NO. 99443-9

SUPREME COURT
STATE OF WASHINGTON

DAVID WHITE,

Petitioner,

v.

CENTURYLINK, INC. and DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Court of Appeals created no conflict with precedent when it recognized that it is rational to base a legislative classification on science. David White does not show any reason for review to challenge this classification used for legislative decision-making.

For occupational noise-related hearing loss, the Legislature adopted a two-year statute of limitations (which White argues violates equal protection and due process) that reflects the science about hearing loss. RCW 51.28.055(2)(a). Medical science shows—and case law recognizes—that the progression of noise-related hearing loss ceases once a worker leaves damaging noise sources. So the statute of limitations limits monetary benefits to only those periods with occupational noise exposure. RCW 51.28.055(2)(a).

Despite this rule, White filed a workers' compensation claim for occupational hearing loss three decades after his last exposure to noise at work. He does not dispute that his claim was not timely under RCW 51.28.055(2)(a). But he argues that it violates equal protection to not apply the occupational disease statute of limitations for other diseases, which is two years after notice of the condition by a medical provider. Contrary to White's claims, no Supreme Court case holds that the Legislature is

precluded from limiting hearing loss claims, consistent with the medical understanding of hearing loss, to damage resulting from noise at work.

The Court of Appeals correctly rejected White's equal protection argument because hearing loss is unlike many occupational diseases. Work-related hearing loss stops when the worker is no longer exposed to noise at work. The Legislature thus had a rational basis for excluding monetary benefits for workers removed from damaging noise.

White shows no conflict with Supreme Court precedent, no significant issue of constitutional law, and no issue of substantial public interest, so this Court should deny review.

II. ISSUE STATEMENT

1. White filed his hearing loss claim three decades after his last occupational exposure to noise. Work-related hearing loss ceases when a worker is removed from the noise. Under an equal protection analysis, does the two-year time limit in RCW 51.28.055(2)(a) bear a rational relationship to the State's legitimate purpose in only compensating disabilities caused by work exposure?

2. Does due process impose a duty on a private employer to provide notice of events that trigger the hearing loss statute of limitations?

III. STATEMENT OF THE CASE

A. The Science of Hearing Loss Shows That Noise-Related Hearing Loss Ceases When the Worker Is Removed From Noise

Workers may file workers' compensation claims for industrial injuries, which are sudden and traumatic events, and for occupational diseases, which arise from the distinctive conditions of employment. RCW 51.08.100, .140; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Noise-related hearing loss is classified as an occupational disease. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002); *Pollard v. Weyerhaeuser Co.*, 123 Wn. App. 506, 512, 98 P.3d 545 (2004). This classification is because noise-related hearing loss generally results from cumulative trauma rather than a single traumatic event and so lacks the time-definiteness of an industrial injury.

Noise-related hearing loss ceases when the worker is removed from the noise. "[T]he medical community has long recognized that prolonged, excessive noise creates an environment in the ear in which [sensory hair cells are irreversibly damaged.]" *In re Eugene W. Williams*, No. 95 3780, 1998 WL 226194, at *2 (Bd. Indus. Ins. Appeals Mar. 2, 1998). But once a worker is removed from the damaging noise source, the progression of the worker's noise-related hearing loss ceases. *See Jenkins v. Weyerhaeuser Co*., 143 Wn. App. 246, 250, 177 P.3d 180 (2008) (all

testifying doctors agreed that noise-related hearing loss "does not progress if the person is no longer exposed to the harmful noise").

Though a worker's hearing loss from occupational noise exposure no longer progresses after the worker is removed from the noise, the worker's hearing loss may worsen due to age and other factors. The medical community recognizes that the aging process may cause sensory hair cells to die in the same manner as noise exposure. *In re Williams*, 1998 WL 226194, at *3.[1] There is no scientifically reliable method to distinguish between noise-related hearing loss and age-related hearing loss. *See Heidy*, 147 Wn.2d at 81. But an employer cannot rely on the fact that workers of a certain age have hearing loss to argue that a specific worker has not suffered occupational hearing loss. *Id.* at 86.

Because noise-related hearing loss ceases when a worker is removed from the noise and is indistinguishable from age-related hearing loss, the Legislature crafted a statute of limitations unique to hearing loss claims. *See* RCW 51.28.055(2). For all other occupational disease claims, a worker has two years to file a claim from the date a doctor notifies the worker in writing that the worker has a condition for which the worker

[1] The hair cell population may also be damaged by a "host of factors other than noise or age[,]" including "infection, fever, medications, drug toxicity, stroke, cardiovascular efficiency, body chemistry and fatigue." *In re Williams*, 1998 WL 226194, at *3.

could file a claim. RCW 51.28.055(1). Because this statute of limitations does not begin to run until a doctor provides written notice, an occupational disease claim could potentially be allowed many years after the occupational exposure that caused the condition. For hearing loss, a worker has two years after the last injurious occupational exposure to noise or until September 2004, whichever is later, to file a claim to receive monetary benefits, such as a permanent partial disability award. RCW 51.28.055(2). If a worker does not file within the time limit, the worker may only receive medical benefits such as hearing aids. *Id.*

B. White Applied for Workers' Compensation Benefits Three Decades After He Stopped Being Exposed to Noise at Work

White filed a claim for occupational hearing loss in 2017. CP 119. Because this was three decades after he last worked, he likely had age-related hearing loss along with work-related hearing loss when he filed his claim. Neither White nor his self-insured employer, Qwest Corporation, dba CenturyLink, Inc., would be able to prove what proportion of the hearing loss was work-related and what proportion was age-related. *See Heidy,* 147 Wn.2d at 86.

Based on information from White, the Department allowed his claim and awarded permanent partial disability benefits for bilateral

hearing loss. *See* CP 136–38. CenturyLink appealed the Department's order to the Board of Industrial Insurance Appeals. CP 135.

At hearing, White admitted that he last performed work for CenturyLink or its subsidiaries in 1986 or before. CP 119. Because White was last exposed to occupational noise in 1986, he had until September 2004 to file his claim to remain eligible for monetary benefits.

Because White filed his 2017 application of benefits well past the 2004 deadline, CenturyLink moved for partial summary judgment and also moved in limine to preclude all evidence of entitlement to temporary total, permanent partial, or permanent total disability awards under the Industrial Insurance Act. CP 75–78, 111–24. Both motions asserted that the statute of limitations in RCW 51.28.055 prevented White from receiving monetary benefits. CenturyLink did not contest White's entitlement to medical aid benefits.

White did not contest any facts presented in support of CenturyLink's motions. CP 100–09. The Department, upon learning that White's last occupational exposure was significantly more than two years before he applied for benefits, did not contest the motions. CP 156.

The Board granted CenturyLink's motions. It reversed the Department's award of permanent partial disability benefits but affirmed the Department's allowance of hearing aids. CP 11, 31–32.

White appealed the Board's decision to the superior court. CP 1–6. CenturyLink moved for summary judgment. CP 162–65. The Department supported CenturyLink's motion. RP 7; CP189-243.[2] The trial court granted summary judgment to CenturyLink. CP 261.

After White appealed, the Court of Appeals affirmed. CP 263–69; *White v. Qwest Corp.*, No. 80715-3-I, 2020 WL 7488087 (Wash. Ct. App. Nov. 9, 2020) (slip op.). The Court of Appeals rejected White's equal protection argument, finding it is rational to treat occupational hearing loss differently than other occupational diseases: "[T]here is no reliable clinical method to determine what percentage of hearing loss is attributable to occupational noise exposure versus the aging process or other non-work related cause." Slip op. at 7. So it is rational to limit claims to those where the hearing loss occurs close in time to the end of the last exposure at work:

> Because the progression of hearing loss caused by workplace noise exposure may cease, while hearing loss may, for other reasons, continue, there is a reasonable basis [to] distinguish between occupational hearing loss and other occupational disease. And there is a logical and scientific basis to tie the limitations period to the end of exposure to workplace noise.

Slip op. at 7–8.

[2] The Department may take a position guided by its interests in superior court, and it need not take the same position as in its order. *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 775–76, 466 P.2d 151 (1970).

The Court of Appeals also rejected White's due process argument that the employer had to notify him of hearing loss at work. "No authority supports White's claim of a due process right to notice from his employer, a private entity, of a triggering event for purposes of a statute of limitations." Slip op. at 11–12 (noting that an employer has "'no obligation' to inform the employee that he had compensable loss" (citing *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009))). Slip op. at 11–12.

IV. ARGUMENT

"In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (citing *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995)). The Court of Appeals properly applied this presumption, and its decision does not merit review.

White claims he showed conflict with Supreme Court precedent, a significant issue of constitutional law, and an issue of substantial public interest. Pet. 8, 13, 20; RAP 13.4(b)(1), (3), (4). These arguments all center on a claim that there is no rational basis to treat hearing loss

differently than other occupational diseases. This claim ignores the science underlying the legislative classification, and there is no reason to grant review to reconsider the Court of Appeals' proper recognition of this science.

A. White Shows No Conflict with *Heidy* Because It Recognizes the Science Underpinning the Legislature's Hearing Loss Approach

There is no reason to review the Court of Appeals' decision as it correctly applied RCW 51.28.055. RCW 51.28.055 has two statutes of limitation for occupational diseases.[3] Subsection (1) provides a general two-year limit starting from the date a doctor notified the worker in writing about an occupational disease. Subsection (2) applies more narrowly to occupational hearing loss, requiring workers to file a hearing loss claim within two years of their most recent occupational noise

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[3] RCW 51.28.055 provides:

> (1) Except as provided in subsection (2) of this section for claims filed for occupational hearing loss, claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician [about the existence of an occupational disease and that a claim may be filed] . . .
>
> (2)(a) Except as provided in (b) of this subsection, to be valid and compensable, claims for hearing loss due to occupational noise exposure must be filed within two years of the date of the worker's last injurious exposure to occupational noise in employment covered under this title or within one year of September 10, 2003, whichever is later.
>
> (b) A claim for hearing loss due to occupational noise exposure that is not timely filed under (a) of this subsection can only be allowed for medical aid benefits under chapter 51.36 RCW.

exposure or within one year after September 2003, whichever is later, to be eligible for monetary benefits. It is undisputed that White did not file his application for benefits within two years of his last exposure or within one year after September 2003.

White concedes that rational basis review applies.[4] Pet. 9. So he must show that "the challenged law [is not] rationally related to a legitimate state interest." *Yim v. City of Seattle*, 194 Wn.2d 682, 689, 451 P.3d 694 (2019) (quotation omitted); *see also Am. Legion*, 164 Wn.2d at 609.[5] White claims the statute of limitations for occupational hearing loss is not rationally related to a legitimate governmental purpose (Pet. 8, 12-15) and, to argue this, claims that the Court of Appeals' decision conflicts with *Heidy*, 147 Wn.2d 78. Pet. 13, 15–16.

In making this argument, White concedes the well-known science of occupational hearing loss recognized in *Heidy* that "the present methods of differentiating between [age-related and noise-related hearing loss are] not scientifically reliable," and that there is an "imperfect science" about

[4] When a party challenges a statute on equal protection grounds, rational basis review applies if the statute does not involve a suspect classification or fundamental right. *Am. Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008).

[5] "A legislative distinction will withstand [rational basis review] if, first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation." *Am. Legion*, 164 Wn.2d at 609 (quotation omitted).

distinguishing age-related hearing loss from noise-related hearing loss. *Heidy*, 147 Wn.2d at 81–82, 85–86; Pet. 13, 15–17.

Given this "imperfect science," it is rational to treat occupational hearing loss claims differently than other occupational diseases. Hearing loss claims are unique among occupational diseases because there is a lack of reliable medical information to determine the extent of occupational hearing loss versus other factors that cause hearing loss, such as age. *See Heidy*, 147 Wn.2d at 81–82, 85–86; Pet. 13. Science cannot reliably determine how much hearing loss occurs on or off the job.

Even so, science has established that once a worker is removed from a damaging noise source at work, the progression of noise-related hearing loss ceases. *See Jenkins*, 143 Wn. App. at 250; *In re Williams*, 1998 WL 226194, at *2. So it is rational to require a worker to file a claim for occupational hearing loss close in time to the last occupational noise exposure. That is because, after this point, it would not be possible to distinguish non-occupational age-related hearing loss from hearing loss due to a work exposure. A worker like White may well have—and likely did—suffer non-occupational hearing loss in the three decades after his exposure to noise at work had ended.

White argues that the Court of Appeals' decision, which relied on medical evidence about hearing loss, conflicts with *Heidy* (as discussed in

Harry): "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.'" *Harry*, 166 Wn.2d at 18 n.6 (citing *Heidy*, 147 Wn.2d at 86); *see also* Pet. 13. But *Heidy* addressed setting disability levels for hearing loss, and it said nothing about statutes of limitation for hearing loss claims. *Heidy*'s applicability is not to show a conflict but to recognize the science underpinning the Legislature's decisions. The Legislature acted rationally to further the State's legitimate interest in only paying benefits for work-related disabilities, and *Heidy* does not provide otherwise.[6]

White's arguments under RAP 13.4(b)(3) and (4) similarly hinge on his notion that there is not a rational basis for distinguishing between the occupational disease classes, and they fail for the same reason as his first argument. He shows no reason for review. Pet. 19.

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[6] White points to RCW 51.16.040 as authority to bolster his equal protection argument. Pet. 10. This statute provides that the same monetary benefits are paid for occupational diseases and industrial injuries, but says nothing about setting statutes of limitations. RCW 51.16.040. RCW 51.28.050 provides only a one-year statute of limitations for industrial injuries, where the occupational-disease statute of limitations is two years. *Compare* RCW 51.28.050 *with* RCW 51.28.055. If White's theory were correct, then occupational diseases would only have a one-year statute of limitations.

B. No Review Is Warranted to Consider White's Due Process Arguments Because Due Process Does Not Apply to a Private Party's Actions

White also makes a due process argument that his employer should have provided him notice that he had work conditions that would trigger the statute of limitations. Pet. 13–14, 16–18. But due process applies only to government action. U.S. Const. amend XIV (No "*State* [shall] deprive any person of life, liberty, or property, without due process of law."). The Court of Appeals correctly cited *Harry* for the proposition that the "employer had 'no obligation' to inform the employee that he had compensable loss." Slip op. at 11–12 (quoting *Harry*, 166 Wn.2d at 19). White shows no significant question of constitutional law.

V. CONCLUSION

White shows no basis for review, and so review should be denied.

RESPECTFULLY SUBMITTED this 5th day of March 2021.

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SUPREME COURT
STATE OF WASHINGTON

DAVID WHITE, Petitioner, v. CENTURYLINK, INC. and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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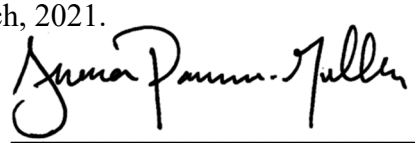
DATED this 5th day of March, 2021.



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