the schedule of benefits in effect on the date of each documented incremental loss.

¶ 2 We conclude that the Department erred in calculating Harry's permanent partial disability award according to the 1974 schedule of benefits. RCW 51.32.180(b) is ambiguous as to whether "the date ... the disease ... [i]s totally or partially disabling" refers to the first date any compensable hearing loss first occurred, or the last date hazardous workplace noise contributed to the disability for which a worker seeks compensation. Applying the liberal construal mandate, we hold occupational hearing loss is "partially disabling" within the meaning of RCW 51.32.180(b) as of the date a worker was last exposed to hazardous occupational noise.

## **FACTS**

¶ 3 Donald Harry worked for Buse from 1968 until his retirement in 2001. He was exposed to loud noise throughout his employment. Buse administered annual audiograms in compliance with a Washington Industrial Safety and Health Act of 1973 (chapter 49.17 RCW) regulation. An audiogram performed in 1974 showed that Harry suffered a compensable hearing loss in his left ear. Successive audiograms document a gradual worsening of Harry's condition. By 1986, Harry's hearing loss had progressed to both ears. However, it was not until his retirement, in 2001, that he consulted a doctor. His doctor informed him he had a binaural (both ears) hearing loss of 38.13 percent.

¶ 4 Harry filed a permanent partial disability claim for occupational hearing loss. The Department accepted the claim and ordered Buse to compensate Harry for 38.13 percent binaural hearing loss, according to the schedule of benefits in effect in 2001. Buse protested the order. It argued Harry's permanent partial disability award should be calculated according to the 1974 schedule of benefits, when he first experienced a compensable hearing loss in his left ear. The Department agreed and revised its order based on the schedule of benefits in effect in 1974.

¶ 5 The Board of Industrial Insurance Appeals (BIIA) and the superior court affirmed the Department's order. The Court of Appeals reversed. *Harry v. Buse Timber & Sales, Inc.*, 134 Wn.App. 739, 171 P.3d 1058 (2006). It reasoned that occupational hearing loss is appropriately analyzed as multiple diseases rather than a single disease, with compensation determined according to the schedule of benefits in effect at the time of each documented incremental loss. *Id.* at 746, 171 P.3d 1058.

¶ 6 Buse and the Department both filed petitions for review, which we granted. *Harry v. Buse Timber & Sales, Inc.*, 161 Wn.2d 1014, 171 P.3d 1057 (2007).

## **ANALYSIS**

¶ 7 The Industrial Insurance Act (IIA), Title 51 RCW, was designed to provide "sure and certain relief" to injured workers while limiting employer liability for industrial injuries. RCW 51.04.010; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker in order to minimize "the suffering and economic loss" that may result from work-related injuries. RCW 51.12.010; *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) ("[W]here reasonable minds can differ over what Title 51 RCW provisions mean..., the benefit of the doubt belongs to the injured worker.").

¶ 8 Occupational hearing loss is compensable as a permanent partial disability according to a fixed schedule of benefits. RCW 51.32.080(1)(a). Unlike the other disability classifications, a "permanent partial disability" is defined as a loss of bodily function rather than inability to perform one's job functions.<sup>1</sup> *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 585, 925 P.2d 624 (1996); RCW 51.08.150. Cf. RCW 51.08.160 ("permanent total disability" prevents a worker from performing any work); RCW 51.32.090 (same for "temporary total disability"); RCW 51.32.090(4)(a) ("temporary total disability" interferes with a worker's normal job functions). A claimant is entitled to an award based on the percentage of functional loss of the affected body part, applying the schedule of benefits in effect on the date of injury. See RCW

51.32.080(2), (7). Thus, the amount of the award depends on two factors: the extent of the disability and the date the injury occurred.

¶ 9 It is undisputed Harry is entitled to a permanent partial disability award for 38.13 percent binaural hearing loss, resulting from continuous exposure to workplace noise from 1968 until his retirement in 2001. The only disputed issue is whether his occupational hearing loss is compensable according to the schedule of benefits in effect on the first date occupational noise resulted in a ratable loss of hearing or on the last date it contributed to his compensable disability.

¶ 10 Occupational hearing loss may result from either an industrial accident or continuous exposure to hazardous levels of noise. Noise-induced hearing loss is classified as an occupational disease.<sup>2</sup> *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 130, 814 P.2d 629 (1991); *Pollard v. Weyerhaeuser Co.*, 123 Wn.App. 506, 512, 98 P.3d 545 (2004); *In re Brooks*, No. 02 17331 (Wash. BIIA Aug. 1, 2003); cf. *Rector v. Dep't of Labor & Indus.*, 61 Wn.App. 385, 810 P.2d 1363 (1991) (hearing loss resulting from head injury compensable as industrial injury). This is because noise-induced hearing loss results from cumulative trauma rather than a single traumatic event and thus lacks the time-definiteness of an industrial injury.

¶ 11 Accordingly, RCW 51.32.180(b) controls the applicable schedule of benefits. RCW 51.32.180(b) was enacted in 1988 as an amendment to RCW 51.32.180 to address the applicable date for determining the appropriate rate of compensation for occupational diseases. Laws of 1988, ch. 161, § 5. RCW 51.32.180 provides:

Every worker who suffers disability from an occupational disease in the course of employment ... shall receive the same compensation benefits ... as would be paid and provided for a worker injured or killed in employment under this title, except as follows ... (b) ... the rate of compensation for occupational diseases shall be established as of *the date the disease* requires medical treatment or *becomes totally or partially disabling*, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.

(Emphasis added.)

¶ 12 Petitioners argue the statutory language, "the date the disease ... becomes totally or partially disabling," plainly means the date any compensable hearing loss first occurs, even if most of the claimant's compensable disability resulted from subsequent exposure to hazardous workplace noise. Accordingly, petitioners claim that Harry's 38.13 percent binaural hearing loss is compensable according to the schedule of benefits in effect in 1974, when an industrial audiogram revealed the existence of a 5.6 percent unilateral hearing loss.

¶ 13 The petitioners' interpretation of the statute is untenable. An "[o]ccupational disease" is "such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. Although we have described hearing loss as a "progressive condition," see *Heidy*, 147 Wash.2d at 88, 51 P.3d 793, hearing loss is not progressive in the sense that pneumonia or asbestosis is progressive. *Id.* Occupational hearing loss occurs simultaneously with exposure to injurious noise and does not progress after the exposure ends. *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993). The injury is complete when the worker is removed from a noisy environment. *Id.*; *Pollard v. Weyerhaeuser*, 123 Wn.App. 506, 512, 98 P.3d 545 (2004). Prior hearing loss contributes to successive hearing loss only in the sense the resulting disability is cumulative.

¶ 14 Thus, if "partially disabling" refers to the first compensable hearing loss a worker experiences, as petitioners contend, any hearing loss that arises subsequently could not constitute the same "disease" referred to in RCW 51.32.180(b). This is because increased hearing loss cannot occur before a worker's subsequent exposure to injurious occupational noise. And it follows that an occupational disease cannot become "partially disabling" within the meaning of RCW 51.32.180(b) *before* the occurrence of the workplace conditions that caused the compensable loss at issue.<sup>3</sup>

¶ 15 If the phrase "the date the disease... becomes totally or partially disabling" refers to the date a compensable loss first occurs, we would, like the Court of Appeals, agree with Harry that

RCW 51.32.180(b) requires the Department to apply multiple schedules of benefits to even a single claim for occupational hearing loss, as though it were multiple diseases. However, such an interpretation would unduly complicate the adjudication of occupational hearing loss claims. We believe the legislature intended a single claim for a permanent partial disability to be compensable according to a single schedule of benefits. Indeed, RCW 51.32.180(b) directs the Department to calculate benefits according to a single date, not multiple ones, presumably to further the goal of reducing litigation and providing "swift and certain" relief to injured workers.

¶ 16 Considering the purpose of the IIA, the liberal construal mandate, the definition of occupational disease, and the nature of occupational hearing loss, we interpret "the date the disease ... becomes totally or partially disabling," RCW 51.32.180(b), as referring to the date the aggregate compensable disability occurred, not the date a compensable loss first occurred. Accordingly, we hold the date of last injurious exposure is the date occupational hearing loss is "partially disabling" within the meaning of RCW 51.32.180(b).

¶ 17 Harry declined to advance this reading of the statute because he assumed it was foreclosed by our decision. *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991); see *Suppl. Br. of Resp't, Donald Harry* at 7-8 n. 1 ("RCW 51.32.180... specifically prohibits the establishment of the rate of compensation as of the date of last exposure" (citing *Landon*, 117 Wash.2d at 127, 814 P.2d 626)).

¶ 18 In *Landon*, we explained that in adopting the 1988 amendment to RCW 51.32.180(b), the legislature rejected the last injurious exposure rule in favor of the date of manifestation rule as applied to long-latency diseases such as asbestosis and silicosis. Under the date of manifestation rule, the date the disease actually requires medical treatment or interferes with a worker's job performance, not the date of contraction, controls the schedule of benefits. See, e.g., *Puckett v. Johns-Manville Corp.*, 169 Cal.App.3d 1010, 215 Cal.Rptr. 726 (1985); *Zurich Gen. Accident & Liability Ins. Co. v. Indus. Comm'n*, 203 Wis. 135, 233 N.W. 772 (1930) (disability



occurred when worker was obliged to take a lower paying job as a result of silicosis).

¶ 19 Landon held the date of manifestation rule applies as well to claims filed before the effective date of the 1988 amendment: "[W]orkers' compensation benefits should be calculated as of the date the disease manifests itself, not the date the worker suffered the last injurious exposure to the harmful material." Landon, 117 Wash.2d at 128, 814 P.2d 626. Landon is factually distinguishable because it involves a long-latency disease, not a cumulative trauma disease.<sup>4</sup>

¶ 20 The legislative history of RCW 51.32.180(b) and our case law support the conclusion an occupational disease may be compensable according to the date of last injurious exposure when that date coincides with the date of manifestation, as in the case of cumulative trauma injuries like occupational hearing loss.

¶ 21 Before 1988, the legislature provided merely that disabilities resulting from occupational diseases are compensable in the same manner as those resulting from injuries. See former RCW 51.32.180 (1988); RCW 51.16.040. The first occupational diseases covered by the IIA were gradual onset injuries caused by cumulative trauma. Laws of 1937, ch. 212, § 1(19), at 1033 (allowing compensation for disabling joint inflammation that results from "continuous rubbing, pressure or vibration of the parts affected"); *Dennis v. Dep't of Labor & Indus.*, 44 Wn.App. 423, 722 P.2d 1317 (1986), *aff'd*, 109 Wn.2d 467, 745 P.2d 1295 (1987). The common law standard for determining the date of occurrence for such occupational diseases was the last date of injurious exposure or the last day worked, on the theory the injury continued so long as the worker was exposed to the injurious workplace conditions and the injury became disabling when the worker could no longer work. See *Schuriknight v. City of North Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194 (2002); *Bldg. Materials Corp. v. Britt*, 211 S.W.3d 706, 712 (Tenn.2007) ("gradually occurring injuries are a new injury each day"; adopting last-date-worked rule as the date of injury for cumulative trauma injuries).

¶ 22 When an occupational disease involves a gradual onset disability resulting from cumulative trauma, fixing compensation

according to the last day worked or the last day of injurious exposure usually compensates disabilities resulting from occupational disease comparably to disabilities resulting from industrial injuries. This is because an occupational disease resulting from cumulative trauma is similar to an industrial injury in that the timing of the disability generally coincides with the timing of the injury-causing event.<sup>5</sup>

¶ 23 In the case of a long-latency occupational disease, however, the last injurious exposure rule does not fulfill the statutory purpose of compensating diseases and injuries equally but results in application of an out-dated schedule of benefits. *Landon*, 117 Wash.2d at 127, 814 P.2d 626.

¶ 24 In order to remedy the inequity, many jurisdictions adopted the date of manifestation rule in place of the last injurious exposure rule for identifying the date of occurrence for disability resulting from long-latency diseases. See 3 Larson, *supra*, § 53.05 (overwhelming majority of states reject last injurious exposure rule in favor of date of disability, knowledge, or manifestation for determining applicable schedule of benefits in occupational disease claims).

¶ 25 Our board of industrial insurance appeals adopted the date of manifestation rule. *In re Wilcox*, No. 69,954 (Wash. BIIA May 30, 1986); *In re Weil*, No. 86 2814, at 4 (Wash. BIIA Nov. 30, 1987) ("If occupational disease and injury claims are to be treated the same for purposes of computing compensation, then the computation of benefits must be tied to the point in time when both events have occurred, i.e., the occupational event or exposure, and some resulting condition.") ("injury" encompasses two distinct elements: a "tangible happening," and "an immediate or prompt result"). The board's decision was followed by both the legislature when it enacted the 1988 amendment to RCW 51.32.180(b), Laws of 1988, ch. 161, § 5, and followed by this court. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370, 915 P.2d 519 (1994) (statutory language, "totally or partially disabling," is synonymous with common law "date of manifestation" rule); *Landon*, 117 Wn.2d 122, 814 P.2d 626; see also *Nygaard v. Dep't of Labor & Indus.*, 51 Wn.2d 659, 661-62, 321 P.2d 257 (1958) (bronchial asthma caused by workplace exposure became a "compensable disability" when it caused the worker to "collapse" and "miss work," not when it first

developed, years earlier); *Plese v. Dep't of Labor & Indus.*, 28 Wn.2d 730, 183 P.2d 1001 (1947) (holding that a worker suffering from silicosis was entitled to compensation according to the date the disease caused him to quit work, not the date of diagnosis).

¶ 26 We decline to interpret RCW 51.32.180(b) in a manner that leads to the absurd result of compensating an injured worker according to benefit levels in effect before the injurious exposure that caused the disability at issue. The purpose of the 1988 amendment to RCW 51.32.180(b) was to compensate workers appropriately for disabilities that arise *after* the date of last injurious exposure. The 1988 amendment cures the inequity that results when there is a long delay between injurious cause and injurious effect by requiring compensation to be determined according to the time a worker experiences the actual disabling effects of an occupational disease. However, the legislature did not intend to reduce benefits for workers whose compensable disability coincides with the date of last injurious exposure, as in the case of gradual onset cumulative trauma injuries like occupational hearing loss.

¶ 27 Other jurisdictions that reject the last injurious exposure rule as applied to long-latency diseases continue to apply it in determining compensation for cumulative trauma disabilities, including occupational hearing loss.<sup>6</sup> See *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 960 (9th Cir.1998) (date of last injurious exposure determines benefits for occupational hearing loss under Longshore and Harbor Workers' Compensation Act); *Discher v. Indus. Comm'n*, 10 Wis.2d 637, 103 N.W.2d 519 (1960) (date of wage loss or last day worked is date of injury for occupational diseases, including hearing loss); *Berry v. Boeing Military Airplanes*, 20 Kan.App.2d 220, 885 P.2d 1261 (1994) (adopting last date worked as date of occurrence for carpal tunnel syndrome after taking account of its "hybrid" nature as injury/disease); *Barker v. Home-Crest Corp.*, 805 S.W.2d 373 (Tenn.1991) (date an employee is no longer able to work is the date of injury for carpal tunnel syndrome).

¶ 28 In *Bath Iron Works*, the Supreme Court found it "quite proper" and not inconsistent with congressional intent to determine the time

of injury in occupational hearing loss cases as the time of last injurious exposure, considering the nature of the disease process:

The injury, loss of hearing, occurs simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases. Under those circumstances, we think it quite proper to say that the date of last exposure—the date upon which the injury is complete—is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss.

Bath Iron Works, 506 U.S. at 165, 113 S.Ct. 692; see also Railco Multi-Constr. Co. v. Gardner, 564 A.2d 1167 (D.C.App.1989) (date of compensation for occupational hearing loss fixed by date cumulative loss occurred, not date first loss occurred); John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101, 105 (Iowa 1989) (date of occurrence of occupational hearing loss is date of last exposure to injurious noise, whether due to retirement, termination, or transfer from excessive noise exposure) (citing Iowa Code § 85B.8); Green Bay Drop Forge Co. v. Indus. Comm'n, 265 Wis. 38, 60 N.W.2d 409 (1953) (occupational hearing loss compensable as of last day worked); Ciavarro v. Despatch Shops, Inc., 22 A.D.2d 312, 255 N.Y.S.2d 48 (1964) (date of disability for occupational hearing loss is last day worked, per statute).

¶ 29 RCW 51.16.040 requires that occupational diseases are compensable "in the same manner" as injuries. Compensating occupational hearing loss according to the date of last injurious exposure better fulfills this statutory mandate. In the case of successive injuries to the same body part, whether the worker is entitled to a new schedule of benefits for the aggravation of a prior injury depends on whether the aggravation was proximately caused by subsequent workplace conditions. See *In re Tracy*, No. 88 1695 (Wash. BIIA Feb. 2, 1990). When an aggravation is not caused by subsequent conditions, the original schedule of benefits applies. But if subsequent workplace conditions contributed to the successive injury, the worker is entitled to a new schedule of benefits.

¶ 30 Because new hearing loss arises from a worker's exposure to injurious noise, some portion of Harry's compensable loss is attributable to his last exposure to hazardous workplace noise.

Fixing compensation for his aggregate hearing loss according to the date a compensable disability first occurred would undercompensate him for his post-1974 disability. Considering the liberal construal mandate, we must resolve the case in favor of the injured worker.

¶ 31 The last injurious exposure rule prevents an employer from apportioning responsibility for an occupational disease claim. Under the last injurious exposure rule, an employer is responsible for the aggregate disability to which it contributed. See WAC 296-14-350; Tri, 117 Wash.2d at 130, 814 P.2d 629.7

¶ 32 The Court of Appeals reasoned that compensating Harry according to the present value of his entire disability would amount to a "windfall." We disagree. This is not a case where a worker negligently or deliberately failed to file a claim. There is no evidence in the record that Harry received notice from a healthcare provider that he had a compensable disability, which would have triggered the statute of limitations for his occupational hearing loss. See RCW 51.28.055 (occupational disease claim timely only if filed within two years after receiving notice from a healthcare provider of the existence of a compensable loss; additionally, a claimant filing more than two years after the date of last injurious exposure is entitled only to medical benefits, not a permanent partial disability award, for occupational hearing loss). Therefore, Harry is entitled to compensation for his entire disability. *Cf. In re Lovell*, No. 69,823 (Wash. BIIA Nov. 25, 1986) (worker precluded from claiming benefits for preexisting hearing loss that occurred before statute of limitations ran on claim); *In re Burrill*, No. 47 766 (Wash. BIIA Dec. 13, 1977) (allowing claim for hearing loss arising after the date the statute of limitations ran on preexisting hearing loss).<sup>8</sup>

¶ 33 This result is not inequitable to the employer, which could have reduced its liability by providing Harry with a physician-certified notice of compensable hearing loss. Buse was aware of the existence of Harry's occupational hearing loss as it occurred. Although it had no obligation to inform Harry he had a compensable loss, Buse cannot complain his failure to file a claim deprived it of notice of its potential obligation to pay benefits or the opportunity to make its workplace safer.

¶ 34 A core purpose of the IIA is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer. This purpose is not well served by applying a schedule of benefits in effect long before the injurious workplace exposure occurred. Thus, in addition to being grossly unfair to injured workers like Harry, the Department's handling of occupational hearing loss claims undermines a primary purpose of the IIA because the compensation awards do not accurately reflect the cost of workplace injuries. The legislature never intended this inequitable, illogical, and absurd result when it amended RCW 51.32.180.

¶ 35 According to the record, Donald Harry was exposed to injurious noise throughout his employment, yet his occupational hearing loss did not require medical treatment before retirement. He is entitled to compensation for his permanent partial disability according to the schedule of benefits in effect on the date of his retirement.

## **CONCLUSION**

¶ 36 We affirm the Court of Appeals' reversal of the Department's order applying the 1974 schedule of benefits to Harry's 2001 permanent partial disability claim for occupational hearing loss. Occupational hearing loss that does not require medical treatment before retirement is compensable according to the schedule of benefits in effect on the date occupational noise last contributed to the disability for which a worker seeks compensation. We reverse the Court of Appeals holding that Harry is not entitled to compensation for his entire disability and remand for further proceedings consistent with this opinion. Because he has prevailed here, Harry is entitled to reasonable attorney fees, per RCW 51.52.130.

**WE CONCUR: C. JOHNSON, SANDERS, CHAMBERS, OWENS,  
and STEPHENS, JJ.**

**FAIRHURST, J. (dissenting).**

¶ 37 The legislature has provided an unambiguous mechanism for establishing compensation benefits for claims resulting from

progressive hearing loss. While that scheme may not be optimal, the legislature has made its decision about which schedule of benefits will be used. The majority, however, claims the statutory prescriptions are ambiguous and has fashioned its own new rule without statutory authority and contrary to case law. Because this attempt to remedy a perceived inequity usurps the role of the legislature and is strained, I respectfully dissent.

¶ 38 Benefits to workers injured on the job are statutorily governed by Title 51 RCW, the Industrial Insurance Act (IIA). For occupational diseases, the plain language of RCW 51.32.180(b) clearly states how to calculate benefits: "the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim."

¶ 39 When construing a statute, we first look to the plain meaning of the statute. "The `plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (quoting *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002)). If not otherwise defined by statute, the ordinary meaning includes the dictionary definition. *Campbell & Gwinn*, 146 Wash.2d at 9, 11, 43 P.3d 4; *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762, 27 P.3d 608 (2000). If a statutory provision is subject to more than one reasonable interpretation, it is ambiguous. *Jacobs*, 154 Wash.2d at 601, 115 P.3d 281. Any ambiguity in the language of the IIA must be resolved in favor of the injured worker. RCW 51.12.010; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

¶ 40 There is no disagreement in this case over the operative portion of the statute— when the disease becomes partially disabling. "[B]ecome" is defined as:

1 a *obs* (1): COME (2): GO ... b (1): to come to exist or occur (2): to emerge as an entity: grow to manifest a certain essence, nature, development, or significance ... c *archaic*: to come to experience—used with an infinitive 2 a: to pass from a previous state or condition and come to be: grow or change into being through taking on a new character or characteristic ... b: to take on a new role, essence, or nature and come to be ... c: to come to be—used as an auxiliary in passive constructions ... 3 a: HAPPEN.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 195 (2002). While the term "partially disabling" is not defined by statute, RCW 51.08.150 defines "[p]ermanent partial disability" as "the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability." This definition focuses on the loss of bodily function rather than the inability to perform one's job functions, and it includes both monaural and binaural hearing loss. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 585, 925 P.2d 624 (1996); RCW 51.08.150; RCW 51.32.080(1)(a). The statute uses the present participle form of disable—disabling; it does not use the past participle form of the term—disabled. The tense is important because the term "disabled" implies a completed action while "disabling" implies that the disability merely exists. Putting the definitions together, the plain meaning of the statute is that the compensation rate is based when the loss of bodily function components of the disease come to exist. See WAC 296-14-350(3); *Boeing Co. v. Heidy*, 147 Wn.2d 78, 88, 51 P.3d 793 (2002); *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 124 n. 1, 814 P.2d 626 (1991). Thus, the rate of compensation is based when the bodily loss first exists. Given the precise wording of the statute and the particular tenses of the words used, I cannot see another reasonable reading of this statute.

¶ 41 At the time of Donald Harry's first audiogram in 1974, he had a 5.6 percent monaural loss of his hearing and had a permanent partial disability. Harry's occupational disease first came to be because of that test, and thus, his rate of compensation should be based on the schedule in effect on that date. The plain meaning of the statute dictates that the rate of compensation for Harry's



occupational monaural hearing loss is 1974, when Harry first lost his hearing.<sup>1</sup>

¶ 42 The majority, however, concludes that the term "becomes ... partially disabling" is ambiguous. RCW 51.32.180(b). It provides no explanation of how the term is ambiguous or what competing reasonable interpretations are at play. Instead, the majority argues that the plain-meaning interpretation advanced by petitioners is untenable because the outcome is that a compensation rate will be set before a worker's subsequent exposure to injurious occupational noise causes further occupational hearing loss.<sup>2</sup> Majority at 1014. While the majority may be correct as a matter of economic fairness that it may not be appropriate to compensate a victim of occupational disease at a rate that went into effect nearly four decades before he is compensated, that is the province of the legislature, not this court.<sup>3</sup> Determinations on what would be a more equitable economic outcome are not grounds for overriding the clear meaning of the law. That the legislature's result does not comport with this court's notion of perfect equity does not necessitate the construction of a legal fiction to plug a nonexistent ambiguity.

¶ 43 The majority argues that the interpretation proposed by petitioners would lead to absurd results. *Id.* at 1016. This court has held that if a literal interpretation of a statute is absurd, the statute is ambiguous and the court will move on to examine the legislative history and use judicial canons of statutory interpretation. *State v. Taylor*, 97 Wn.2d 724, 729-30, 649 P.2d 633 (1982); *In re Det. of Martin*, 163 Wn.2d 501, 509-13, 182 P.3d 951 (2008). Contrary to the majority's holding, the type of absurdity that causes a statute to be ambiguous is not when there are any absurd policy results from the plain meaning of the statute. Rather, a statute is absurd, and thereby ambiguous, if its plain meaning is directly inconsistent with its statutory purpose or with another statute so as to render either of the statutes meaningless.<sup>4</sup> See *Martin*, 163 Wash.2d at 509-13, 182 P.3d 951. In this case, the purpose of the statute is to set the rate of compensation, which it does. The plain meaning of the statute does not contradict another statute in the IIA. Despite policy concerns, the plain meaning of the statute must be given effect.

¶ 44 In addition to creating this rule on its own and going against the plain meaning of the statute, the majority relies upon case law that does not support its conclusion. Regarding Washington cases, the majority discusses *Landon*, 117 Wash.2d at 127, 814 P.2d 626, in explaining its interpretation of RCW 51.32.180(b). In *Landon*, we held that for claims resulting from asbestosis filed before the 1988 amendments to RCW 51.32.180(b), the date of manifestation rule should apply because the last injurious rule would not fulfill the then-existing statutory purpose of compensating diseases and injuries equally. *Landon*, 117 Wash.2d at 124-26, 814 P.2d 626. With regard to the 1988 amendments, this court explained that the legislature rejected the last injurious exposure rule in favor of the date of manifestation rule. *Id.* at 127, 814 P.2d 626. The majority uses the pre-1988 amendment analysis to support its conclusion, but regarding the statements about the current statute, the majority dismisses those statements because *Landon* dealt with a long-latency disease rather than a cumulative trauma disease. Majority at 1015. The majority's distinction is flawed. The distinction could be made for claims made before the 1988 amendments when the statutes simply stated that diseases were to be treated the same as injuries. *Landon*, 117 Wash.2d at 124, 814 P.2d 626; former RCW 51.32.180 (1977). That distinction cannot be made, however, when the legislature changed the statute and adopted the date of manifestation rule. If anything, *Landon's* statement regarding the 1988 amendments to former RCW 51.32.180 support the conclusion that the date of manifestation rule applies.

¶ 45 Similarly, the majority's citation to several cases from foreign jurisdictions that have applied the last injurious exposure rule is misleading. In none of those cases was the court interpreting a statute remotely similar to RCW 51.32.180(b). In *Discher v. Industrial Commission*, 10 Wis.2d 637, 103 N.W.2d 519 (1960); *Berry v. Boeing Military Airplanes*, 20 Kan.App.2d 220, 885 P.2d 1261 (1994); *Railco Multi-Construction Co. v. Gardner*, 564 A.2d 1167 (D.C.1989); *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101 (Iowa 1989); and *Green Bay Drop Forge Co. v. Industrial Commission*, 265 Wis. 38, 60 N.W.2d 409 (1953), all the courts were interpreting statutes that based compensation on the terms "date of injury" or "date of accident." In *Ciavarro v. Despatch Shops, Inc.*, 255 N.Y.S.2d 48, 22 A.D.2d 312, 314 (N.Y.App. Div.1964), the court was interpreting a statutory scheme

that explicitly explained that compensation for occupational hearing loss became due and payable six months after separation from work and the last day of work shall be the date of disablement. In *Barker v. Home-Crest Corp.*, 805 S.W.2d 373 (Tenn.1991), the court examined its state common law in applying the last injurious exposure rule. Finally, in *Bath Iron Works Corp. v. Office of Workers' Compensation Programs*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993) and *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir.1998), the courts were interpreting the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, and examined what constituted the time of injury as applicable to that statutory regime. If Washington's statutory scheme used the same terminology, those cases might be helpful in determining the meaning of our statute. However, none of those cases interpret a statute similar to RCW 51.32.180(b). As such, those cases are unhelpful to our examination of the specific terminology of our statutes.

¶ 46 Finally, while the majority contends that employing the date of manifestation rule would be absurd, its own analysis belies the argument. In response to the argument that compensating Harry according to the present value of his entire disability would amount to a "windfall," the majority contends that Harry did not deliberately fail to file the claim, act negligently, or receive notice that he had a compensable disability. Majority at 1018. While all of those facts are true, those facts go toward Harry's motives in filing the compensation claim and the calculation of the running of the statute of limitations. Harry's motives do not matter for purposes of determining which compensation schedule to use, and the statute of limitations provision has different wording. In a footnote, the majority notes that it is possible to segregate the compensation rate of a prior permanent partial disability based on reliable medical evidence. *Id.* at 1018 n. 7. Noticing that the compensation rate could be adjusted based upon an earlier schedule, the majority at least implicitly notes the policy concern of a windfall. Thus, while it is not dispositive to determining the plain meaning of a statute, the majority recognizes it is possible that the legislature drafted RCW 51.32.180(b) as it did to protect companies from having to pay a windfall to workers. There may be better ways to protect companies from having to pay a windfall to workers, but the legislature unambiguously wrote a policy to achieve that purpose.

¶ 47 Occupational hearing loss is, indeed, a factually unique affliction that may not comport perfectly with existing statutory remedies and, as such, may not compensate all victims equitably. Such a determination rightfully belongs to the legislature, and this court should not infringe on the rightful territory of our coordinate branch. Because the manner in which the majority reaches its conclusion is in opposition to existing law and usurps the role of the legislature, I dissent.

WE CONCUR: ALEXANDER, C.J., and J. JOHNSON, J.

### FootNotes

1. RCW 51.08.150 provides: "'Permanent partial disability' means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability."

2. The Court of Appeals criticized this court's characterization of occupational hearing loss as a "disease" rather than an "injury," finding it counterintuitive considering the condition results from cumulative trauma. *Harry*, 134 Wash.App. at 745 n. 14, 171 P.3d 1058. Occupational hearing loss may be compensable either under a "repeated impact theory" of injury or as an "occupational disease." 3 Arthur Larson, *Larson's Workers' Compensation Law* § 52.05 (2007) (collecting cases). Although occupational hearing loss is unlike long-latency diseases resulting from exposure to toxic substances, such as silicosis, it is similar to other gradual-onset diseases caused by repeated impacts, e.g., bursitis and carpal tunnel syndrome. The majority of jurisdictions classify hearing loss as a disease because it lacks the time-definiteness of an industrial injury and is similar to other cumulative trauma disabilities arising from repetitive trauma. See *Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 728, 672 P.2d 1055 (1983) (hearing loss is a disease, not an injury) (collecting cases); *Marie v. Standard Steel Works*, 319 S.W.2d 871, 878 (Mo. 1959) (classifying hearing loss as a disease, while stating, "'We attempt no scientifically exact discrimination between accident and disease, or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one or the other, but often overlap.'" (quoting

Connelly v. Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366, 367-68 (1925)); Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.1955) (hearing loss determined to be occupational disease under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901); 3 Larson, supra, § 52.05. Occupational hearing loss is unusual in that it is a permanent condition, and the extent of disability is readily ascertainable by audiogram. In this respect, it is unlike most injuries as well as most diseases. In any event, the distinction between injury and disease is no longer relevant for purposes of providing compensation and benefits. RCW 51.16.040 ("The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title."); see Dennis, 109 Wash.2d at 472-73, 745 P.2d 1295 (discussing IIA's historical evolution from "no coverage" of diseases to broad coverage).

3. RCW 51.32.080(1)(a) lends support to our conclusion. Under that provision, unilateral hearing loss is statutorily defined as a distinct permanent partial disability from binaural hearing loss. See RCW 51.32.080(1)(a). Thus, Harry's 1974 unilateral hearing loss could not constitute the date his binaural hearing loss became partially disabling. See *In re Lovell*, No. 03 16736 (Wash. BIIA Feb. 23, 2005) (the date a unilateral hearing loss occurs is not the date binaural hearing loss becomes partially disabling).

4. Nor is the result here controlled by *Heidy*, 147 Wn.2d 78, 51 P.3d 793. In *Heidy*, this court held, "a worker's knowledge of his or her disabling condition does not affect when the rate of compensation is established." Rather, the rate of compensation is established when "the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first." *Id.* at 88-89, 51 P.3d 793 (quoting RCW 51.32.180(b) and citing *Landon*, 117 Wash.2d at 124, 814 P.2d 626). This court's holding that the knowledge requirement is unsupported by the statute does not compel the conclusion occupational hearing loss is "disabling" for purposes of RCW 51.32.180(b) upon the first occurrence of some ratable disability. The Board's knowledge requirement did not affect the rate of compensation in *Heidy*. See 147 Wash.2d at 83, 51 P.3d 793 (noting the schedule of benefits was the same, with or without a knowledge requirement). To the extent *Heidy* suggests occupational hearing loss is compensable according to the first rather than the last date hazardous noise contributed to the compensable disability, we disapprove it.

5. Even in the case of an industrial injury, the date of disability controls the applicable rate of compensation, and is not necessarily equivalent to the date of accident. See *In re Walker*, No. 93 6528 (Wash. BIIA July 24, 1995) (where date of disability does not coincide with date of injury, date of disability controls the schedule of benefits). Injury is defined as "the physical conditions" that result from a "sudden and tangible" traumatic event. Physical conditions may manifest, resulting in disability, more than one year following an industrial accident. *Crabb v. Dep't of Labor & Indus.*, 186 Wn. 505, 508, 58 P.2d 1025 (1936) (allowing claim when disabling effect of industrial injury develops more than one year following accident); *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941) (allowing reopening of claim where disability occurred more than one year after accident); RCW 51.32.160 (authorizing adjustment in rate of compensation for aggravation of disabilities).

6. Other jurisdictions calculate benefits for occupational hearing loss according to the "last day of work," the date of "incapacitation," or the date of "disablement." The parties have drawn our attention to no case, and our research reveals none, where the date of injury for purposes of a permanent partial disability award is established as of the date any compensable hearing loss first occurs. Instead, most jurisdictions deem the date of occurrence as the date the injury is complete, i.e., the date of last injurious exposure.

7. This case does not involve, and therefore we do not address, the circumstances under which a worker's prior permanent partial disability may be segregated based on reliable medical evidence. See RCW 51.32.080(5) (formerly RCW 51.32.080(3) (1988)); *Heidy*, 147 Wash.2d at 86, 51 P.3d 793 (absent reliable medical evidence, age-related hearing loss may not be segregated from noise-related hearing loss; employers must "bear the burden of an imperfect science"); cf. *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 684, 94 P.2d 764 (1939) (segregation applies when a worker "already is, in fact, permanently partially disabled" but does not apply when the preexisting condition was not a compensable disability).

8. The Court of Appeals dismissed the Department's concern a tiered compensation remedy would unduly complicate the adjudication of a hearing loss claim, stating "the Department must simply do a little more math." *Harry*, 134 Wash. App. at 749, 171 P.3d 1058. A tiered award may indeed be impracticable. It is well

established permanent hearing loss cannot be measured validly until the worker has been removed from the noisy environment for a particular period of time. See 3 Larson, *supra*, § 52.05[2] (discussing the "removal-from-noise" requirement); 2 Modern Workers Compensation § 109:25, at 46-47 (1993) (collecting cases). The current protocol requires 18 hours of removal from noise to take account of "temporary threshold shifts." According to the record in this case, Harry's industrial audiograms were administered during lunch breaks. Thus, it is questionable whether they could reliably measure the actual extent of his incremental hearing loss, as opposed to merely establishing the loss exceeded the American Medical Association threshold for some compensable disability. For this reason, the Department relies on clinical audiograms to rate the extent of permanent partial disability, although industrial audiograms are not per se unreliable. See *Heidy*, 147 Wash.2d at 87, 51 P.3d 793 (reliability of industrial audiograms to be determined by factfinder).

1. It may be that Harry suffered from two different kinds of disease—monaural and binaural hearing loss—and, thus, has two separate compensation schedules. The first schedule would be compensation for monaural hearing loss that existed in 1974 and went to 1986. The second schedule would compensate Harry for the binaural hearing loss that existed from 1986 to present. However, because Harry never raised this argument below and only made one compensation request for occupational hearing loss, it is not appropriate for this court to step in and bifurcate Harry's compensation.

2. Under the majority's reasoning, claimants with medically untreatable partial disabilities are advantaged as compared to those with diseases that are medically treatable. The claimants with medically untreatable partial disabilities can now wait to file their claim for benefits for the highest possible rate while the claimants with treatable disabilities will still be subject to the earlier schedule of benefits. I do not believe that the plain meaning of the statute accords such disparate treatment.

3. *Pollard v. Weyerhaeuser Co.*, 123 Wn.App. 506, 98 P.3d 545 (2004), does not aid Harry. In *Pollard*, the Court of Appeals held that if a person files subsequent claims for further occupational hearing loss, then the rate of compensation is based on when the person filed the previous claim. *Id.* at 514, 98 P.3d 545. Here, as

Harry only filed one claim for occupational hearing loss, he cannot benefit from the holding in Pollard.

4. This analytical framework makes sense given that our justification for avoiding absurd results is that we presume the legislature was rational and did not intend absurd results in drafting the statute. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting)). It is also why we have described the standard as avoiding "unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). For instance, in *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007), this court noted that while the plain meaning of the term "account receivable" in a statute led to a substantial effect on the ability to collect business debt, it was not tantamount to an absurd result. The operative effect of the statute was not absurd because all of the related statutes could still be given effect and because it was clear the legislature had considered such impacts in its drafting of the statute. *Id.* In holding that the operative effect of a narrower definition of "account receivable" would lead to absurd results, we noted that such an interpretation would be standardless and affect other statutory schemes. *Id.* at 665, 152 P.3d 1020. Thus, while courts look to the operative effect of a literal meaning of the statute, they are not to depart from that plain meaning unless the legislature could not have rationally intended the results. Simply because the court does not like the policy consequences of a literal interpretation does not mean that the legislature could not have rationally intended those results.



EXHIBIT 2

**In re: Robert Lenk, Sr., BIIA Dec., 91 6525 (1993)**

# Board of Industrial Insurance Appeals

State of Washington

## Significant Decisions

See OCCUPATIONAL DISEASE Tinnitus

Tinnitus is an impairment manifested by different functional responses than hearing loss and, in appropriate circumstances, it must be evaluated in terms of a percentage of total bodily impairment separately from hearing loss. ....**Robert Lenk, Sr.**, 91 6525 (1993) [concurrence]

See PERMANENT PARTIAL DISABILITY Tinnitus

Because tinnitus is an impairment manifested by different functional responses than hearing loss and is neither a scheduled impairment nor addressed in the categories contained in WAC 296-20, it must be evaluated in terms of a percentage of total bodily impairment. It is appropriate to analogize to categories of mental health impairment in light of the similarity in the disruption of daily living caused by the worker's tinnitus and that described in the categories of mental health impairment. ....**Robert Lenk, Sr.**, 91 6525 (1993) [concurrence]

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IN RE: ROBERT K. LENK, SR. ) DOCKET NO. 91 6525

CLAIM NO. N-048062 ) DECISION AND ORDER

### APPEARANCES

Claimant, Robert K. Lenk, Sr., by  
Rumbaugh & Rideout, per  
Teri L. Rideout

Employer, Western Wright Marine, Inc., by  
Edward S. Wright

Department of Labor and Industries, by  
Office of the Attorney General, per  
Thomas L. Anderson and Tyler M. Johnson, Assistants

This is an appeal filed on behalf of the claimant, Robert K. Lenk, Sr., on December 4, 1991 from an order of the Department of Labor and Industries dated November 25, 1991. That order affirmed a prior Department order dated June 28, 1991 which closed the claim with a permanent partial disability award equal to 28.43% of complete hearing loss in both ears. Reversed and remanded.

## PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer, Western Wright Marine, Inc., to a Proposed Decision and Order issued on February 4, 1993 in which the order of the Department dated November 25, 1991 was reversed and the claim remanded to the Department with directions to pay the claimant a permanent partial disability award equal to 28.43% of complete hearing loss in both ears, to accept the claimant's tinnitus condition as an occupational disease, to pay the claimant a permanent partial disability award for his tinnitus [2] equal to 10% as compared to total bodily impairment, and to thereupon close the claim.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The sole issue on which evidence was presented in this case is whether the claimant is entitled to a permanent partial disability award for his occupationally-related tinnitus, in addition to his award for bilateral partial hearing loss, the amount of which is not in dispute. Our industrial appeals judge concluded that the tinnitus condition warrants a permanent partial disability award equal to 10% as compared to total bodily impairment. While we agree with this ultimate determination, we feel it is necessary to further explain the reasons for our decision. We also feel compelled to respond to the employer's contention in his Petition for Review that his company should not be held solely responsible for the claimant's hearing impairments.

## DECISION

The claimant, Robert K. Lenk, Sr., is a 53 year old man who has worked for over 30 years as a machinist. The majority of such work was in California, but his most recent years of machinist jobs were in this state after he moved here in 1982. He worked as a machinist into early 1991. Although his employment exposed him to high noise levels, he did not use protective hearing devices except on an intermittent basis. Over the years, the claimant experienced a gradual decrease in his hearing. In early 1988, after commencing work at Western Wright Marine, Inc., Mr. Lenk also began to notice a high-pitched ringing noise in his ears. In September of 1990 the claimant was examined by Shahn Divorne, a licensed [3] hearing aid specialist. Mr. Divorne tested the claimant for hearing aids and referred him to Dr. Gordon G. Thomas, an otolaryngologist, to evaluate Mr. Lenk's complaints of hearing loss and ringing in the ears.

Dr. Thomas first saw the claimant on September 19, 1990. At that time, an audiogram was performed which revealed binaural noise-induced hearing loss at the frequencies from 1,500 to 4,000 hertz, with recovery at the 6,000 hertz level. To measure the ringing in the claimant's ears, Dr. Thomas also had the claimant undergo a masking test. This test showed an intensity or volume of the ringing of 94 decibels bilaterally at the high-pitch frequency of 8,000 hertz. Based on these examinations, Dr. Thomas diagnosed the claimant with neurosensory hearing loss and also bilateral tinnitus, both of which he

related to occupational exposure. To treat these conditions, the claimant was provided hearing aids which were also fitted with masking devices. These improved his hearing, but not his high-pitched tinnitus problem.

In October of 1991, the claimant was examined by Dr. William Ritchie, also an otolaryngologist, at the request of the Department of Labor and Industries. Dr. Ritchie performed a series of audiometric studies which showed bilateral sensorineural hearing loss with normal levels of speech recognition and discrimination. Dr. Ritchie rated the claimant's percentage hearing impairment based on measurements at the 500, 1,000, 2,000, and 3,000 hertz levels in accordance with the American Medical Association's Guide to the Evaluation of Permanent Impairment (AMA Guidelines). While Dr. Ritchie also diagnosed noise-induced binaural tinnitus, he did not provide a separate rating for this condition, nor did he perform a masking test. [4]

Dr. Thomas testified on behalf of the claimant. The Department countered with the testimony of Dr. Ritchie. Both doctors agreed that the claimant suffers from noise-induced tinnitus which is causally related to his work as a machinist. They also believe that this condition is permanent and not amenable to further treatment. Their only disagreement is whether the claimant should receive a separate permanent partial disability award for his tinnitus.

Dr. Thomas believes that tinnitus and hearing loss are distinct medical conditions which deserve separate ratings. In his opinion, the degree of disability attributable to the claimant's tinnitus is 10% to 15% as compared to total bodily impairment. He bases his rating on the claimant's masking test and the way in which the claimant is affected by his tinnitus. Dr. Ritchie, on the other hand, seems to believe that the claimant's tinnitus is a symptom of his hearing loss which cannot be rated separately because it is purely subjective. Thus, he believes that the impairment from tinnitus can only be evaluated within the hearing loss impairment.

We find that the claimant's tinnitus is a separate medical condition from his hearing loss. Both Drs. Thomas and Ritchie testified that tinnitus and hearing loss can occur independently. They also acknowledged that these conditions have very different sequelae. Although Dr. Ritchie believes that tinnitus interferes with hearing ability, he also admitted that it can cause problems which are not associated with hearing loss, such as impaired concentration and difficulty sleeping. This testimony is consistent with the AMA Guidelines (admitted as Exhibit No. 3), which classify tinnitus as a separate disturbance of the ear (Ch. 9.1). It is also in line with the [5] Department's own regulations which recognize that tinnitus can be an "accepted" condition requiring its own particular treatment modalities such as masking devices. WAC 296-20-1101.

The separate effects of hearing loss as compared to tinnitus, at least in part, are rather obvious. Although they both affect hearing ability, they do so in different ways. By definition, tinnitus is the presence of "noise", a ringing in the ears. Hearing loss, on the other hand, is the diminishment or absence of "noise", i.e., sound, in the ears. Tinnitus can appear without hearing loss, and vice-versa. The conditions can appear in the same

person, but at different levels of frequency (pitch), which, from the evidence herein, is clearly Mr. Lenk's situation.

This brings us to Dr. Ritchie's concern that tinnitus is not a measurable impairment. The AMA Guidelines do state that, while the criteria for evaluating hearing impairment are "relatively specific", tinnitus, on the other hand, is "not measurable". However, these same guidelines do not consider this to be a bar to rating the impairment caused by tinnitus. Under Ch. 9.1 of the AMA Guidelines, physicians are instructed to "assign a degree of impairment that is based on severity and importance, and is consistent with established values". This obviously involves some subjective judgment on the part of the physician, but there are many kinds of impairment ratings which involve some element of subjectivity. Dr. Thomas' solution to reduce the degree of subjective evaluation was to have the claimant undergo a masking test which, even Dr. Ritchie acknowledged is a valid diagnostic tool used by many examiners in the field of otolaryngology. While, as Dr. Ritchie said, a masking test cannot by itself measure the degree of impairment caused [6] by tinnitus, it does provide the examiner with a means of quantifying the condition with some objectivity, by determining the intensity (loudness) and frequency level of the ringing sensation. We believe that this information can, in turn, be used as a reasonable medical basis to gauge the accuracy and reliability of the patient's complaints. In making this observation, we are not unmindful that the results of the masking test are dependent, in part, on the subjective responses of the patient. However, as Dr. Ritchie conceded, this is really no different from an audiogram which is the accepted test for evaluating hearing loss impairment, and which also has a subjective element inherent in its hearing loss measurements.

We also note that our courts have recognized that certain impairments are compensable even though they cannot be fully measured by objective tests. *In Price v. Dep't of Labor & Indus.*, 101 Wn.2d 520 (1984), our State Supreme Court held that workers suffering from an industrially-related mental health condition are not required to present objective clinical evidence of worsening in order to have their claim reopened for additional benefits. In coming to this conclusion, the Court explained that psychiatric opinions are primarily based upon the patient's symptoms which are necessarily subjective in nature. *Price* at 528. It appears that workers with the medically-acknowledged condition of tinnitus face a similar situation, since such condition can affect them in much the same way as would a mental health impairment, (i.e., loss of sleep, loss of concentration, interference with interpersonal relations, etc.). Under these circumstances, we do not feel that it is reasonable to demand that workers such as Mr. Lenk be required to [7] demonstrate, in a completely objective manner, that which medical technology may be as yet unable to precisely quantify.

Having determined that tinnitus is a separate impairment from hearing loss, manifested by some different functional responses, we now turn to the manner in which it should be rated. Tinnitus is not listed as a specified permanent partial disability under RCW 51.32.080, nor does it fall under any of the categories of unspecified disabilities described in the Washington Administrative Code sections. WAC 296-20-200 et. seq. Nonetheless, this does not mean that tinnitus cannot be rated. WAC 296-20-220(1)(o)

provides that bodily areas which are not included in the categories and which do not involve loss of hearing, loss of central visual acuity, loss of an eye by enucleation, or loss of the extremities or use thereof, "shall" be assessed for impairment "in terms of percentage of total bodily impairment". As noted above, hearing loss and tinnitus are not synonymous; they have different functional effects on the ears. Thus, we find that it was appropriate for Dr. Thomas to evaluate Mr. Lenk's impairment due to tinnitus under the above-cited special rule for unspecified disabilities.

Because there is no category which covers Mr. Lenk's tinnitus, we feel that it is proper to evaluate his impairment by analogizing to those unspecified disabilities which are categorized. This is certainly in line with the AMA Guide's instruction to assess the impairment "consistent with established values". As noted, we believe that tinnitus is quite analogous to a mental health impairment because they both involve a subjective component and can cause similar disruptions in activities of daily living. Accordingly, we can use the rules for rating [8] mental health impairments (WAC 296-20-340) as guides for our evaluation of Mr. Lenk's impairment due to tinnitus.

In opting for this approach, we do not suggest that the mental health categories should be mechanically applied to determine impairment ratings for tinnitus. Rather, we recognize that in many cases, the ultimate rating will fall between the various categories. For example, there is no guaranteeing that the increments of mental impairment, either in terms of describing the loss of function or in terms of the percentage of impairment, will correlate to increments of severity of tinnitus problems. We emphasize that we use the mental health impairment scheme by way of analogy only. Our decision in this matter does not prevent rating "between" categories as long as the rating is supported by the medical evidence of record and is not inconsistent with the descriptions of the mental health impairments.

In applying these principles to the facts at hand, we agree with Dr. Thomas that the claimant's industrially-related tinnitus is properly rated at a disability equal to 10% as compared to total bodily impairment. As previously noted, the masking test performed in September of 1990 measured the claimant's tinnitus at 94 decibels, which, in Dr. Thomas' opinion, is similar in intensity to a fire siren. In addition, the frequency (pitch) of the claimant's tinnitus is at a considerably higher level (8,000 hertz) than the frequencies of his ratable hearing loss (500 through 3,000 hertz). In other words, Mr. Lenk has an effect on his hearing functions due to his tinnitus which is not reflected in his permanent partial disability award for binaural hearing loss based solely on the loss at the lower frequencies. Even Dr. Ritchie stated that, while presence of tinnitus at one of the four frequencies at which [9] binaural hearing loss is rated would affect the percentage rating of such loss (i.e., would be encompassed within that rating), such would not be the case if the tinnitus was at higher levels outside of those frequencies.

Consistent with the results of the masking test showing an intense and high-pitched tinnitus, the claimant is frequently irritable, has difficulty sleeping nearly every night, and cannot understand conversations over the telephone. He also suffers severe headaches and is distracted due to impaired concentration. Given these disruptions in daily

activities, we are satisfied that the claimant's impairment due to tinnitus most closely corresponds to the mild social and cognitive limitations contemplated under Category 2 of WAC 296-20-340. Although the rather severe results of Dr. Thomas' masking test (with which Dr. Ritchie stated he had no disagreement in light of his audiogram findings) might imply a greater impairment, there is no evidence that the claimant has lost interest in his usual daily activities or needs supervision to perform work activities, which factors are necessary and contemplated under any category above Category 2.

We must also note here that if the claimant's tinnitus was at frequency levels by which binaural hearing loss is measured, our decision could very well be different, since in such a situation, according to the evidence in this record, the tinnitus itself would affect and be encompassed within the binaural hearing loss percentage rating. A rating determination under such a factual scenario must necessarily await another case, with its medical evidence specifically addressed thereto.

Finally, we feel constrained to address Mr. Edward Wright's contention in his Petition for Review that his company, Western Wright [10] Marine, Inc., should not be held solely responsible for Mr. Lenk's occupationally-related hearing problems; although, as a legal matter, that issue is not before us in this narrowly defined appeal.

Mr. Wright points out that Mr. Lenk was exposed to high noise levels as a machinist for many years before, and for a period of time after, his employment period with Western Wright Marine, Inc. In fact, his work for this company was all in the year 1988. Mr. Wright states that the corporation was dissolved as of the end of 1988, and that new owners commenced operating the plant in 1989, and Mr. Lenk was rehired and worked for them in 1989 and 1990. These facts are corroborated by Mr. Lenk's own testimony. The same type of machinery work was continued with the same equipment, under the business name of Western Wright Marine, but with the word "Incorporated" being dropped from the name. It is also possible that Mr. Lenk may have done some machinist work for other employers in this state, after moving here in 1982 and prior to going to work for Mr. Wright in 1988; however, our testimonial record is not clear on this point. In light of this employment history, Mr. Wright argues that most, if not all, of the costs of this claim should be charged to other employers.

In this regard, our industrial appeals judge's Proposed Decision and Order found that Mr. Lenk's last injurious exposure to high levels of occupational noise occurred during his employment at Western Wright Marine, Inc. Based on the record before us, and in view of the limited issue we were called upon to decide (i.e., solely whether or not Mr. Lenk's tinnitus condition warrants a permanent partial disability award) such a finding should not be made, and is very possibly incorrect. While Mr. Lenk's occupational exposure at Western Wright Marine, Inc., was no [11] doubt injurious, it may not have been his "last" injurious exposure. That exposure appears to have occurred during his work for the successor employer, Western Wright Marine (with no "Inc.") in 1989 and 1990. If such is the case, the Department of Labor and Industries may possibly charge all costs of this claim to the industrial insurance account of Western Wright Marine, under the "last injurious exposure rule" which is used to assign liability between

successive insurers for occupational disease benefits. This rule requires that the insurer "on the risk" during the most recent exposure, that has a causal relationship to the occupational condition, is solely liable for the costs of the claim. *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128 (1991).

On the other hand, the Department has another rule regarding proration of costs resulting from occupational disease claims, WAC 296-17-870(6). This rule applies to such claims involving a worker's exposure to the "disease hazard" while working for two or more employers who are insured under the State Fund. The rule provides that the Department shall prorate the costs of the claim to each period of employment involving exposure to the hazard. If the Department applies this rule to the costs of this claim, such costs would be proportionately shared with Western Wright Marine, and perhaps with other employers in this state for whom Mr. Lenk may have done machinist work in the 1982 to 1988 period.

As noted above, it is not within this Board's jurisdiction in this appeal to determine how the Department should allocate the costs of this claim to potentially liable employers. That determination must rest with the Department's underwriting and premium rating staffs, following our remand of this claim to the Department. **[12]**

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we enter the following findings and conclusions:

## **FINDINGS OF FACT**

1. On March 11, 1991, Robert K. Lenk, Sr., filed his application for benefits with the Department of Labor and Industries alleging that he had suffered hearing loss while in the employ of Western Wright Marine, Inc. On June 28, 1991, the Department issued an order which allowed the claim, granted him an award for permanent partial disability equal to 28.43% of complete hearing loss in both ears, and thereupon closed the claim. After a Protest and Request for Reconsideration filed by the claimant on August 9, 1991, raising the issue of compensability of his tinnitus condition, the Department issued an order on November 25, 1991, affirming the prior order.

On December 4, 1991, Mr. Lenk filed his Notice of Appeal with the Board of Industrial Insurance Appeals from the November 25, 1991 Department order, raising the sole issue of compensation for his tinnitus. On January 9, 1992, the Board issued an order which granted the appeal.

2. Mr. Lenk is a 53 year old man who has worked for over 30 years as a machinist. In this capacity, the claimant was exposed to high noise levels. He did not wear protective hearing devices, except on an intermittent basis. In 1988, while working as a machinist for Western Wright Marine, Inc., the claimant began to notice a constant, high pitched ringing noise in his ears. Prior to this time, he had experienced a gradual loss of hearing in both ears.



3. As a proximate and natural consequence of his many years of occupational exposure to machine noise while working as a machinist, including the years of 1988, 1989, and 1990 when he engaged in such work for Western Wright Marine, Inc., and for its successor, Western Wright Marine, the claimant developed binaural hearing loss and tinnitus. Exposure to high noise [13] levels was a distinctive condition of the claimant's employment as a machinist.

4. As of November 25, 1991, the claimant had binaural hearing loss as demonstrated by an audiogram, at the 1,500, 2,000, 3,000, and 4,000 hertz frequencies, with recovery at the 6,000 hertz level. In addition, he had tinnitus, as measured by a masking test, at the intensity of 94 decibels bilaterally at the frequency of 8,000 hertz.

5. As of November 25, 1991, the claimant had the following mild social and cognitive limitations due to his tinnitus at the 8,000 hertz frequency: frequent irritability; difficulty understanding conversations over the telephone; problems reading and following directions due to impaired concentration; and frequent substantial sleep disturbances. These limitations on his normal function were not related to his bilateral hearing loss at the lower hertz frequencies.

6. As of November 25, 1991, the claimant's hearing loss causally related to his occupational exposure was fixed and stable and resulted in permanent partial disability equal to 28.43% of complete hearing loss in both ears, as measured at the 500 through 3,000 hertz frequencies per the accepted standard under the American Medical Association Guidelines.

7. As of November 25, 1991, the claimant's tinnitus causally related to his occupational exposure was fixed and stable and resulted in permanent partial disability equal to 10% as compared to total bodily impairment.

## **CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. The claimant's hearing loss and tinnitus are compensable as occupational diseases within the meaning of RCW 51.08.140.
3. As of November 25, 1991, the claimant had a permanent partial disability due to hearing loss equal to 28.43% of complete hearing loss in both ears, within the meaning of RCW 51.32.080. [14]
4. As of November 25, 1991, the claimant had a permanent partial disability due to tinnitus equal to 10% as compared to total bodily impairment within the meaning of RCW 51.32.080 and WAC 296-20-220(1)(o).
5. The order of the Department of Labor and Industries dated November 25, 1991, which affirmed an order of the Department dated June 28, 1991, which order granted Mr. Lenk an award for permanent partial disability equal to 28.43% of complete hearing loss in both ears and closed the claim, is incorrect in part and is reversed, and the claim is remanded to the Department with directions to grant

Mr. Lenk said award for permanent partial disability for hearing loss equal to 28.43% of complete hearing loss in both ears, to accept the tinnitus condition, to grant Mr. Lenk an award for permanent partial disability for tinnitus equal to 10% as compared to total bodily impairment, and thereupon to close the claim.

It is so ORDERED.

Dated this 12th day of May, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

S. FREDERICK FELLER Chairperson

/s/

FRANK E. FENNERTY, JR. Member

/s/

PHILLIP T. BORK Member

### **SPECIAL ADDITIONAL STATEMENT**

I have joined my colleagues in the foregoing decision, because the evidence in the record is very clear that Mr. Lenk does have a substantial tinnitus condition in addition to his bilateral sensorineural hearing loss; that such tinnitus condition is at a high level of [15] frequency (pitch) not encompassed by his ratable hearing loss at the lower frequency levels; and that the effects on his normal functions by reason of the tinnitus are in addition and unrelated to the effect of his hearing loss.

However, two things disclosed by this record disturb me.

(1) Dr. Thomas has been the subject of at least two proceedings before the Medical Disciplinary Board based on serious unethical and improper actions connected with his medical practice, for which he is now under a probationary period imposed by that Board, involving close monitoring of details of his practice and several other sanctions imposed on him. He is, however, entitled to continue to practice during the probation, subject to compliance with all terms thereof. Suffice it to say that the ethical violations involved raise substantial doubts about Dr. Thomas' honesty, trustworthiness, and morality.

However, I accept Dr. Thomas' opinions on the existence of Mr. Lenk's tinnitus, its intensity and frequency level, the deleterious effects it has on his normal functioning, and the justification for assigning it an impairment rating separate from the bilateral hearing loss rating in this case. This acceptance is not because of any great credibility attached to Dr. Thomas, but because, on all these salient medical points, his opinions are effectively corroborated by those of Dr. Ritchie! Dr. Ritchie's only departure appears to be that since effects of tinnitus are not "measurable", that is not sufficiently objective to allow an impairment rating to be determined. We have exhaustively set forth in our decision the reasons why this is not so.

(2) The record strongly suggests that Dr. Thomas is absolutely the only otolaryngologist in this state who will rate impairment from [16] tinnitus. This is puzzling, if true, in view of the Department rule recognizing tinnitus as an acceptable condition; the AMA guidelines recognizing it as a condition which is subject to an impairment rating; the apparent general acceptance of those guidelines in evaluating hearing-related problems; and the rule in WAC 296-20-220(1)(o) setting forth that bodily disabilities not specified in RCW 51.32.080 and not included in the categories of unspecified disabilities shall be assessed for impairment in terms of "percentage of total bodily impairment".

The record reflects that there are Tinnitus Clinics at both the University of Washington and University of Oregon Medical Schools, and the masking test and its proper application for determining intensity and frequency level of tinnitus was developed at the Oregon School. With availability of these expert technical resources, it certainly appears that the entire otolaryngology community ought to come up with a greater degree of standardization in evaluation of relative severities of tinnitus, to arrive at greater consistency and fairness in administrative adjudication of all cases of occupational noise-induced tinnitus. I sincerely hope this will be an achievable goal in our state's system.

Certainly, an endless succession of adversarial cases before this Board and/or the courts -- with the suspect Dr. Thomas as the expert witness on claimant's side, and various otolaryngologists/forensic examiners called as witnesses on the defense side -- is not a sensible or efficient or cost-effective way to go. While certainly lucrative to the medical experts, and also to the attorneys representing claimants and employers, such a litigious "system" does little to advance the interests of the only two truly interested parties in the workers' compensation [17] arena, namely, workers and employers.

Dated this 12th day of May, 1993.

/s/

PHILLIP T. BORK Member

EXHIBIT 3

**In re: Catherine Schmidt, BIIA Dec., 57,001 (1981)**

Significant Decisions

See PERMANENT PARTIAL DISABILITY Rating by Board

The Board may determine the appropriate category of permanent impairment despite the absence in the record of any medical testimony rating the worker's permanent partial disability in category or percentage terms. The determination requires a comparison of the category descriptions with the medical evidence of the worker's physical or mental restrictions. ....Catherine Schmidt, 57,001 (1981)

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IN RE: CATHERINE SCHMIDT ) DOCKET NO. 57,001

)  
Claim No. G-857652 ) DECISION AND ORDER  
)

APPEARANCES

Claimant, Catherine Schmidt, by  
    Critchlow and Williams, per  
    Kim Williams, David Williams and George A. Critchlow  
Employer, Trader Pats, Inc.,  
    None

Department of Labor and Industries, by  
    The Attorney General, per  
    Robert C. Milhem and Stephen D. Phillabaum, Assistants

This is an appeal filed by the claimant on June 9, 1980, from an order of the Department of Labor and Industries dated April 10, 1980, which closed the claim with no permanent partial disability award. Reversed and remanded.

**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued by a hearings examiner for this Board on January 15, 1981, in which the order of the Department dated April 10, 1980 was sustained.

The Board has reviewed the evidentiary rulings of the hearings examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue before us is the extent of the claimant's disability causally related to her industrial injury of February 20, 1976, as such disability existed on April 10, 1980. The evidence presented by the parties has been quite well summarized by the hearings examiner and need not be repeated in detail.

From our review of the record, we are satisfied the claimant sustained some organic brain damage as the result of the automobile accident. The claimant sustained other injuries which healed leaving no residual disability. Dr. Andrew G. Webster, a general

surgeon, [2] attended the claimant on the day of her accident. A diagnosis was made of a cerebral contusion, a bruise of the brain more severe than a concussion. Dr. Webster followed the claimant for a considerable period of time but referred her to Dr. William T. Sherman, a psychiatrist, in November of 1976 because of her continuing mental problems. Based upon his own association and examinations of the claimant, together with a report from a psychologist, Dr. Sherman diagnosed a post-traumatic organic brain syndrome and a reactive depression (emotional instability) which were related to the industrial injury. Dr. Sherman testified the claimant had cognitive (intellectual or mental) difficulty, particularly in manipulation of numbers. It was his opinion that her ability to return to work which required manipulation of numbers would be significantly impaired and that her emotional instability would negatively affect her employment capabilities. He further felt that Ms. Schmidt would have difficulty in being responsive quickly and alertly involving nearly any type of sophisticated abstraction.

The claimant does not complain of symptoms from the lacerations and pelvic fracture which she sustained, but does complain of other factors which resulted from her brain damage. She testified she "flipped-out" easily, got over-wrought and angry, got nervous and lost perspective of where she was and would stare off into space as if she were hypnotized and could not pull herself back. Additionally, she testified her memory for handling numbers was short and that when she tried to attend a bookkeeping school she was unable to mentally retain formulas necessary for successful completion.

Nowhere in the record did either Dr. Webster nor Dr. Sherman attempt to give a percentage rating reflecting the extent of the claimant's permanent impairment of mental health. Neither did any physician attempt to describe the claimant's psychiatric limitations within the categories for evaluating permanent impairment, WAC 296-206-20-330 [3] and WAC 296-20-340. It does appear from the record that no further treatment would likely improve the claimant's occupational potential and her condition must be considered fixed.

If we were to accept and rely upon the opinions of Dr. Issac Lawless who was called to testify to the results of a single examination conducted March 25, 1980, it would be clear the claimant should not be entitled to any compensation for disability for her injury. Yet we are aware that having seen the claimant on a more extensive basis, Dr. Sherman and Dr. Webster are in preferred positions to evaluate the impact of the claimant's industrial injury upon her permanent mental health. *Groff v. Department of Labor and Industries*, 65 Wn. 2d 35 (1964). The claimant was able to function quite consistently in employment in her private life prior to the industrial injury. It would not appear that she had any pre-existing permanent impairment which could be equated to a psychiatric partial disability prior to her industrial injury. There being no prior disability, it is not important that neither Dr. Webster nor Dr. Sherman attempted to segregate the claimant's pre-injury psychiatric status from that of her post-injury psychiatric status causally related to the injury. cf. *Orr v. Department of Labor and Industries*, 10 Wn. App. 697 (1974).

We must now turn our attention to whether the opinions of Dr. Sherman together with the observations of Dr. Webster provide a sufficient basis for us to conclude that the claimant suffers from a permanent partial disability for impairment in her mental health. Prior to October 1, 1974 when the current system for evaluating unspecified partial disabilities was adopted, it was common to see permanent partial disability ratings expressed in terms of a percentage of the maximum allowed for unspecified disabilities or simply a percentage as compared to total bodily impairment. See, for example *e.g.*, *Page v. Department of Labor and Industries*, 52 Wn. 2d 706 (1958), and *Johnson v. Department of Labor and Industries*, 88 Wn. 2d 844 (1977). [4]

However, with the inception of the category system for rating permanent impairments, percentage ratings became less material. See WAC 296-20-220(1)(e), Rule 5 and WAC 296-20-670(1)(a), Rule 1.

We believe that the system for evaluating unspecified disabilities as compared to total bodily impairment for injuries occurring on or after October 1, 1974 does not encourage, much less require, physicians who testify before this Board in such cases to state their opinions regarding disability in terms of a percentage of total bodily impairment. It is entirely appropriate, and we commonly observe, medical witnesses' testimony to be couched in terms of the category of permanent impairment which they feel is appropriate. Yet we cannot see that the failure of an expert witness to testify in the language of the statute or administrative rule is fatal to establishing a prima facie case. See *Anthis v. Department of Labor and Industries*, 16 Wn. App. 335 (1976) and *Coleman v. Prosser Packers*, 19 Wn. App. 616 (1978).

The critical question is whether this Board has authority to evaluate and weigh testimonial evidence devoid of both the percentage and category rating and determine if an award for permanent partial disability should be made. We note that in *Dowell v. Department of Labor and Industries*, 51 Wn. 2d 428, the court found that the question of the extent of partial disability is ultimately for the trier of fact. In addition, we discern it to be the law of this state to be that the trier of fact must award compensation for permanent partial disability on the basis of medical testimony regarding bodily function loss, whether physical or psychological, and that such awards must be within the "range" of expert testimony. *Ellis v. Department of Labor and Industries*, 88 Wn. 2d 844 (1977).

Still, given the current scheme for rating permanent impairments for injuries occurring on or after October 1, 1974, we do not believe the law requires that such "range" be stated in terms of percentage of disability or replaced by a physician within any single category [5] or continuum of categories as reflected in the Administrative Code. We believe it is sufficient for the trier of fact to rely upon a description of impairments and restrictions in its deliberations and align those restrictions with the framework of the existing categories for evaluating permanent impairment. In short, we believe this Board may compare the category descriptions with the record evidence, descriptive of physical or mental restrictions, and choose the category which those restrictions most closely

resemble. In so doing, we believe the permanent partial disability award which would follow would fall within the range of expert testimony which case law requires.

With respect to the claimant in this appeal, we turn to WAC 296-20-340 and observe that the evidence in the record before us reveals the claimant to be subject to more than just "nervousness, irritability, worry or lack of motivation" which is described by Category I. Category II in total describes an impairment of mental health that would be represented by:

"Any and all permanent worsening of preexisting personality traits or character disorders where aggravation of preexisting personality trait or character disorder is the major diagnosis; mild loss of insight, mildly deficient judgment, or rare difficulty in controlling behavior, anxiety with feeling of tension that occasionally limit activity; lack of energy or mild apathy with malaise; brief phobic reactions under usually avoidable conditions; mildly unusual and overly rigid responses that cause mild disturbance in personal or social adjustment; rare and usually self-limiting psycho-physiological reactions; episodic hysterical or conversion reactions with occasional self-limiting losses of physical functions; a history of misinterpreted conversations or events, which is not a preoccupation; is aware of being absentminded, forgetful, thinking slowly occasionally or recognizes some unusual thoughts; mild behavior deviations not particularly disturbing to others; shows mild over-activity or depression; personal appearance is mildly unkept. Despite such features, productive activity is possible most of the time. If organicity is present, some difficulty may exist with orientation; language skills, comprehension, memory; judgment; capacity to make decisions; insight; or unusual social behavior; but the patient is able to carry out usual work day activities unassisted."

The majority concludes that the preponderance of evidence in [6] the record before us reflects the claimant's permanent impairment related to the injury to fall within the description of above quoted, especially with respect to the claimant being aware of being absent-minded, forgetful, thinking slowly occasionally and recognizing some unusual thoughts. Given this state of affairs, we believe the claimant is entitled to an award for permanent partial disability reflective of that condition.

## **FINDINGS OF FACT**

After a thorough review of the entire record, the Board finds as follows:

1. On March 8, 1976, an accident report was received by the Department of Labor and Industries alleging the claimant had sustained an injury while employed by Trader Pats, Inc., on February 20, 1976. The claim was accepted, medical treatment provided, time-loss compensation paid, and on April 10, 1980 the Department closed the claim with no award for a permanent partial disability. On June 6, 1980, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals who issued an order on June 23, 1980, granting the appeal and directing that proceedings be had on the issues raised by the appeal.



2. On February 20, 1976, while driving a vehicle for her employer, the claimant was involved in a collision which resulted in multiple abrasions, cuts and a cerebral contusion together with a fractured pubic rami.
3. As of April 10, 1980, the claimant was suffering from a post-traumatic organic brain syndrome with reactive depression (emotional instability), more particularly manifested by cognitive difficulty particularly in the manipulation of numbers.
4. As of April 10, 1980, the claimant's condition was fixed and her permanent partial disability resulting from the industrial injury was then consistent with Category II of WAC 296-20-340, Categories for Evaluation of Permanent Impairments of Mental Health.
5. As of April 10, 1980, the claimant was not precluded from gainful employment on a reasonably continuous basis by the residuals of the industrial injury of February 20, 1976.

### **CONCLUSIONS OF LAW**

The Board having made the foregoing findings of fact, now concludes as follows: [7]

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and the subject matter of this appeal.
2. The order of the Department of Labor and Industries dated April 10, 1980, closing the claim with no permanent partial disability award is incorrect and should be reversed, and this claim remanded to the Department of Labor and Industries with direction to pay the claimant a permanent partial disability award reflective of Category II of WAC 296-20-340 (10% as compared to total bodily impairment) and thereupon close the claim.

It is so ORDERED.

Dated this 21st day of April, 1981.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

MICHAEL L. HALL Chairperson

/s/

FRANK E. FENNERTY, JR. Member

/s/

AUGUST P. MARDESICH Member

EXHIBIT 4

**In re: Harold Sells, BIA Dec., 95 4334 & 95 4547 (1996)**

1996 WL 879376 (Wash.Bd.Ind.Ins.App.)

**Board of Industrial Insurance Appeals**

**State of Washington**

IN RE: HAROLD W. SELLS

**Claim No. T-766413**  
**Docket Nos. 95 4334 & 95 4547**  
December 20, 1996

**Appearances:**

\*1 Claimant, Harold W. Sells

by Springer, Norman & Workman, per Leonard F. Workman

Self-Insured Employer, Weyerhaeuser Company

by Jack S. Eng

Department of Labor and Industries

by The Office of the Attorney General, per Mary V. Wilson, Assistant

**DECISION AND ORDER**

This is an appeal filed by claimant, Harold W. Sells, with the Board of Industrial Insurance Appeals on July 24, 1995, and a cross-appeal filed by the self-insured employer, Weyerhaeuser Company, on August 4, 1995, from an order of the Department of Labor and Industries dated July 18, 1995. The order directed the self-insured employer to pay an award for permanent partial disability equal to 7.51 percent complete loss of hearing in both ears and to be responsible for the purchase and maintenance of hearing aids and closed the claim. **REVERSED AND REMANDED.**

**PROCEDURAL AND EVIDENTIARY MATTERS**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on May 17, 1996, in which the order of the Department dated July 18, 1995, was affirmed. Weyerhaeuser Company contends we extended the time for filing Petitions for Review only to June 28, 1996, and Mr. Sells' Petition for Review is, therefore, not timely because his attorney did not date and file the petition until July 1, 1996. Weyerhaeuser Company is incorrect. Although Mr. Sells requested an extension only to June 28, 1996, by letter of May 30, 1996, we granted an extension for all parties to July 2, 1996.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

**DECISION**

Mr. Sells sustained an occupational disease of binaural hearing loss and tinnitus (ringing in the ears) due to noise exposure in the course of his employment with Weyerhaeuser Company. The parties stipulated the Department determined the total permanent partial disability award, equal to 7.51 percent complete loss of hearing in both ears, by adding an award described as 5 percent complete loss of hearing in both ears for tinnitus to an award described as 2.51 percent complete loss of hearing in both ears for actual hearing loss. The monetary award directed by the Department was \$3,244.32. From this amount we can determine that the Department calculated the award by multiplying 7.51 percent times \$43,200. That is the amount prescribed by the Legislature for complete loss of hearing in both ears in prior amendments to benefit schedules for specified disabilities under RCW 51.32.080(1), effective from July 1, 1986 through June 30, 1993.

Mr. Sells contends his actual hearing loss is much greater than 2.51 percent. Weyerhaeuser Company contends Mr. Sells' actual hearing loss was accurately determined by the Department, but the award added for tinnitus should be only 3 percent complete loss of hearing in both ears and the monetary award should have been calculated by using the schedule of benefits in effect in 1976.

\*2 We readily agree with our industrial appeals judge that the Department correctly determined that Mr. Sells' actual hearing loss due to noise exposure in the course of his employment is equal to 2.51 percent complete loss of hearing in both ears. Mr. Sells retired in 1987. The three testifying medical experts agree that noise-induced hearing loss does not progress once the worker is no longer exposed to injurious noise. In spite of this, Mr. Sells' expert otolaryngologist, Dr. Lester Bergeron, relied upon a November 29, 1994 audiogram for his opinion that Mr. Sells sustained occupational noise-induced hearing loss of 28.125 percent complete loss of hearing in both ears. The November 29, 1994 audiogram, as well as a January 10, 1994 audiogram, reflect a marked increase in hearing loss when compared to a 1991 audiogram and when compared to the general pattern and degree of hearing loss reflected in nine prior audiograms produced at intervals throughout Mr. Sells' employment. We are thus convinced by the testimony of other expert otolaryngologists, Dr. Alexander P. Ierokomos and Dr. William Ritchie, relying upon the prior audiograms, including those closer to Mr. Sells' retirement in 1987. Both Dr. Ierokomos and Dr. Ritchie rated Mr. Sells' occupational noise-induced hearing loss at 2.51 percent complete loss of hearing in both ears.

We have granted review specifically to discuss Weyerhaeuser Company's contentions concerning Mr. Sells' permanent impairment due to tinnitus and the applicable schedule of benefits for calculating the monetary award for actual hearing loss and for tinnitus.

#### Permanent Impairment Due to Tinnitus

The Department calculated Mr. Sells' award for permanent partial disability for tinnitus by using its Policy 14.40, entitled Tinnitus with Compensable Hearing Impairment, effective September 20, 1993. Policy 14.40 directs that: physicians may rate tinnitus

only in the presence of an otherwise compensable hearing impairment; and, when rating tinnitus, physicians are to use the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment. Policy 14.40 incorporates language from the AMA Guides to the Evaluation of Permanent Impairment (3rd Edition, revised), that indicates 3 percent to 5 percent, depending upon severity of the tinnitus, should be added to the rating for hearing loss. Thus, under Policy 14.40 an award for permanent partial disability for tinnitus is calculated as a percentage of the amount prescribed by our Legislature either for complete loss of hearing in both ears or, presumably, for complete loss of hearing in one ear, under RCW 51.32.080(1). In Mr. Sells' case the Department directed Weyerhaeuser Company to pay Mr. Sells 5 percent of \$43,200 (the amount prescribed for complete loss of hearing in both ears in the schedule determined applicable by the Department), or \$2,160, for permanent impairment due to tinnitus.

At hearing, Mr. Sells' expert, Dr. Bergeron, testified Mr. Sells' tinnitus was moderate (on a scale including mild, moderate, and marked) and thus 4 percent should be added for tinnitus to the percentage rating of actual loss of hearing loss in both ears. Upon cross-examination by Weyerhaeuser Company's attorney, Dr. Bergeron indicated he selected 4 percent from an available range of 3 to 5 percent under the Department's Policy. After Weyerhaeuser Company's attorney informed him that the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment allowed for a range of 0 (zero) to 5 percent, Dr. Bergeron testified, "It's hard to say, maybe 3." 3/27/96 Tr. at 59. Weyerhaeuser Company contends this is consistent with a rating for tinnitus provided by Dr. Ritchie. However, we note Dr. Ritchie did not provide a rating for Mr. Sells' permanent impairment due to tinnitus. After having described to him the rating system employed by Dr. Bergeron, Dr. Ritchie was only asked, and responded affirmatively to, the question of whether that was "consistent with your understanding of the rating system." Ritchie Dep. at 22. We also note that Dr. Bergeron fell far short of indicating he held any opinion regarding the 3 percent rating on a more-probable-than-not basis. Based upon the testimony we have just described, Weyerhaeuser Company requests we reduce Mr. Sells' award for permanent impairment due to tinnitus to 3 percent of the amount allowable for complete loss of hearing in both ears.

\*3 The Department has never adopted for publication in the Washington Administrative Code a regulation that describes the method for rating and providing awards for permanent impairment due to tinnitus. Indeed, the Department did not acknowledge workers' potential entitlements to such awards until our published Significant Decision, *In re Robert Lenk, Sr.*, BIIA Dec., 91 6525 (1993). The Department's continuing failure to adopt such regulations, by continuing to address these issues only in the form of a policy, is contrary to the explicit direction of our Legislature, concerning the rating of permanent impairments. The Legislature has directed the Department to "... enact such rules having the force of law." (Emphasis supplied.) RCW 51.32.080(2). The lack of formal rules on the issue of rating impairment due to tinnitus is also contrary to the requirements of our state Administrative Procedures Act, Ch. 34.05 RCW. We discussed the agency rule making requirements of the Administrative Procedures Act in *In re State Roofing & Insulation, Inc.*, BIIA Dec., 89 1770 (1991). Further, the Department's Policy 14.40, in directing physicians rate tinnitus as a percentage of

hearing loss, appears in conflict with its regularly adopted regulation in WAC 296-20-220(1)(o). In this section the Department directs physicians to rate impairments not otherwise covered by the adopted rules as a percentage of total bodily impairment. We recognize WAC 296-20-220(1)(o) appears to except from its purview permanent impairments that “involve the loss of hearing” as well as other bodily areas already included in the list of specified disabilities contained in RCW 51.32.080(1). However, we found in Lenk that Mr. Lenk’s tinnitus was a separate condition from his hearing loss. We held it was, therefore, appropriate to rate permanent impairment due to tinnitus as a percentage of total bodily impairment under WAC 296-20-220(1)(o). As yet there has been no judicial or legislative determination, or other rule making act of the Department that would supersede our conclusion.

In his Special Additional Statement following the body of our unanimous decision in Lenk, the Employer Member then on this Board urged a greater standardization in evaluation of relative severity of tinnitus, “to arrive at greater consistency and fairness in administrative adjudication of all cases of occupational noise-induced tinnitus.” Lenk, at 16. As we have emphasized, the Department has yet to adopt a regulation to this end having the full force of law as directed by the Legislature and as required by the Administrative Procedures Act. We, again, note that a formal rule addressing the impairment issues would supersede our evaluations of how to compute awards for tinnitus. Therefore, when confronted with the question of rating impairment for tinnitus we are left with our stated determination as set forth in Lenk. Under the principle of stare decisis we are inclined to follow our decisions.

\*4 Another basis to rate tinnitus differently than we did in Lenk would be to establish a factual/scientific foundation that tinnitus is not, in fact, a wholly separate condition. Our decision in Lenk is based upon the factual record presented to us at that time. On the strength of that record we readily determined that hearing loss and tinnitus were separate conditions justifying separate awards for impairment. In the present appeal there was no extensive development of the scientific distinctions between general hearing loss and tinnitus. Rather, the experts seem to acquiesce to the rating scheme proposed by the AMA guides without any discussion of causal relationships between the two conditions. We see nothing in this record to factually challenge the rating scheme we utilized in Lenk.

In the present case the Department and two of the testifying medical experts relied upon Policy 14.40 to rate Mr. Sells’ permanent impairment. A third expert did not rate Mr. Sells’ permanent impairment due to tinnitus. The result has still been confusion. As indicated earlier, the parties stipulated the Department included for tinnitus an award of 5 percent complete loss of hearing in both ears. Yet, even though the Department was represented by an assistant attorney general, no evidence from a physician was provided to establish that its award was correct.

Also as indicated earlier, contrary to Weyerhaeuser Company’s contentions, its expert, Dr. Ritchie, did not provide a rating for permanent impairment due to tinnitus. Rather, for its argument that Mr. Sells’ award should be less, Weyerhaeuser Company is left to rely

upon its cross-examination of Mr. Sells' expert, Dr. Bergeron. Dr. Bergeron was uncertain as to which edition of the AMA Guides to the Evaluation of Permanent Impairment he should use under Policy 14.40. Indeed, the Policy does appear confusing in this regard in light of its direction that physicians use the "current" edition of the AMA Guides to the Evaluation of Permanent Impairment. Long established case law in this state holds the law, "in effect on the date of injury governs the calculation of benefits for workers" suffering industrial injury (*Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22 (1963)), and RCW 51.16.040 directs benefits for occupational diseases are to be calculated in the same way as benefits for those injured on the job. *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122, 124 (1991).

In light of the fact that Dr. Bergeron's rating appeared to vary depending upon the particular edition of the AMA Guides to the Evaluation of Permanent Impairment he used, we believe it likely his rating would have varied still more had he rated Mr. Sells' permanent impairment due to tinnitus as a percentage of total bodily impairment as we allowed in *Lenk*. We have no way of knowing whether failure of the attorneys to present evidence consistent with our decision in *Lenk* was due to confusion, oversight, or conscious strategy. Neither Mr. Sells' attorney, the attorney for Weyerhaeuser Company, nor our industrial appeals judge, raised any objection or concern that Mr. Sells' permanent impairment due to tinnitus was rated in a manner inconsistent with our holding in *Lenk*, that is, as a percentage of complete loss of hearing in both ears as opposed to as a percentage of total bodily impairment. We, therefore, will not remand Mr. Sells' appeal to our hearings section for the presentation of further evidence.

\*5 We are, however, convinced the Department's failure to adopt a regulation, having the force of law, describing the method for rating and calculating awards for permanent impairment due to tinnitus, has added to the possibility that the worker and the employer in this case have not had a fair adjudication at the Department or as full a hearing as would have been allowed at this Board. Further, many workers in this state suffering from occupational caused tinnitus may not even be aware they may be entitled to an award for permanent partial disability due to their tinnitus. They cannot readily discern such from the Department's adopted regulations, and we doubt they are privy to the Department's internal policies, such as Policy 14.40. The same unfortunate situation will exist until the Department adopts a regulation to guide all workers, employers, and physicians in the evidence they submit to the Department and, if necessary, to this Board.

In *Lenk*, in the absence of a Department regulation, we found it is appropriate to analogize to the categories of permanent impairments of mental health, including rating between categories, contained in WAC 296-20-340, in order to determine the percentage of total bodily impairment due to tinnitus. This was because of the similarity in the disruption of daily living caused by a worker's tinnitus and that described in the categories of permanent mental health impairments. In *Lenk*, we ultimately agreed with Dr. Gordon G. Thomas' rating of 10 percent as compared to total bodily impairment. Due to his tinnitus Mr. Lenk was frequently irritable, had difficulty sleeping nearly every night, could not understand conversations over the telephone, suffered severe

headaches, and was distracted due to impaired concentration.

We have previously held this Board may select a category of impairment based upon medical findings and restrictions even in the absence of medical opinion of a specific category rating. In re Catherine Schmidt, BIIA Dec., 57,001 (1981) and In re Linda Donnelly, BIIA Dec., 54,669 (1981). We have held we may determine a worker's permanent partial disability is greater than any category testified to by the medical experts, provided the Board's rating is supported by the objective findings in evidence. In re Donald Woody, BIIA Dec., 85 1995 (1987). And, in Lenk, we noted our reliance upon a case involving worsening of a mental health condition, Price v. Department of Labor & Indus., 101 Wn.2d 520 (1984), for our holding that we would rate permanent impairment due to tinnitus even though the worker may not be able to demonstrate his or her impairment in a completely objective manner. Where the evidence is sufficient, then, we will not hesitate in the absence of a regulation duly adopted by the Department to evaluate permanent impairment due to tinnitus as a percentage of total bodily impairment, as we indicated in Lenk.

In the present case, we certainly will not reduce Mr. Sells' monetary award for permanent impairment due to tinnitus based upon the confusing testimony of Dr. Bergeron couched in terms of a rating method inconsistent with our guidance in Lenk. Neither do we find Mr. Sells has presented sufficient evidence to justify our increasing his award. Save for Dr. Bergeron's evaluation of Mr. Sells' tinnitus as moderate on a scale including mild, moderate, and severe, the record contains few characterizations of the effects of Mr. Sells' tinnitus. Mr. Sells reported the "[r]inging is there pretty near all the time ... you'd hear that ringing and it would wake you up at night sometimes. It will just be ringing away." 3/27/96 Tr. at 25. Mr. Sells also testified he did not have dizziness associated with the tinnitus. Attending physician, Dr. Ierokomos, called to testify by Weyerhaeuser Company, indicated tinnitus was a "major complaint" of Mr. Sells, although Dr. Ierokomos at the time did not understand the tinnitus was permanent Ierokomos Dep. at 17. Dr. Ritchie testified Mr. Sells reported to him the ringing "involved both ears and was continuous and he described it as severe." Ritchie Dep. at 7. Among these characterizations, only the reference to being awakened sometimes at night is analogous to the various descriptions of disruptions in daily life contained in the categories of permanent mental health impairment.

\*6 In monetary terms under the schedule utilized, the award, \$2.160, directed by the Department for Mr. Sells' permanent impairment due to tinnitus, is equal to an award for permanent impairment for 2.4 percent as compared to total bodily impairment. On the relatively meager record before us as to the impact of Mr. Sells' tinnitus upon his daily life, we are not convinced by a preponderance of the evidence that his permanent impairment due to tinnitus is greater than 2.4 percent as compared to total bodily impairment. Consistent, however, with our holding in Lenk and with the concerns that we have expressed, we will reverse the Department order and direct that Mr. Sells' award for permanent partial disability be made separately as a percentage, 2.4 percent, as compared to total bodily impairment.



## Applicable Schedule of Benefits

Weyerhaeuser Company contends Mr. Sells' award should be calculated based upon the benefit schedule in effect in 1976. Mr. Sells testified several times during these proceedings that he had been aware of his hearing loss for about twenty years. He stated that he had problems with the telephone and television, that his wife and others would tell him he did not hear a thing they said, and that he would turn up the volume on the television so much that people did not like it. Weyerhaeuser Company's attorney asked Mr. Sells whether he found his "hearing loss disabling ... back then ... did it interfere with [his] life?" He responded, "Yes, very much, people talking to you, and you know." 3/27/96 Tr. at 36. Relying upon this testimony, Weyerhaeuser Company asks we find Mr. Sells' occupational disease was, therefore, "partially disabling" in 1976 within the meaning of RCW 51.32.180.

In a long line of published Significant Decisions, we have held that the date of manifestation of disability is the date that determines the applicable schedule of benefits in an occupational disease claim. In re Charles Jones, BIIA Dec., 87 2790 (1989); In re Kenneth Alseth, BIIA Dec., 87 2937 (1989); In re Milton May, BIIA Dec., 87 4016 (1989); In re Otto Weil, Dec'd, BIIA Dec., 86 2814 (1987); and, In re Robert Wilcox, BIIA Dec., 69,954 (1986). The date of manifestation of disease or disability is the point in time when medical evidence of disability or need for treatment is coupled with knowledge on the worker's part. Generally speaking, when the worker actively seeks out medical advice or treatment, knowledge can be inferred. Jones, at 11-12. See also, Alseth, at 13.

Each of the just referenced cases concerned claims filed prior to July 1, 1988. In 1988 the Legislature amended RCW 51.32.180 to include the following language:

(b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or date of filing the claim.

\*7 In *Jones*, at 6, we stated:

we conclude that the 1988 Legislature merely clarified what it meant by the date of manifestation by defining it as 'the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first....'

In *Landon*, our Supreme Court agreed that the date of manifestation controls to set the schedule of benefits in occupational disease claims filed prior to July 1, 1988. The court left to future resolution any specific interpretation of the date of manifestation. Also, in a footnote, the court in *Landon*, 117 Wn.2d at 124, stated:

This decision affects only claims filed before July 1, 1988. RCW 51.32.180 was amended in 1988 so that it now directs that the rate of compensation for claims filed on or after July 1, 1988, depends on the date the disease requires medical treatment or the

date the disease becomes totally or partially disabling, whichever occurs first.

The court subsequently, in *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222 (1994), considered whether the benefits in claims of three widows of workers who died from asbestos-related disease should be calculated as of the date of manifestation of the disease giving rise to the deceased workers' original claims, or, calculated with reference to the particular disease that caused the workers' deaths. The court held that benefits should be calculated with reference to the particular diseases giving rise to the workers' deaths. We note each of the workers' original claims was filed before July 1, 1988, and each of the widows' claims was filed after July 1, 1988. Despite the fact that the widows' claims were filed after July 1, 1988, the court held "the survivor's benefits should be determined as of the date of manifestation of the asbestos-related disease causing the death." *Kilpatrick*, at 232.

We recognize the *Kilpatrick* court was not squarely faced with the issue of whether the 1988 amendment to RCW 51.32.180 replaced the date of manifestation test with a different test for determining the date of the applicable schedule of benefits in occupational disease claims filed on or after July 1, 1981. Nevertheless, the lack of distinction in *Kilpatrick* between claims filed before, and those filed on or after July 1, 1988, seems to lend weight to the belief we stated in *Jones*, that the Legislature merely clarified what it meant by date of manifestation by way of its 1988 amendments to RCW 51.32.180.

We recognize also that our holding in *Jones* might be viewed as *dicta* that is not controlling in claims filed on or after July 1, 1988, because in *Jones* we were presented with a claim that was filed before July 1, 1988. We do not, however, believe it is important, in the context of the present case, that we determine whether our holding in *Jones* applies equally to claims filed on or after July 1, 1988. Laying *Jones* aside, and focusing only upon the amended statutory language, we believe the statutory term "partially disabling" requires at a minimum that a qualified medical expert testify that Mr. Sells' hearing loss was indeed partially disabling on an earlier date than already reflected by the Department's choice of benefit schedules. This is consistent with the widely held understanding that determinations of disability, whether partial or total, must be founded upon medical opinion. By Department rule, the evaluation of bodily impairment must be made by medical experts. WAC 296-20-200(2); Cf. *Brannon v. Department of Labor & Indus.*, 104 Wn.2d 55 (1985), and *In re Michael McGoff*, BIIA Dec., 90 1897 (1991). As explained below, the expert medical testimony in Mr. Sells' case is not sufficient to allow an inference that his hearing loss was partially disabling prior to 1987. Mr. Sells' schedule of benefits would, therefore, not change even if we were to disregard *Jones* in the present case.

**\*8** Mr. Sells retired in 1987. As indicated, the testifying physicians agree that his hearing loss due to occupational noise exposure did not increase after he was no longer exposed to injurious occupational noise. Mr. Sells had hearing tests throughout his employment. However, we have no indication that he was informed of the results of

these tests. From the record before us, it appears Mr. Sells first sought medical attention related to hearing loss from Dr. Ierokomos in August of 1991. None of the testifying medical experts rated Mr. Sells' permanent impairment as of any date earlier than his retirement. Dr. Bergeron relied upon a November 1994 audiogram. Both Dr. Ritchie and Dr. Ierokomos relied upon a 1991 audiogram. They referred to earlier audiograms only to confirm that the two audiograms produced in 1994 reflected an increase in hearing loss generally inconsistent with the **general** pattern and degree of hearing loss due to occupational noise exposure reflected in 1991 and earlier audiograms.

Based upon this evidence we find the Department used the correct schedule of benefits. We cannot find that the date of manifestation of Mr. Sells' hearing loss occurred at a time earlier than July 1, 1986, the effective date of the benefit schedule that the Department used in computing Mr. Sells' benefits. The record does not provide medical testimony clearly confirming disability earlier than the date of retirement in 1987. Moreover, although Mr. Sells stated he was earlier aware of his hearing loss, none of the evidence indicates he was aware of its occupational cause. Mr. Sells did not seek medical assistance for his hearing loss until 1991.

After a thorough review of the record before us, the Proposed Decision and Order, the Petitions for Review and Employer's Reply to Claimant's Petition for Review, we make the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. On September 10, 1993, Harold W. Sells filed an application for benefits for hearing loss in both ears sustained in the course of his employment at Weyerhaeuser Company, a self-insured employer under the Industrial Insurance Act. After issuing a series of orders that were timely protested and subsequently held in abeyance, on July 18, 1995, the Department issued an order correcting an order of December 9, 1994, and closed the claim with directions to the self-insured employer to pay to the claimant an award for permanent partial disability equal to 7.51 percent complete loss of hearing in both ears and to be responsible for the purchase and maintenance of hearing aids.

On July 24, 1995, Harold W. Sells filed a Notice of Appeal of the July 18, 1995 order with the Board of Industrial Insurance Appeals. On August 30, 1995, the Board issued an order granting the appeal, assigning it Docket No. 95 4334, and directing that further proceedings be held.

On August 4, 1995, the self-insured employer, Weyerhaeuser Company, also filed a Notice of Appeal from the July 18, 1995 order with the Board of Industrial Insurance Appeals. On August 30, 1995, the Board issued an order granting the appeal, assigning it Docket No. 95 4547, and directing that further proceedings be held.

\*9 2. The claimant has conditions described as loss of hearing in both ears and tinnitus (ringing of the ears) proximately caused by exposure to injurious noise during the

course of his employment with the self-insured employer.

3. As of July 18, 1995, the claimant's conditions, proximately caused by exposure to injurious noise during his employment with the self-insured employer, were fixed and stable and not in need of further treatment.

4. The claimant's hearing loss proximately caused by his employment with the self-insured employer causes permanent impairment that is best described as 2.51 percent complete loss of hearing in both ears.

5. The claimant's tinnitus (ringing in the ears) proximately caused by his employment with the self-insured employer causes permanent impairment that is best described as 2.4 percent as compared to total bodily impairment. Under the AMA Guides to the Evaluation of Permanent Impairment and Department Policy 14.40, that permanent impairment due to tinnitus proximately caused by the claimant's employment with the self-insured employer is best described as 5 percent complete loss of hearing in both ears.

6. To calculate the claimant's monetary award for permanent partial disability, the Department used a schedule of benefits that was in effect from July 1, 1986 through June 30, 1993.

7. The claimant became aware that he had hearing problems and ringing in his ears in approximately 1976, when he had difficulty using the telephone and hearing his television and was informed by his wife and others that he was not hearing them, and when others did not like the volume he used on his television. The claimant believes that his hearing loss was disabling to him, or that it interfered with his life, very much in 1976.

8. The claimant was not informed by a physician that his hearing loss or tinnitus (ringing in the ears) was occupationally caused until August 1991, when he sought medical assistance for hearing problems from Dr. Alexander P. Ierokomos.

9. The earliest year for which a physician has estimated the claimant's degree of permanent impairment due to his hearing loss and tinnitus (ringing in the ears) proximately caused by his employment with the self-insured employer is 1987, the year of the claimant's retirement and removal from injurious occupational noise.

### **CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals.

2. As of July 18, 1995, the claimant had a permanent partial disability within the meaning of RCW 51.32.080 equal to 2.51 percent complete loss of hearing in both ears

that was proximately caused by his employment at Weyerhaeuser Company between approximately 1960 and 1987.

3. Under RCW 51.32.080, WAC 296-20-220(1)(o), and this Board's published Significant Decision in In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993), the claimant's permanent impairment due to his tinnitus proximately caused by his employment with the self-insured employer, should be rated and expressed as a percentage of total bodily impairment. As of July 18, 1995, the claimant had a permanent partial disability due for this tinnitus equal to 2.4 percent as compared to total bodily impairment.

\*10 4. Within the meaning of RCW 51.32.180, the claimant's occupational disease did not become manifest by requiring medical treatment or becoming totally or partially disabling before 1987. The Department used the correct schedule of benefits in calculating the claimant's award for permanent partial disability.

5. The order of the Department of Labor and Industries dated July 18, 1995, that corrected a Department order dated December 9, 1994, and closed the claim with directions to the self-insured employer to pay to the claimant a permanent partial disability award equal to 7.51 percent complete loss of hearing in both ears and to be responsible for the purchase and maintenance of hearing aids, is incorrect and is reversed. The claim is remanded to the Department with directions to issue an order that corrects the order dated December 9, 1994, and that directs the self-insured employer to pay the claimant awards for permanent partial disability equal to 2.51 percent complete loss of hearing in both ears and for 2.4 percent as compared to total bodily impairment, both calculated using the schedule of benefits in effect July 1, 1986 through June 30, 1993, and that directs the self-insured employer to be responsible for the purchase and maintenance of hearing aids, and to thereupon close the claim.

It is so ORDERED.

Dated this 20th day of December, 1996.

S. Frederick Feller  
Chairperson  
Frank E. Fennerty, Jr.  
Member

#### **DISSENT**

I dissent from my fellow Board members' decision to continue relying upon Lenk to rate permanent impairment due to tinnitus as a percentage of total bodily impairment, rather than relying upon Department Policy 14.40. Lenk was issued by this Board in the absence of the Department providing or directing permanent partial disability awards for tinnitus.

Policy 14.40 was adopted following Lenk, wherein the Employer Member of this Board

urged standardization of the medical rating of tinnitus and the administrative provision of awards for tinnitus. It is readily apparent that great progress has been made toward this goal, as evidenced by the development of a consistent policy and by this particular case. The medical experts in this claim employed the American Medical Association Guides to the Evaluation of Permanent Impairments when they assessed Mr. Sells' tinnitus. Likewise, neither the employer nor Mr. Sells have raised concern over the method utilized for rating Mr. Sells tinnitus.

The majority focuses on this issue, solely upon its own initiative, ostensibly because the Department has not, subsequent to Lenk, adopted a specific regulation as part of the Washington Administrative Code directing the rating of tinnitus. This unnecessary focus in the present case fails to credit and support the progress which the medical community and the Department have made towards standardization. This focus unnecessarily risks perpetuation of confusion. Moreover, contrary to the majority assertion, the Department's policy is not inconsistent with the governing statutes and Administrative Code provisions already adopted by the Department.

\*11 The Department's adopted regulations do not otherwise direct that tinnitus should be rated as a percentage of total bodily impairment.

In cases of injury or occupational disease of bodily areas and/or systems which are not included in these categories or rules and which do not involve loss of hearing, loss of central visual acuity, loss of an eye by enucleation or loss of the extremities or use thereof examining physicians shall determine the impairment of such bodily areas and/or systems in terms of percentage of total bodily impairment.

WAC 296-20-220(o) (Emphasis supplied). I am not aware of any instance brought before this Board in which a worker has sought an award for tinnitus other than in occupational hearing loss cases. All such claims are made in the context of contended hearing loss, whether or not the hearing loss is ultimately determined to rise to a compensable degree. In all practical instances, then, tinnitus is excepted from the regulation above concerning rating as a percentage of total bodily impairment.

A clarifying policy, such as Policy 14.40, is appropriate due to legislative adoption of the schedule of specified disabilities, including awards for "complete loss of hearing in both ears" and "complete loss of hearing in one ear," contained in RCW 51.32.080(1)(a). It is not clear that a regulation is required. The Legislature has directed that compensation for these disabilities, "other than complete, shall be in proportion ... to that which such partial loss of ... hearing most closely resembles and approximates." RCW 51.32.080(2). I am not aware of any more generally accepted and widely used method for rating permanent impairments than that provided in the various editions of the American Medical Association Guides to the Evaluation of Permanent Impairments. Those guidelines call for the rating of permanent impairment due to tinnitus as a percentage of hearing loss. It is, therefore, entirely reasonable for the Department to simply clarify that tinnitus falls within the group of specified disabilities contained in RCW 51.32.080(1)(a), and that impairment from tinnitus should be rated "in proportion" as directed by the Legislature in RCW 51.32.080(2). Further, the policy is in accord with

the Legislature's encouragement of the Department in developing a rating system for unspecified disabilities: "give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides." RCW 51.32.080(3)(a).

In sum, Policy 14.40 fully accomplishes the result urged by this Board in Lenk. It is consistent with legislative direction and consistent with Department regulations. Continued reliance upon Lenk, or insistence upon a regulation, is neither necessary or warranted. Although I believe the issue need not have been raised in this appeal, the most appropriate course of action would be to indicate that Lenk has truly outlived its usefulness. This would further, rather than risk detracting from the goal of standardization originally urged by the Board. That goal has been reached already by the Department.

\*12 The only expert medical testimony in this record, rating Mr. Sells' impairment due to tinnitus in more probable than not terms, is that of Dr. Bergeron, rating Mr. Sells' impairment due to tinnitus as equal to 4 percent complete loss of hearing in both ears. Adding this to the 2.51 percent, Mr. Sells is, therefore, entitled only to an award for permanent partial disability equal to 6.51 percent complete loss of hearing in both ears.

I concur in the majority determination that the Department used the correct schedule of benefits in this case. I concur in this only because, as the majority notes the self-insured employer failed to present **medical opinion** that Mr. Sells' occupational hearing loss was partially disabling prior to 1987. The self-insured employer sought rather to rely only upon Mr. Sells' own lay testimony concerning earlier partial disability. It is reasonable to hold the Department, employers, and workers to the same standard of proof when total or partial disability is contended within any context in industrial insurance in this state.

However, we should also more clearly acknowledge that the language contained in the 1988 amendments, RCW 51.32.180(b), sets the schedule of benefits in claims filed on or after July 1, 1988. As the majority acknowledges, both Jones and Landon concerned claims filed before July 1, 1988, and Kilpatrick did not face the matter squarely. Application of the "date of manifestation" rule to set benefit schedules in claims filed on or after July 1, 1988, is not legally correct and only adds unnecessary confusion and uncertainty to the process. The new statutory language--"requires medical treatment or becomes totally or partially disabling, whichever occurs first"--is clear when coupled with the simple requirement that, as in other matters, determinations of total or partial disability must be founded upon medical opinion.

Dated this 20th day of December, 1996.

Judith E. Schurke  
Member

1996 WL 879376 (Wash.Bd.Ind.Ins.App.)

**No. 45478-5.**

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II**

**Ederi Haggenmiller, Pro Se Appellant,  
v.  
DEPARTMENT OF LABOR AND INDUSTRIES,  
STATE OF WASHINGTON Respondent.**

**Certificate of Service**

**TO:                    DAVID C. PONZOHA                    COURT CLERK  
                          WASHINGTON STATE  
                          COURT OF APPEALS DIVISION TWO  
                          950 Broadway, Suite 300,  
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**I certify that on this day I served the attached BRIEF OF APPELLANT TO COURT OF APPEALS, DIVISION TWO, plus this two page certificate of service to the parties to this proceeding as listed above. A true and correct copy thereof was delivered to the United States Postal Service and placed into the stream of mail to the respective parties as indicated.**

**Dated this 19<sup>th</sup> day of May, 2014.**



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