No. 99443-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DAVID WHITE, *Petitioner / Appellant*

v.

QWEST CORP.

and

DEPARTMENT OF LABOR AND INDUSTRIES, *Respondents*

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is David White. Mr. White was the appellant in the action filed with Division I of the Court of Appeals and the plaintiff in the action filed in King County Superior Court. Respondents are Century Link, doing business as and formerly Qwest Corporation, ("Qwest"), and the Department of Labor and Industries ("Department").

II. DECISION OF THE COURT OF APPEALS

Mr. White seeks review of the decision of the Court of Appeals in *White v. Qwest Corp.*, __ Wn. App. 2d __, __ P.3d __, 2020 WL 7488087 (Nov. 9, 2020) (ordered published December 18, 2020), attached as Appendix 1, and referred to below as the "Opinion".

III. ISSUE PRESENTED FOR REVIEW

Does RCW 51.28.055 (the Occupational Hearing Loss Statute) violate equal protection and due process principles and Abrogate the Statutory Protections of the occupational disease statute, RCW 51.32.180, on its face or as applied in this case because it irrationally affords less protection to workers with occupational hearing loss than those with other injuries?

IV. STATEMENT OF THE CASE

This case involves the unconstitutional disparate treatment of workers with occupational hearing loss. On March 23, 2017, Mr. White applied for benefits for binaural occupational hearing loss due to his lengthy exposure to injurious noise while working for Qwest Corp. CP 83. His last

exposure to injurious noise occurred in approximately 1986. *Id.* On July 7, 2017, the Department ordered Qwest to accept the claim for occupational hearing loss, pay Mr. White a permanent partial disability ("PPD") award for 40.10% hearing loss of in both ears, and provide and maintain hearing aids.[1] CP 136-137, 146-147.

On appeal to the Board of Industrial Insurance Appeals ("Board"), Qwest stipulated to claim allowance and to provide medical treatment in the form of hearing aids (CP 35-36), then moved for Summary Judgment applying not the law as it existed at the time of Mr. White's injury, but instead, the law as it was later amended in 2003 (CP 111-122). Mr. White directly challenged the constitutionality of RCW 51.28.055 in his response to Qwest's motion. CP 100-109. The employer replied. CP 94-97. The Board granted Qwest's motion for summary judgment by interlocutory order. CP 53-55. Mr. White appealed the interlocutory grant of summary judgment (CP 53-55) and raised his constitutional concerns again. CP 47-52. The Board affirmed the interlocutory grant of summary judgment and expressly declined to address Mr. White's constitutional challenges for want of jurisdiction. CP 44. The hearings judge ultimately issued a Proposed Decision and Order ("PDO") allowing then closing the claim

[1] The Department's July 7, 2017 order was affirmed on October 16, 2017. CP 145.

without an award for PPD, never addressing Mr. White's constitutional challenges to RCW 51.28.055. CP 28-34, 53-55, 71-73. The Board adopted the PDO as its final decision, also without addressing Mr. White's constitutional challenges. CP 3-4, 11.

Mr. White appealed to King County Superior Court. CP 1-2. There, Qwest again moved for summary judgment, which the trial court granted, but without addressing Mr. White's constitutional challenges to RCW 51.28.055. CP162-165, 258-262. Mr. White appealed to the Court of Appeals, who affirmed the trial court. CP 263, Appx. 1. Division I published its opinion after Qwest moved for publication and change of caption. This timely petition follows.

V. SUMMARY OF ARGUMENT

RCW 51.28.055 violates both the equal protection and due process clauses of the U.S. Constitution and offends our State Constitution's Article I, Section 3 and conflicts with this Court's precedent. It creates two classes of injured workers, those with occupationally related hearing loss and those who do not. For those who surmise on their own that they have suffered occupational hearing loss within two years of having last been exposed to injurious levels of noise, RCW 51.28.055 grants those workers a full basket of benefits, such as medical treatment, time loss compensation, and PPD. For workers like Mr. White, who were not afforded audiometric testing by

their employers and only become self-aware of their occupational hearing loss more than two years after last exposure, are treated like second-class citizens. Their recovery is limited to hearing aids only. This distinction fails to treat all workers injured by occupational disease equally under the eyes of the law, is not rationally related to a legitimate governmental purpose, and shifts the duty of the employer to maintain a safe workplace to workers to become aware of and monitor their own occupationally related hearing loss.

This argument is supported by this Court's precedent, with which Division I's published opinion conflicts. Review and reversal are warranted to resolve these conflicts and to answer this significant question of state and constitutional law that affects the public interest.[2]

VI. ARGUMENT

1. RCW 51.28.055 Violates Equal Protection and Due Process, and Abrogates the Statutory Protections of the Occupational Disease Statute, RCW 51.32.180, in Conflict With Published Precedent

A core purpose of the Industrial Insurance Act ("IIA") is to allocate the cost of workplace injuries to the industry that generates them, with the intent to compel employers to make workplaces safer. Accordingly, the IIA is "'liberally construed' ... to further the purpose of providing

[2] RAP 13(b)(1), (3), and (4).

compensation to all persons injured in their employment, with all doubts resolved in favor of the worker."[3]

Under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and its state analog, the state must afford all persons equal protection of the laws. U.S. Const. Amend. XIV.[4] Equal protection concerns irrational governmental classifications. If the classification does not concern a "protected class," a classification is constitutionally justified only if it is rationally related to a legitimate state interest, also known as the "rational basis test." Disability is not generally considered a protected class, making the rational basis test applicable.[5] The test presumes that legislation is valid and will be upheld if the classification is "rationally related to a legitimate state interest."[6]

RCW 51.28.055(2)(a) irrationally circumscribes benefits for injured workers, but only those who suffer occupationally related hearing loss.[7]

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[3] *Henry Indus., Inc. v. Dep't of Labor & Indus. of Wash.*, 195 Wn. App. 593, 605, 381 P.3d 172 (2016).

[4] *See also, generally*, *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976); *Hodel v. Indiana*, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1976).

[5] *City of Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

[6] *Id.* at 440.

[7] RCW 51.28.055 reads: "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 or a licensed advanced registered nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed. The notice shall also contain a statement that the worker has two years from

RCW 51.28.055 unconstitutionally creates and singles out a class of injured workers (those with occupationally related hearing loss) and treats them differently from other injured workers in general without any rational basis or justification. Injured workers are divided into two classes – those with occupational diseases, and those with industrial injuries. This is antithetical to the occupational disease statute, RCW 51.16.040, which mandates that regardless of whether one has an occupational disease or an industrial injury, all persons must be compensated "***in the same manner***."

Occupationally related hearing loss is properly characterized as an occupational disease and must be treated as such under RCW 51.16.040.[8] However, the occupational hearing loss statute, RCW 51.28.055, ignores the overall mandate and protections of the occupational disease statute and instead creates a sub-class of ***inferior*** injured workers – those with occupationally induced hearing impairments. The statute then further

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the date of the notice to file a claim. The physician or licensed advanced registered nurse practitioner shall file the notice with the department. The department shall send a copy to the worker and to the self-insurer if the worker's employer is self-insured. However, a claim is valid if it is filed within two years from the date of death of the worker suffering from an occupational disease.

(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.

(3) The department may adopt rules to implement this section."

[8] *Harry v. Buse Timber & Sales, Inc.*, 166 Wn. 2d 1, 17, 201 P.3d 1011 (2009).

subdivides the hearing-impaired workers into two more sub-classes: Group 1 hearing impaired workers, who are eligible for the traditional bouquet of benefits, such as time loss, treatment, and permanent partial disability; and Group 2 hearing impaired workers, who are eligible for ***nothing but hearing aids***.

Moreover, Article I, Section 3 of our State Constitution and the Fifth and Fourteenth Amendments of our U.S. Constitution provide that no person shall be deprived of life, liberty, or property, without due process of law. Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of U.S. Constitutional amendments V and XIV.[9]

In accordance with *Mathews v. Eldridge*, a court weighs the following factors to determine what process is due in a particular situation: (1) the private interest at stake in the governmental action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the additional burdens that added procedural safeguards would entail.[10] Due process requires that the Department or other agency give the appealing party "adequate notice and

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[9] *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976).

[10] *Kustra v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 674, 175 P.3d 1117 (2008).

an opportunity to be heard, and that procedural irregularities [do] not undermine the fundamental fairness of the proceedings," including " 'such procedural protections as the particular situation demands' "[11]

All workers have a private interest at stake in their vested right to receive benefits from the Department.[12] Our Supreme Court noted that all injured workers covered by the IIA have a vested interest in disability payments upon allowance of an industrial injury or occupational disease. *Id.* Here, Qwest stipulated to the allowance of Mr. White's claim for occupational hearing loss. CP 35-36. There is no dispute Mr. White has a vested interest in receiving his disability benefits.

Yet, all similarly situated hearing-impaired workers are not treated alike, and there are no reasonable grounds for distinguishing between the two legislatively created classes. For those workers who self-procure audiograms within two years of leaving noisy employment, they gain access to the panoply of benefits: time loss, treatment, and PPD. But for those workers, like Mr. White, who did not get himself tested within two years of leaving Qwest's injuriously noisy work environment, his only recourse is access to hearing aids despite ***suffering the same compensable injury.***

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[11] *Id.*
[12] *Id.*

There are no rational grounds for distinguishing between the two classes created by RCW 51.28.055. Division I accepted Qwest and the Department's argument that the reason for distinguishing between the two classes lied in the absence of reliable medical information to detect the extent of the occupationally related hearing loss versus other factors. CP 196-199. But this argument conflicts with published precedent of this Court. This Court held in *Boeing Co. v. Heidy*: "Even in the absence of reliable medical evidence, when age-related hearing loss may not be segregated from noise-related hearing loss; employers must bear the burden of an imperfect science."[13]

Division I's published opinion creates an untenable conflict where this Court has already found that this additional burden was not inequitable to the employer because the employer could have reduced its liability by providing the worker with a physician-certified notice of compensable hearing loss that time of leaving employment. This Court's rationale applies here, and this conflict warrants review.[14]

The facts of this case highlight the utter irrationality of the law as applied by the trial court and Division I.[15] Qwest was required to conduct

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[13] *Harry* 166 Wn.2d at 18 n.6 (citing *Boeing Co. v. Heidy*, 147 Wn.2d 78, 88, 51 P.3d 793 (2002) (overruled on other grounds)).

[14] RAP 13.4(b)(1).

[15] Laws may be unconstitutional either on their face or as applied to individual cases. *Cleburne*, 473 U.S. at 450 (applying rational basis review to invalidate a particular

annual audiograms in compliance with a Washington Industrial Safety and Health Act of 1973 ("WISHA") (RCW 49.17.060). Employers are also required by WAC 296-817-100 and 200 to audiometrically test their employees' hearing and to notify them in writing of the existence of a standard threshold shift. Qwest never tested Mr. White's hearing. It cannot now complain that Mr. White's "stale claim" deprived Respondents of notice of its potential obligation to pay benefits or the opportunity to make its workplace safer.[16]

RCW 51.28.055 unreasonably displaces the protections of the occupational disease statute, which identifies the date of manifestation as the "trigger" for the two-year limitation for filing a compensable claim. Mr. White's occupational disease manifested prior to the September 2003 amendment of RCW 51.28.055. Under the prior statute, the time for filing claims for occupational hearing loss simply mirrored the time limitations imposed under the general occupational disease statute, RCW 51.16.040 and RCW 51.32.180.[17]

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zoning decision that targeted mentally disabled persons); *see also, e.g., Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 57 P.3d 611 (2002) (statute banning industrial insurance disability benefits to prisoners who have no statutory beneficiaries violated equal protection and due process as applied to two prisoners).

[16] *See Harry*, 166 Wn.2d at 18-19 (noting the inequity of ruling in favor of an employer who failed to give employee notice that they sustained occupational hearing loss).

[17] RCW 51.32.180 reads: Occupational disease limitation (b)(2) 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**

Because hearing loss is an occupational disease, it should be treated the same. Yet, for no rational reason, Division I held in a published decision it is not. Instead, for occupational hearing loss alone, the statute uses the "date of last injurious exposure," not the date of manifestation, which is the "date the disease requires medical treatment" as the reference point for compensation.

Importantly, the occupational disease limitation, RCW 51.32.180, was amended in 1988 for the specific purpose of *curing* 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. There is no rational basis to treat workers with occupational hearing loss, especially Mr. White, differently.[18]

Here, Division I found that the "unique aspects of hearing loss provided a basis to distinguish it from other occupational diseases."[19] Division I then erred by placing the burden of "imperfect science" back on the injured worker to surmise his own hearing loss, despite this Court's clear

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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).

[18]

[19] *White*, 2020 WL 7488087 at *3.

directive in *Heidy*, placing this burden squarely on the employer's shoulders to mitigate.[20]

Again, Division I's published opinion creates a square conflict with cases like *Harry* and *Heidy*.[21] Imperfect science is not a rational basis for treating hearing impaired workers differently from other injured workers claiming any other occupational disease. The two-year limitation on filing a timely claim, ***without notice*** to the injured worker, is not rationally related to any legitimate government interest, flies in the face of the underlying remedial purpose of the Act, and subjugates the rights of hearing-impaired workers below all others. Mr. White and other injured workers with occupational hearing loss claims must be treated equally for the purposes of timeliness of their claims.

When looking at RCW 51.28.055, workers asserting a claim for occupational disease, as opposed to a claim for hearing loss, are entitled to written notice from a medical provider of the existence of a disease and that

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[20] *Heidy*, 147 Wn.2d at 85-86. The Opinion reads: "In sum, determining the cause of hair cell loss in the presence of multiple potential causes is an extremely difficult task," and there 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. *Id.* at 5; *Heidy*, 147 Wn.2d at 85-86...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." *White*, 2020 WL 7488087 at *3-4.

[21] The *Heidy* court could not have reached the Constitutionality of the later 2003 amendments, which is the subject of this Petition.

they may have a claim for benefits. However, there is ***no notice requirement*** for workers who wish to file a claim ***for hearing loss***; instead, they are required to ***intuit*** a causal link between their workplace and their own loss of hearing, and then file a claim within two years of their last exposure to noise at work. An unsophisticated worker should not be expected to make that causal connection, particularly when the broad purpose of the IIA is to provide ***sure and certain relief for all injured workers, not just some***. The lack of notice requirement for workers wishing to file a claim for hearing loss is a violation of procedural due process and is exactly why this Court has held that the worker should not bear the burden of imperfect science. Division I failed to appreciate this key point.

Consistent with the *Mathews v. Eldridge* factors, injured workers like Mr. White deserve some ***notice***, however small, to pass due process muster. Without any notice or other procedural safeguards, the risk of erroneous deprivation of benefits is unreasonably high and is only specific to hearing impaired workers. The financial burden and onus are on the injured worker to screen himself for compensable hearing loss, even though the employer bears the burden of testing its employees on an annual basis and notifying the same of any threshold changes.[22] Because of the insidious

[22] WAC 296-817-20035 (audiometric testing required); RCW 49.17.060 (employer responsible for maintaining a safe workplace).

development of hearing loss, workers typically do not recognize their hearing loss symptoms, which are permanent, until it is too late, and well after the statute of limitations runs.

Unfortunately, Division I found that Mr. White was not entitled to the same written notice that all other injured workers receive under the occupational disease statute. And instead, the only "notice" due to Mr. White and all other hearing-impaired workers, was "the Board's determination that his claim was untimely and he was ineligible for the benefit."[23]

Comparing the high risk of erroneous deprivation with the actual cost and value of providing one additional, low or no cost safeguard has life changing potential. When the employer shirks its responsibility for maintaining a hearing loss safety program and/or fails to conduct audiometric testing for its workers, simple written notice to all workers would be monumental. Workers would then understand that it is their obligation to seek an audiogram upon leaving employment in order to preserve their eligibility for full benefits. With simple notice, the risk of erroneous deprivation would be entirely mitigated. Another alternative would be to require employers to audiometrically screen workers upon

[23] *White*, 2020 WL 7488087 at *5.

leaving employment, as already required under WISHA. This additional, low-cost safeguard would incentivize, reduce, and limit an employer's own liability for noise related hearing loss as foreseen by this Court in *Heidy*.

Both the government and employer share a vested interest and the obligation to ensure uniformly safe working environments for all workers and reducing, if not eliminating workplace injuries. And compared to the risk of erroneous deprivation with the heightened risk of permanent hearing loss, the cost of employer notice and potential testing is *de minimus*.

2. Equal Protection of a Class of Injured Workers Is an Issue of Constitutional Law with Substantial Public Importance

Supreme Court review is warranted because the equal protection of a class of injured workers is an important question of constitutional law that substantially affects the public interest.[24] This court has long recognized the public's interest in "assur[ing] safe and healthy working conditions for every person working in Washington," as has the Legislature.[25] This Court

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[24] RAP 13.4(b)(3) and (4).

[25] *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 458, 788 P.2d 545 (1990) (citing RCW 49.17.010) RCW 49.17.010 states: "The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the

has yet to weigh in on the important constitutional questions in this case, *i.e.*, whether workers with occupational hearing loss deserve the same protection and due process as other workers with occupational injuries. However, this Court has granted review in cases involving occupational hearing loss to effectuate the "purpose of the IIA, the liberal construal mandate, the definition of occupational disease, and the nature of occupational hearing loss," to ensure that workers are afforded the utmost protection.[26] Here, too, this case presents an important question of constitutional and state law that substantially affects the public interest. Review and reversal are warranted.

VII. CONCLUSION

The time limitation imposed for filing hearing loss claims treats hearing impaired workers differently from all other injured workers, without rational basis or connection to a legitimate governmental purpose. It violates Mr. White's, and all other hearing-injured workers' rights, to equal protection under the law and right to due process. Mr. White asks this Court to grant review, find that RCW 51.28.055 is unconstitutional on its

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standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91–596, 84 Stat. 1590)."

[26] *E.g.*, *Harry*, 166 Wn.2d at 12 (granting review and rejecting the employer-friendly last injurious exposure rule).

face or as applied, and award costs and fees as permitted by law, including RCW 51.52.130.

Respectfully submitted this 15th day of January 2021.

VAIL CROSS-EUTENEIER & ASSOCIATES

s/Dominique' Jinhong
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VIII. APPENDIX

1. *White v. Qwest Corp.*, No. 80715-3-I, 2020 Wash. App. LEXIS 2892, at *12 (Ct. App. Nov. 9, 2020).

2. *In re Eugene W. Williams*, BIIA Dec. March 2, 1998. CABR 205-243 (describes the insidious nature of hearing loss, the Department's and self-insured employers' historical treatment of hearing loss claims, and was a pre-cursor to *Boeing v. Heidy* and *Harry v. Buse Timber*). CP 205-243.

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 19th day of January, 2021, the document to which this certificate is attached, Petition for Review, was e-filed with the Court of Appeals, and placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 19th day of January 2021.

Lynn M. Venegas

LYNN M. VENEGAS, Secretary

FILED
11/9/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID WHITE, Appellant, v. QWEST CORPORATION dba CENTURYLINK INC. and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	No. 80715-3-I DIVISION ONE PUBLISHED OPINION

CHUN, J. — An employee who suffers from occupational-related hearing loss must file a claim for workers' compensation benefits within two years of the worker's last exposure to occupational noise or by September 10, 2004, whichever date is later. RCW 51.28.055(2)(a). The failure to do so precludes monetary benefits, such as a partial disability award, and limits recovery to medical aid benefits. In this case, the claimant's last exposure to occupational noise occurred, at the latest, in 1986 and he filed his claim for benefits three decades later. The claimant was entitled only to medical benefits. The statutory limitations provision does not violate equal protection by distinguishing occupational-related hearing loss from other occupational disease or violate due process. We thus affirm the superior court's order granting the employer's motion for summary judgment.

BACKGROUND

In 2017, David White filed a claim for occupational hearing loss that occurred during his employment with Qwest Corporation, d/b/a CenturyLink. Based on the information White provided in his claim, the Department of Labor and Industries (Department), the agency responsible for administering Washington's workers' compensation system, allowed the claim. See RCW 43.22.030 (power and duties of the director of the Department). The Department awarded partial disability benefits of $38,509, corresponding to 40.10 percent bilateral hearing loss.

Both White and the employer appealed the Department's order to the Board of Industrial Insurance Appeals (Board). See WAC 263-12-010 (function and jurisdiction of the Board) While the appeal was pending, White responded to the employer's discovery requests and indicated that his last date of employment with CenturyLink or its subsidiaries was in 1986, at the latest.

CenturyLink moved for partial summary judgment and moved to limit the claim to medical benefits. CenturyLink asserted that White was ineligible for monetary benefits because his claim was untimely under RCW 51.28.055, a statute of limitations provision that applies to occupational hearing loss. CenturyLink stipulated to liability for medical aid benefits—in this case, hearing aids. The Department, having learned the date of White's last exposure to occupational noise, did not contest the employer's motions. The Board granted CenturyLink's motions, reversed the Department's permanent partial disability award, and affirmed the allowance of medical aid benefits.

White appealed the Board's decision to superior court. CenturyLink moved for summary judgment. The Department supported the employer's motion. After hearing argument, the superior court granted CenturyLink's motion. White appeals.

ANALYSIS

White claims the superior court erred in granting summary judgment because RCW 51.28.055(2) is unconstitutional. Specifically, White contends that the statute arbitrarily discriminates between claimants with occupational hearing loss and those with other occupational diseases and violates due process.

Reviewing a decision under the Industrial Insurance Act (IIA), the superior court "considers the issues de novo, relying on the certified board record." RCW 51.52.115; Malang v. Dep't of Labor and Indus., 139 Wn. App. 677, 683, 162 P.3d 450 (2007). We review the superior court's decision, not the Board's order. RCW 51.52.140.

The superior court's ruling is subject to the ordinary rules governing civil appeals. RCW 51.52.140; Romo v. Dep't of Labor & Indus., 92 Wn. App. 348, 353, 962 P.2d 844 (1998). Our review of the superior court's decision on summary judgment is de novo. Malang, 139 Wn. App. at 683-84. We review the superior court's grant of summary judgment to determine whether the evidence shows "'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Romo, 92 Wn. App. at 354 (quoting CR 56(c)). A statute is presumptively constitutional, and the party challenging a statute bears the heavy burden of proving its unconstitutionality

beyond a reasonable doubt. Morrison v. Dep't of Labor & Indus., 168 Wn. App. 269, 272, 277 P.3d 675 (2012).

RCW 51.28.055 establishes the limitations period for filing workers' compensation claims based on occupational disease and includes a specific provision for work-related hearing loss. To be entitled to monetary benefits, a claimant must file such a claim within two years of the last exposure to workplace noise, or by September 10, 2004, whichever is later.

> (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.

RCW 51.28.055(2) (emphasis added). In contrast, a claim for benefits based on other occupational diseases is timely if filed within two years after the worker receives written notice from a medical provider that the disease exists and that a claim may be filed. RCW 51.28.055(1). It is undisputed that White did not file his claim within two years of his last exposure to work-related noise or before September 10, 2004.

As an initial matter, White claims the superior court erred when it declined to reach his constitutional challenges to RCW 51.28.055(2) because, while he did not include a detailed discussion of his arguments in his brief opposing summary judgment, he raised the arguments in a previously-filed trial brief. On review of summary judgment, the appellate court considers the "evidence and issues

called to the attention of the trial court." RAP 9.12. Assuming for purposes of this appeal that White properly called the court's attention to his constitutional arguments, we may consider the issues on review even if the superior court declined to do so. Goodwin v. Wright, 100 Wn. App. 631, 648, 6 P.3d 1 (2000). In other words, the proper remedy for the error, if any, is for this court to consider the arguments on de novo review.[1] See Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 463-64, 909 P.2d 291 (1996).

Equal Protection

White contends that RCW 51.28.055(2) violates equal protection because it "singles out a class of injured workers," those who suffer from occupational-related hearing loss, and treats them differently from workers who suffer from other occupational diseases with no rational basis or justification.

The equal protection clause of the Washington State Constitution, article I, section 12 and the Fourteenth Amendment to the United States Constitution require that "persons similarly situated with respect to the legitimate purpose of the law" receive like treatment. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). An equal protection challenge requires minimal scrutiny, unless the subject legislation affects a fundamental right or a suspect class. Skagit Motel v. Dep't of Labor & Indus., 107 Wn.2d 856, 859, 734 P.2d 478 (1987). White alleges neither and so we apply the rational basis standard of review. Harris v.

[1] Even if we were to conclude that White's briefing below was insufficient to call the trial court's attention to the issues he raises on appeal, this court "will consider an issue raised for the first time on appeal if the claimed error is a manifest error affecting a constitutional right." Vernon v. Aacres Allvest, LLC, 183 Wn. App. 422, 427, 333 P.3d 534 (2014) (quoting RAP 2.5(a)(3)).

Dep't of Labor & Indus., 120 Wn.2d 461, 477, 843 P.2d 1056 (1993); State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Under this standard, a provision is not constitutionally objectionable so long as it (1) applies alike to all members within the designated class, (2) reasonable grounds exist to support the classification, and (3) the classification bears a rational relationship to the purpose of the legislation. Am. Legion Post #149 v. Wash. Dep't of Health, 164 Wn.2d 570, 609, 192 P.3d 306 (2008).

RCW 51.28.055(2) applies equally to all members of the class (workers with occupational hearing loss) with regard to eligibility for benefits. White does not contend otherwise. But as to the second factor, White argues that because occupational-related hearing loss is categorized as an occupational disease, it must be treated the same in every respect to other occupational diseases. See Boeing Co. v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002) (noise-induced hearing loss is an occupational disease). In other words, White claims there are no reasonable grounds to support a distinct limitations period for hearing loss claims.

But White fails to address the unique aspects of hearing loss that provide a basis to distinguish it from other occupational diseases. While hearing loss is a "progressive condition," it is not progressive in the same manner as other conditions, such as asbestosis. Heidy, 147 Wn.2d at 88. Exposure to excessive noise causes sensory hair cells to die in the inner ear. In re Eugene W. Williams, No. 95 3780, at 4 (Wash. Bd. Ind. Ins. App. Mar. 2, 1998). When this happens, sensory cells are replaced by scar tissue that does not sense sound or transmit

signals to the brain. Id. The process of aging also causes sensory hair cells to deteriorate and die in a clinically indistinguishable fashion. Id. But individuals do not lose sensory hair cells at the same rate as they age and there are a host of other factors, including disease, infection, medications, and cardiovascular efficiency, that may also affect an individual's hair cell population. Id. "In sum, determining the cause of hair cell loss in the presence of multiple potential causes is an extremely difficult task" and there 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. Id., at 5; Heidy, 147 Wn.2d at 85-86.

Occupational hearing loss occurs simultaneously with exposure to injurious noise, but ceases to progress once the exposure ends. Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 506 U.S. 153, 161, 113 S. Ct. 692, 121 L. Ed. 2d 619 (1993); Jenkins v. Weyerhaeuser, 143 Wn. App. 246, 250, 256, 177 P.3d 180 (2008). Thus, the injury is complete when the worker is removed from a noisy environment.[2] Pollard v. Weyerhaeuser, 123 Wn. App. 506, 512, 98 P.3d 545 (2004). 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 distinguish between occupational hearing loss and other occupational disease. And there is a logical

[2] White asserts that he did not experience hearing loss until long after his employment ended and the employer did not provide audiogram testing during his employment. White fails to cite the record to support these allegations, as RAP 10.3(a)(6) requires, and our review of the certified board record reveals no evidence to support these assertions of fact.

and scientific basis to tie the limitations period to the end of exposure to workplace noise.

White claims that a separate classification for claimants who suffer from occupational hearing loss is "antithetical" to another provision of the IIA, RCW 51.16.040. But that statute simply provides that benefits for workers disabled by occupational diseases must be *calculated* in the same way as benefits for those who suffer injury on the job. Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 124, 814 P.2d 626 (1991). Nothing in RCW 51.16.040 requires the same statute of limitations to apply to every condition classified as an occupational disease. White fails to overcome the presumption that the statutory classification is reasonable. See Skagit Motel, 107 Wn.2d at 860.

As to the third factor, whether the challenged classification has a rational relationship to the purpose of the legislation, a claimant must do more than question the wisdom of the statute. Masunaga v. Gapasin, 57 Wn. App. 624, 633, 790 P.2d 171 (1990). A classification must be "purely arbitrary" to overcome the strong presumption of constitutionality. State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The IIA was designed to ensure "sure and certain relief" to workers, while at the same time, limit employer liability for industrial injuries. RCW 51.04.010; Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 471, 745 P.2d 1295 (1987). Requiring hearing loss claims to be filed within two years of the most recent workplace noise exposure furthers the legislative purpose of avoiding stale claims and limiting employers' liability for hearing loss that is unrelated to

occupational factors. See Campos v. Dep't of Labor & Indus., 75 Wn. App. 379, 389, 880 P.2d 543 (1994) (upholding RCW 51.32.160 against an equal protection challenge because the distinction between claims closed upon a medical recommendation and those closed without such a recommendation was rationally related to the statutory purpose of finalizing claims). White fails to "show conclusively that the classification is contrary to the legislation's purposes." Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm'rs, 92 Wn.2d 831, 836, 601 P.2d 936 (1979). We conclude that RCW 51.28.055 does not violate equal protection.

Due Process

White also claims that RCW 51.28.055(2) violates his right to procedural due process.

Both the United States and Washington State Constitutions declare that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V, XIV, § 1; WASH. CONST. art. I, § 3. Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. See Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 640, 127 P.3d 713 (2005). Due process is a flexible concept and calls for such procedural protections that the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Morrison, 168 Wn. App. at 272-73. State action that results in the deprivation of constitutionally protected interests is not necessarily unconstitutional; it is only the deprivation of such interests without due process of law that offends the

constitution. Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

A statute meets the requirements of due process if it provides adequate notice and standards to prevent arbitrary enforcement. State v. Maciolek, 101 Wn.2d 259, 264, 676 P.2d 996 (1984). Due process does not require actual notice; rather, it requires the government to provide "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Speelman v. Bellingham/Whatcom County Hous. Auth., 167 Wn. App. 624, 631, 273 P.3d 1035 (2012) (quoting Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)). Determining what process is due in a given situation requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved. Mathews, 424 U.S. at 334-35.

White asserts a "vested interest in receiving his due benefits." He also claims that RCW 51.28.055(2) fails to provide adequate procedural protections because it does not require employers to assess workers or apprise them of the causal connection between workplace noise and hearing loss, and does not require individualized notice of the specific limitations period that applies to occupational hearing loss claims.

A person who alleges a deprivation of due process must first establish a legitimate claim of entitlement. Haberman v. Wash. Pub. Power Supply Sys.,

109 Wn.2d 107, 142, 744 P.2d 1032, 750 P.2d 254 (1987). "Legitimate claims of entitlement entail vested liberty or property rights." Haberman, 109 Wn.2d at 142. A vested right is "'something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.'" Caritas Servs., Inc. v. Dep't of Soc. & Health Servs., 123 Wn.2d 391, 414, 869 P.2d 28 (1994) (emphasis omitted) (quoting In re Marriage of MacDonald, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985)).

Even assuming that White established a legitimate claim of entitlement to a partial disability award, his arguments reflect a misunderstanding of the purpose of the procedural safeguards required by the due process clause. The guarantee of due process applies to actions of government officials that deprive an individual of vested rights. It includes the right to be notified of a governmental decision or action and a meaningful opportunity to be heard to guard against an erroneous deprivation. See Speelman, 167 Wn .App. at 631.

Here, the state action that affected White's asserted interest was the Board's determination that his claim was untimely and he was ineligible for the benefit. It is undisputed that White had notice of the Board's decision and an opportunity to challenge it. 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. See Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 19, 201 P.3d 1011 (2009) (employer had "no obligation" to inform the

employee that he had compensable loss). To the extent that White advocates for mandatory audiogram testing, health and safety regulations in place both currently and at the time of White's employment require such testing if the workplace meets certain threshold requirements. See WAC 296-817-100; see also former WAC 296-62-09027 (1986). There are no facts in the record to establish whether White's workplace met the requirements for testing or evidence in the record to support the assertion that he was not tested prior to leaving his employment.

In addition, RCW 51.28.055 plainly states the timing requirements for occupational hearing loss claims and the consequences of untimely filing. It is well settled that a person is presumed to know the law such that ignorance of the law is not a defense. Harman v. Dep't of Labor & Indus., 111 Wn. App. 920, 927, 47 P.3d 169 (2002). The statutory notice was reasonably calculated as a matter of law to "'apprise interested parties'" about the limitations period that applies to workers' compensation claims stemming from occupational hearing loss. Speelman, 167 Wn. App. at 631 (quoting Jones, 547 U.S. at 226).

White fails to meet his burden to establish that RCW 51.28.055(2) violates his right to due process or equal protection. We affirm the superior court's order of summary judgment.

Chun, J.

WE CONCUR:

Brennan, J.

Verellen, J.

VAIL CROSS AND ASSOCIATES

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