NO. 45478-5-II

**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

EDERI HAGGENMILLER,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE WASHINGTON,

Respondent.

# BRIEF OF RESPONDENT

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## I. INTRODUCTION

This is a workers' compensation case governed by Washington's Industrial Insurance Act, RCW Title 51. A worker receives a permanent partial disability award when treatment for an industrial injury has concluded and he or she has a permanent bodily or mental impairment proximately caused by an industrial injury. The trial court granted summary judgment to the Department of Labor & Industries (Department) regarding Ederi Haggenmiller's permanent partial disability award for hearing loss based on the uncontroverted medical evidence before it. Haggenmiller argues that he was entitled to a larger permanent partial disability award, but he does not support this claim with any testimony from a doctor. It is well-settled that medical testimony is necessary to establish the amount of permanent partial disability. Thus, viewing the evidence in the light most favorable to Haggenmiller, no material dispute remains for a fact-finder to resolve.

Haggenmiller fails to make a claim for relief under Washington's statute addressing "Strategic Lawsuits Against Public Participation" (SLAPP), RCW 4.24.525. The Department responded appropriately to numerous motions filed after the court granted summary judgment to the Department. The trial court correctly denied costs to Haggenmiller and any relief under the anti-SLAPP statute.

## II. COUNTERSTATEMENT OF THE ISSUE

1. **Did the trial court correctly determine the amount of Haggenmiller's permanent partial disability award when no doctor testified to a greater amount of permanent partial disability?**

2. **Do the anti-SLAPP provisions apply to responses filed in a workers' compensation appeal to numerous motions filed by the appellant after the entry of judgment?**

## III. COUNTERSTATEMENT OF THE FACTS

### A. The Department Accepted Haggenmiller's Hearing Loss Claim And Provided Treatment And Benefits

Haggenmiller has worked as a finishing carpenter for approximately 30 years. CP 176, 185. He used power tools that were noisy. See CP 176-77. In 2006 and 2007, he started using impact tools and compound power saws and he also started experiencing hearing problems that he believed progressively worsened. CP 176-77.

The Department accepted his hearing loss claim as an occupational disease and provided treatment, including hearing aids. CP 68, 184. The July 2011 acceptance order also established the date of manifestation as October 9, 2009. CP 68. The date of manifestation is used to set the benefit schedule in effect to determine the amount of the award. RCW 51.32.180(b); WAC 296-14-350. Although Haggenmiller protested the date of manifestation order, the Department affirmed the order on

October 5, 2011. CP 68. He neither protested nor appealed the October 5, 2011 order. CP 68-69. The Department issued the closing order at issue in this appeal, clarifying that "[t]his award is separate from your hearing aid related services", provided 10.32 percent of complete loss of hearing in both ears, and closed the claim. CP 55. Haggenmiller protested the closing order. CP 68-69. The Department affirmed the closing order by a December 2011 order. CP 56. Haggenmiller appealed this December 2011 order to the Board. CP 53-54.

### B. Haggenmiller's Only Medical Witness Calculated His Permanent Partial Disability for Hearing Loss and Tinnitus at 24.83 Percent Combined

At the hearings before the Board, Haggenmiller sought to show that he was entitled to additional permanent partial disability for hearing loss and tinnitus. CP 162-63. Haggenmiller presented testimony of his spouse, Annie Haggenmiller, himself, and Dr. David Kessler. CP 160.

According to Haggenmiller, "[h]earing loss is really not much of a problem for [him] at the moment," and does not affect his social interactions because he does not "really have any problems with asking people to repeat themselves." CP 178. Haggenmiller has also developed tinnitus (ear-ringing), however, which he believes impacts his ability to sleep and ability to drive at the end of the day. CP 178-79. He believes that his tinnitus may have impacted his social interactions and memory.

CP 179-80. According to Haggenmiller, he has experienced depression or alterations to his mood because of the tinnitus, but the hearing loss did not cause any problems. CP 183.

Dr. Kessler is an otolaryngologist who examined Haggenmiller on June 5, 2012. CP 204-05, 209. Dr. Kessler understood that Haggenmiller had an audiogram performed as early as 2009 and hearing loss since then, but did not have them with him on the day of his testimony. CP 219. In his testimony, Dr. Kessler testified that Haggenmiller had "bilateral sensory hearing loss" and he initially estimated that "based on [the] calculations in [his] office he has a 26 percent bilateral hearing loss". CP 209-10. He considered it to be a permanent partial disability "because [he did] not think it will improve over time." CP 209-10. However, Dr. Kessler walked through the calculations in his testimony and clarified that Haggenmiller had 20.83 percent hearing loss. CP 227. Dr. Kessler opined Haggenmiller had an additional four percent impairment attributable to his reported tinnitus. CP 224-27.[1] He relied on the "AMA Guides" and used the Department's Hearing Impairment Calculation

[1] In workers' compensation parlance, when a doctor opines on the level of impairment, the doctor "rates" the condition.

Worksheet. CP 222-23, 229.[2] Thus, Dr. Kessler rated the combined left and right hearing loss at 24.83 percent. CP 227.

Dr. Kessler was not asked to address the date of manifestation, but he said that "[a]pparently there was significant neural hearing loss in 2009." CP 210. Although Haggenmiller initially asked Dr. Kessler to address an alleged mental health condition, Dr. Kessler did not provide an opinion about any mental health condition. CP 214-15.

### C. Dr. Randolph Testified Haggenmiller's Permanent Partial Disability Associated With His Hearing Loss And Tinnitus Was 10.31 Percent At The Time of the 2011 Audiogram He Performed

Dr. Gerald G. Randolph, an otolaryngology specialist, examined Haggenmiller in January 2011. CP 256. Dr. Randolph interviewed Haggenmiller for his history, performed a word recognition/discrimination test, and performed an audiogram. CP 276. Dr. Randolph understood that Haggenmiller's last date of employment—and therefore his last occupational noise exposure was with JP Construction in October 2009. CP 266.

Dr. Randolph rated the Haggenmiller's combined left and right hearing loss at 10.31 percent as of the January 2011 examination. CP 283. Based on his testing and examination, he did not provide a tinnitus rating

[2] Linda Cocchiarella & Gunnar B.J. Andersson, eds., *American Medical Association Guides to Evaluation of Permanent Impairment* 246 (5th ed. 2001) ("*AMA Guides to Impairment*").

because it did not significantly impact Haggenmiller's daily life at the time of his examination. CP 289. However, Dr. Randolph did not disagree with Dr. Kessler's later June 5, 2012 audiogram or his assessment of increased tinnitus. CP 294.

### D. The Board Provided Additional Impairment To Haggenmiller Based On Dr. Kessler's Testimony

Following hearings at the Board, the industrial appeals judge issued a proposed order to reverse and remand the Department's order with instructions to the Department to pay additional permanent partial disability benefits. CP 43-51. Relying on Dr. Kessler's testimony, he reversed the Department order and awarded Haggenmiller a 24.83 percent permanent partial disability award, including four percent for the tinnitus. CP 50-51. The industrial appeals judge also concluded that Haggenmiller failed to make a prima facie case to show that the October 9, 2009 date of manifestation was incorrect and that the bilateral hearing loss and tinnitus caused a mental health condition. BR 50. The industrial appeals judge also denied Haggenmiller's requests for costs, fees, and lost wages noting that no authority had been cited for such requests, that each party pays for its own witness costs in litigation before the Board, and that Osborn could

have appeared at the Olympia hearing by phone, but made no such request. CP 43-44.[3]

Haggenmiller petitioned the Board for review. BR 3-26. He challenged the findings in the proposed decision that he had reached medical fixity as of December 8, 2011, that the date of manifestation was October 9, 2009, that his tinnitus should be rated based on total bodily impairment, and he asserted that he should receive costs for travel and lost work time. BR 3-26. Haggenmiller did not renew his request regarding the mental health condition. BR 3-26. The Department did not seek review of the industrial appeal judge's finding that Haggenmiller is entitled to a permanent partial disability award for bilateral hearing loss and tinnitus equal to 24.83 percent. The Board adopted the proposed decision and order as the final order. CP 2.

### E. The Superior Court Granted Summary Judgment To The Department And Denied The Multiple Motions Haggenmiller Filed After The Entry Of Judgment

Haggenmiller appealed to Jefferson County Superior Court. CP 1. The Department moved for summary judgment asserting that with the additional permanent partial disability awarded by the Board, Haggenmiller could get no further relief based on the issues on appeal and the evidence

[3] The Department identified the location for its testimony for its witness in Olympia early in the process and it was reflected in the Board's litigation orders. CP 87, 95, 104. Haggenmiller indicated that he would object to any location outside of Port Townsend or Poulsbo. CP 100.

presented. BR 345-65; *see generally* RP I.[4] The superior court granted the Department's motion for summary judgment. CP 580-84. The court concluded that "based upon the evidence in the record which the jury would consider, [the court did not] see how a jury could make any decision but to affirm the [Board's] order of March 5, 2013," because there was no evidence showing a higher permanent partial disability award of 24.83 percent, no evidence presented concerning total bodily impairment, no evidence from any expert presented regarding any mental health condition, and the only evidence presented supported a date of manifestation of October 9, 2009. CP 581. Based on the summary judgment, the superior court affirmed the Board, adopting the Board's findings of fact and conclusions of law. CP 582, 584. Haggenmiller appealed to the Court of Appeals on October 15, 2013; CP 576-79, 599.

Thirteen days later, on October 28, 2013, Haggenmiller sought an "Order to Show Cause" in superior court and appeared ex parte to have that order entered. CP 520. It was denied the same day. CP 565.

On October 31, 2013, Haggenmiller filed a "Motion for Reconsideration Order Vacating Judgment Denied". CP 520-42. The Department moved to strike the motion arguing that it was untimely under CR 59(b) and the Court of Appeals had sole authority to consider the

[4] The September 13, 2013, and December 13, 2013 Reports of Proceedings filed in this matter will be referred to as "RP I" and "RP II" respectively.

matter. CP 572-74.[5] The superior court denied Haggenmiller's request for reconsideration on November 13, 2013. CP 570-71, 672. Haggenmiller appealed that order to this Court as well. CP 673-74.

On November 12, 2013, Haggenmiller filed a "Request for Entry of Default". CP 651. Haggenmiller also filed his first designation of clerk's papers and statement of arrangements with this Court on November 14, 2013. CP 653-55. The Department provided a letter response to Haggenmiller's motion indicating that the Department would not be filing a response to his "Request for Entry of Default" because the case lay with the Court of Appeals. CP 662. The superior court denied the motion. CP 669-70.

On December 3, 2013, Haggenmiller then filed "Plaintiff's Motion and Declaration for Entry of Default and for Entry of Default Judgment or in the Alternative Entry of Partial Summary Judgment". CP 721-23. Haggenmiller noted the motion in superior court for argument on December 13, 2013. CP 666. The Department filed a letter dated December 11, 2013 indicating that the Department had not received any "Complaint" to respond to and that it would not provide a formal response because the case lay with this Court. CP 727. On December 13, 2013, the Department's representatives appeared by phone for the motion hearing.

[5] The Department's motions and letters spoke in terms of "jurisdiction", but under RAP 7.2, this is really a question of "authority".

RP II 4. During oral argument, the court explained to Haggenmiller that the Board's decision had been affirmed and there was no basis for his motions and the matter is now at the Court of Appeals. RP II 5. The court also explained that he believed that the motion was frivolous and denied the motion. CP 5.

On December 20, 2013, and December 23, 2013, Haggenmiller filed two additional motions. CP 737-55. On December 20, 2013, Haggenmiller filed "Plaintiff's Special Motion to Strike Mr. James P. Mills's First, Third, and Fourth Claims As Strategic Lawsuits Against Public Participation (RCW 4.24.525) Memorandum of Points and Authorities" and then on December 23, 2013, he filed "Plaintiff's Special Motion to Strike Ms. Christine J. Kilduff's First, Third, and Fourth Claims As Strategic Lawsuits Against Public Participation (RCW 4.24.525) Memorandum of Points and Authorities (hereinafter "Plaintiff's Special Motions")." CP 737-55. Haggenmiller now alleged that the Department's previous responses to his motions, including its motion to strike his untimely motion for reconsideration, violated the anti-SLAPP statute. CP 737-55. He noted it for oral argument for January 10, 2014. CP 737. The Department filed a response and a request for the costs associated with appearing through Court Call, the vendor used by the superior court for telephonic appearances because Haggenmiller's

"ongoing conduct borders on harassment and obliges the Department counsel to spend unnecessary time and taxpayer dollars reviewing pleadings, responding to motions and appearing at the December 13, 2013 and January 10, 2014 hearings." CP 785. Haggenmiller filed yet another motion to strike in response on January 8, 2014. CP 813. The Court denied all of Haggenmiller's motions and awarded Court Call costs to the Department. CP 863-65. Haggenmiller appealed this order to this Court as well.

These consolidated appeals follow.

## IV. STANDARD OF REVIEW

When Haggenmiller appealed the Department's decision to the Board, he had the burden of showing, by a preponderance of the evidence, that the Department's order was incorrect. RCW 51.52.050(2)(a) (appellant's burden to present prima facie case for relief); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942) (proof of every element must be by a preponderance); *see* WAC 263-12-115(2)(a). A claimant must provide strict proof of each element of his or her claim for benefits under the Act. *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510-11, 413 P.2d 814 (1966); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996).

On appeal to superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 483, 40 P.3d 1221 (2002). The superior court reviews the Board decision de novo on the evidence in the certified appeal board record. RCW 51.52.115. The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *Harrison*, 110 Wn. App. at 483.

In an industrial insurance case, it is the decision of the superior court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009). The court reviews the superior court's decision under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 179-81. Although the court construes ambiguous terms in the Industrial Insurance Act liberally, liberal construction "does not apply to questions of fact." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Bennerstrom v. Dep't of Labor*

*& Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show 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." CR 56(c). The moving party, here the Department, bears an initial burden of demonstrating that no genuine issue of material fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party. *Id.* at 226. Once a party seeking summary judgment has made an initial showing that no genuine issues of material fact exist, the nonmoving party must set forth specific facts that, if proved, would establish his or her right to prevail on the merits. CR 56(e); *Young*, 112 Wn.2d at 225.

Here, the Department is entitled to a summary judgment because Haggenmiller failed to provide proof concerning an essential element of his claim, namely regarding medical testimony. *See Id.* at 225. Speculation and conclusory allegations are insufficient to avoid a summary judgment. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009); CR 56(e).

## V. ARGUMENT

### A. Even When Taking The Evidence In The Light Most Favorable To Haggenmiller, Haggenmiller Cannot Receive Any Additional Benefits Because He Failed To Make A Prima Facie Case Supporting His Claims For Additional Relief

Haggenmiller does not prove his central claim that he is entitled to an increased permanent partial disability award. He presented no medical testimony in support of his claim and his argument fails.

Summary judgment is proper if there is no evidence, or reasonable inferences therefrom, that would support a prima facie case for the relief sought. *See Bennerstrom*, 120 Wn. App. at 859; RCW 51.52.050(2)(a). Questions of causation and permanent partial disability require medical opinions to support a prima facie case. *Jackson v. Dep't of Labor & Indus.*, 54 Wn.2d 643, 648, 343 P.2d 1033 (1959); *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 709, 328 P.2d 663 (1958). Here, the opinion testimony of the medical experts do not provide a sufficient basis for Haggenmiller's claims to go to the fact-finder to address his request for additional permanent partial disability for his hearing loss and tinnitus or any mental health impairment.

### 1. No Additional Permanent Partial Disability Is Supported Here Because No Medical Evidence Supports a Permanent Partial Disability Award Higher Than 24.83 Percent of Total Hearing Loss

Haggenmiller did not have medical testimony to support a higher permanent partial disability; such medical testimony is a necessary element to prove greater impairment. *See Page*, 52 Wn.2d at 709; *see Kirkpatrick v. Dep't of Labor & Indus.*, 48 Wn.2d 51, 54, 48 P.2d 979 (1955); *see Wissink v. Dep't of Labor & Indus.*, 40 Wn.2d 672, 676, 245 P.2d 1006 (1952) ("Medical [experts] are the only ones considered qualified to give an opinion on the amount of disability in terms of percentage."). Hearing loss for the purposes of establishing a permanent partial disability award is calculated in accordance with the *AMA Guides to Impairment* and RCW 51.32.080(2). WAC 296-20-220(f). The compensation amount is based on a percentage of the disability award year for complete hearing loss. RCW 51.32.080(2); CP 254-55. Tinnitus accompanying hearing loss is also ratable. *See also Pollard v. Weyerhaeuser,* 123 Wn. App. 506, 510, 98 P.3d 545 (2004). If the physician rates tinnitus, the Department will add zero percent to five percent to the hearing loss formula, depending on severity of the tinnitus. *See In re Harold Sells*, Nos. 95 4334 & 95 4547, 1996 WL 879376, *2 (Bd. Ind.

Ins. Appeals December 20, 1996) (citing DLI Administrative Policy 14.40); *AMA Guides to Impairment* 246.[6]

Dr. Randolph rated Haggenmiller's combined left and right hearing loss at 10.31 percent as of his January 26, 2011 examination, but the industrial appeals judge relied on Dr. Kessler's higher rating and the Department did not seek review by the Board or trial court. CP 43-51, 283. The undisputed opinion of Dr. Kessler establishes the maximum permanent partial disability available to Haggenmiller. Dr. Kessler walked through the calculations in his testimony and opined that Haggenmiller had 20.83 percent hearing loss. CP 227. Dr. Kessler rated the tinnitus at four percent, which combined with the rating on binaural hearing loss. CP 224-27. Thus, Dr. Kessler rated the combined left and right hearing loss at 24.83 percent. CP 227.

Without explanation, Haggenmiller requests "his permanent partial disability award [be] increased to 20.94 percent plus five percent for his tinnitus as part of total hearing loss of 25.94 percent . . ." App. Br. 1. It is unclear how Haggenmiller arrives at 20.94 percent for his demand related solely to his hearing loss without tinnitus, but it is unsupported in the record. Likewise, any increase in the added percentage for tinnitus is unsupported. In his testimony, Dr. Kessler indicates that he "would rate

[6] WAC 296-20-2010(d) provides for the use of the *AMA Guides to the Impairment.*

[his tinnitus] in the four or five percent range." CP 213. When asked to provide the exact percentage by the industrial appeals judge, Dr. Kessler arrived at four percent. CP 213. Dr. Randolph provided no rating for tinnitus of his own, but did not dispute Dr. Kessler's opinion at the time of later audiogram. CP 294. Thus, there is no contradictory evidence for a fact-finder to weigh either in Dr. Kessler's testimony or in Dr. Randolph's testimony.

No medical testimony supports using total bodily impairment to rate Haggenmiller's condition. Permanent partial disability awards are typically paid based on a percentage of lost function compared to a complete loss of function of a specified body part, such as loss of hearing in the ears. RCW 51.32.080(1). But "unspecified disability" is paid based on the degree of impairment when compared to total bodily impairment—in other words, if a disability is related to a body part not specified in the statute, it is rated as a percentage of the total body rather than a percentage of a specified body part. *See* RCW 51.32.080(3)(a). Haggenmiller also asks for his tinnitus to be rated separately from his hearing loss as "a portion of total bodily impairment to be paid as mental category 4, WAC 296-20-340 . . . pursuant to WAC 296-20-220(1)(o)." App. Br. 2. This request is inconsistent with his request for a combined rating of "25.94 percent", but also conflates the concepts of rating an unspecified

disability as a portion of total bodily impairment with impairment ratings for mental health. *See* Part V.A.2 *infra*. Haggenmiller's confusion is understandable given the language of *In re Robert Lenk, Sr.*, No. 91 6525, 1993 WL 741142, *2 (Bd. Ind. Ins. Appeals May 12, 1993).[7] In *Lenk*, the Board compared the findings in mental health categories to support a finding of 10 percent of total bodily disability. *Id.* at *4, 7. Ultimately, the Board used a total bodily disability rating rather than a mental health category. *Id.* at *7.[8]

More importantly, while Haggenmiller reiterates language from a non-significant decision critical of the Department's reliance on its policy to rate tinnitus, he ignores the Board's subsequent significant decision in *In re Clarence Shellum*, No. 99 12154, 2000 WL 815490, *2 (Bd. Ind. Ins. Appeals April 13, 2000). *See* App. Br. at 42-42 (citing *Sells*, 1996 WL 879376 at *4-6). In *Shellum*, the Board distinguished the case where there is no evidence to support a total bodily impairment from *Lenk*. *Id.* The Board recognized a tinnitus condition cannot be separately rated in terms

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[7] The Board designates a decision significant when it considers it to have "an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195. Significant Board decisions are persuasive authority. *See Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491 n. 13, 288 P.3d 630 (2012). The courts, however, have also considered non-significant decisions. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013).

[8] No appellate court has agreed with the analysis in *Lenk* nor does the Department concede that *Lenk*'s incongruous analysis should prevail over the rating standards set forth in the *AMA Guides for Impairment*. Under WAC 296-20-2010(d), the guides control.

of total bodily impairment absent evidence to do so. *Id.* Instead, consistent with the evidence, the Board reasoned that it may accept tinnitus as an addition to the worker's industrially related hearing loss as opposed to using a total bodily impairment rating:

> In *Lenk*, we took exception to a Department policy that requires examining physicians to rate tinnitus as an increase in the percentage of hearing loss. We held that tinnitus is properly evaluated in terms of a percentage of total bodily impairment (TBI) separate from hearing loss. In Mr. Shellum's case, both medical experts testified (and the Department ordered) that Mr. Shellum's tinnitus condition resulted in a four percent addition to his industrially related hearing loss. *There is no evidence in this record that would enable us to rate tinnitus as a percentage of total bodily* impairment. Thus, we find that Mr. Shellum suffers an additional four percent loss of hearing due to the tinnitus condition.

*Id.* at *2.

Haggenmiller's circumstances are nearly identical with *Shellum* and in apposite to the facts of *Lenk.* Here, both medical experts rated Haggenmiller's impairment in accordance with the *AMA Guides to Impairment.* CP 212, 222, 229, 283, 305. Dr. Randolph rated Haggenmiller's bilateral hearing loss at 10.31 percent and did not include an additional percentage for the contended tinnitus because Haggenmiller reported it did not interfere with the aspects of normal daily living. CP 257-259, 288-89. Dr. Kessler opined that Haggemiller had a 20.94 percent bilateral hearing loss, plus four percent for tinnitus, for a

combined hearing loss impairment of 24.83 percent. CP 225-27, 229. Dr. Kessler rated the reported tinnitus in accordance with the *AMA Guides to Impairment* on a scale of zero to five percent, and as a part of Haggemiller's overall bilateral hearing impairment. CP 212, 222, 229.

Like the medical expert in *Shellum*, Dr. Kessler did not rate Haggenmiller's reported tinnitus as a percentage of total bodily impairment. 2000 WL 815490 at *2. In *Lenk*, a medical expert testified that the claimant had 10 percent total body impairment based on tinnitus, but such is not the case here. 1993 WL 741142, *4, 7. Indeed, as in *Shellum*, there is no medical evidence to support rating tinnitus separately as a percentage of total bodily impairment, even assuming it would be legally supportable to do so in contradiction to the *AMA Guidelines to Impairment*. *See* 2000 WL 815490 at *2; WAC 296-20-2010(d). Here, the trial court concluded tinnitus should be a part of the calculation of Haggenmiller's permanent partial impairment for hearing loss resulting from his occupational noise exposure and even viewing the evidence in the light most favorable to the non-moving party, there is no evidence for a reasonable jury to infer a different methodology.

### 2. Haggenmiller Is Not Entitled To Permanent Partial Disability For A Mental Health Impairment Because He Failed To Show That Any Mental Health Condition Is Proximately Caused By His Occupational Disease

Haggenmiller is not entitled to a permanent partial disability award for mental health impairment because he failed to present a medical opinion to establish that he has a mental health condition proximately caused by his hearing loss and he has failed to present medical evidence of mental health impairment.

The proximate cause relationship between a condition and an injury or occupational exposure must be established by medical testimony unless the relationship is one which lay people would ordinarily be able to relate. *Jackson*, 54 Wn.2d at 648; *Kralevich v. Dep't of Labor & Indus.*, 23 Wn.2d 640, 656, 161 P.2d 661 (1945); *see Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 311, 289 P.3d 727 (2012), *review denied*, 177 Wn.2d 1017 (2013). The medical expert testimony requirement applies equally to psychiatric conditions. *See Price v. Dep't of Labor & Indus.*, 101 Wn.2d 520, 523-24, 682 P.2d 307 (1984).

No mental health expert testified in this case and no testifying physician offered any opinion on a contended mental health condition. Drs. Kessler and Randolph are otolaryngologists. CP 205, 246. Dr. Randolph testified that given his specialty he does not address mental

health conditions. CP 318. Similarly, Dr. Kessler offered no mental health opinion. CP 214-25. Haggenmiller's lay testimony that he has a mental health condition is not sufficient to establish causation for a medical question. *See Jackson*, 54 Wn.2d at 649 (holding that it is proper to limit the instructions to a jury to the necessity for medical testimony where the issue falls within the realm of medical knowledge and therefore not appropriate to provide instruction allowing lay testimony alone to establish causation).[9] Haggenmiller had the opportunity to put on such evidence in his case-in-chief by calling an expert witness with expertise in mental health conditions, and failed to do so. Viewing the facts in the light most favorable to the non-moving party, no evidence demonstrates Haggenmiller has a mental health condition proximately caused by his occupational noise exposure. The Department is entitled to judgment as a matter of law on this question because Haggenmiller did not make a prima facie case.

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[9] *But see Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968) (upholding the refusal of an instruction which would have limited the proof on proximate cause to medical testimony, pointing out that the jury should not be excluded from a consideration of the *corroborative* lay testimony and circumstances of the case). Here, there is no medical opinion on causation for lay witness testimony to corroborate. CP 214-25, 318.

### 3. The Date of Manifestation Is October 9, 2009 As A Matter Of Law Because The Final And Binding Allowance Order Conclusively Established The Date Of Manifestation

Haggenmiller is not entitled to a later date of manifestation because he did not present medical evidence to support his argument that it should be based on Dr. Kessler's 2012 audiogram and he failed to protest or appeal the Department order establishing the date of manifestation.

The schedule of benefits for a permanent partial disability award under an occupational disease claim is determined by the date of manifestation. RCW 51.32.180(b). RCW 51.32.180(b) provides:

> For claims filed on or after July 1, 1988, the rate of compensation for occupational disease 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).

The rate of compensation is established by the date the worker consulted with a doctor or received hearing aids, or the date the first valid audiogram reflects a disability, but no later than the last day of exposure because occupational hearing loss occurs simultaneously with exposure to injurious noise and the disability does not progress after the exposure ends. *See Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 9, 201 P.3d

1011 (2009); *see also Pollard v. Weyerhaeuser,* 123 Wn. App. 506, 512, 98 P.3d 545 (2004). Here, no medical evidence supports Haggenmiller's assertion that he had additional occupational exposure after October 2009.[10] Indeed, the medical experts either did not comment on additional occupational exposure or believed that Haggenmiller "has been essentially unemployed since October 2009." CP 271. Haggenmiller incorrectly argues that the date of manifestation should be established based on Dr. Kessler's June 5, 2012 audiogram, despite no medical opinion supporting his request to rely on that audiogram as the basis for the date of manifestation. App. Br. 1. In any case, neither the trial court nor Board could revisit the October 9, 2009 date of manifestation because the Department had an order establishing the date of manifestation that became final and binding. Once the Department has entered a decision, the recipients of that decision have 60 days to file a protest and request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060. The Industrial Insurance Act provides finality to decisions of the Department and an unappealed Department order is res judicata as to the issues encompassed within the terms of the order. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565

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[10] Haggenmiller's spouse testified Haggenmiller worked after 2009 in the construction industry, but there was no description of what work he performed and no medical opinion to establish that the work he performed constituted further occupational noise exposure. CP 171-72.

(1997) (Talmadge, J., concurring); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008). This is true even if the Department order was erroneous. *Marley*, 125 Wn.2d at 537. Res judicata "precludes the parties from rearguing the same claim." *Id.* at 538.

Haggenmiller did not protest or appeal the allowance order. Thus, res judicata applies to the unappealed October 5, 2011 order and prevents Haggenmiller from arguing that his date of manifestation is at a later date. *See Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 411-12, 419-20, 128 P.2d 308 (1942).

After stipulating to the jurisdictional and historical facts, which establish the "facts for the purposes of establishing the Board's jurisdiction to hear the case and determine the issue to be resolved[,]" Haggenmiller failed to present any evidence to establish that he timely protested or appealed the October 5, 2011 order. CP 68.

The Department accepted his hearing loss claim as an occupational disease and provided treatment, including hearing aids. CP 68, 184. The July 27, 2011 allowance order also established the date of manifestation as October 9, 2009. CP 68. Haggenmiller protested the order on September 23, 2011; it was affirmed by an order dated October 5, 2011. CP 68. The order affirming the allowance and date of manifestation was

neither protested nor appealed. CP 68-69. The Department closed the claim by an order dated December 8, 2011, affirming an October 6, 2011 order.

CP 55. Haggenmiller filed an appeal to the Board asking it to review "the notice decision dated December 8, 2011" seeking "an individualized permanent disability rating of 18 percent in the right ear, 25.5 percent in the left ear, with binaural hearing loss ratable at 19.25 percent." CP 53-54.

On its face, Haggenmiller's appeal in this case was limited to the December 8, 2011 order. CP 53. The separate October 5, 2011 order affirmed the July 27, 2011 order, which allowed Haggenmiller's claim for bilateral hearing loss due to occupational noise exposure and established the date of manifestation of October 9, 2009. CP 68-69. Just as the Department is bound to the allowance of Haggenmiller's occupational disease claim, he cannot now challenge the date of manifestation.

#### 4. Haggenmiller Is Not Entitled To Any Costs In His Appeal Because He Did Not Prevail And He Fails To Establish Any Conduct In Violation Of CR 11

Haggenmiller is not entitled to attorney fees or costs. Haggenmiller apparently suggests that he should be entitled to attorney fees and costs regardless of whether he prevails here. *See* App. 44-46. However, RCW 51.52.130(1) only allows fees and costs in cases where

the worker has appealed, if "the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation[.]"[11] Because Haggenmiller should not prevail here and because this Court should uphold the superior court's decision, he should not receive attorney fees or costs for his work here or at the superior court.

Additionally, the Department's counsel did not violate CR 11 regarding its request that venue be established where the witness is located. *Contra* App. Br. 11. Haggenmiller's suggestion that Department's counsel acted inappropriately by requesting hearing time in Olympia is without merit. On its face, CR 11 applies to written and signed motions, pleadings, and memoranda.[12] It says an attorney signing such a document thereby attests that it is well grounded in fact and law and is not being used to harass or delay. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d

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[11] While a pro se *attorney* may receive attorney's fees because he must take time out of his regular practice, Haggenmiller cites no authority for a pro se litigant to receive attorney's fees. *Leen v. Demopolis*, 62 Wn. App. 473, 487, 815 P.2d 269 (1991).

[12] CR 11(a) provides in part:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law 3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

210, 217, 829 P.2d 1099 (1992). The rule says nothing about oral representations. In deciding whether there was an abuse of discretion, the court must "keep in mind [t]hat the purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." *Bryant*, 119 Wn.2d at 219. Here, the Department did not file a pleading for an improper purpose. *See* CR 11.

In any case, the Department made a proper oral request to have the hearing in Olympia. The venue requirements of RCW 4.12.030 relied upon by Haggenmiller do not apply here because Title 51 RCW has its own standards for venue. While it is true hearings as a general rule should be held in the county of the worker's residence, or of the injury, proceedings can be held elsewhere "if required in justice to interested parties." RCW 51.52.102; *see also* RCW 51.52.100; *see also* WAC 263-12-115(7). Here, the hearing for Haggenmiller's witnesses was held in Kitsap County at Haggenmiller's suggestion, and an additional hearing location was held in Olympia to accommodate the Department's medical witness, whose main office is in Olympia. CP 253; *see In re Maria Chavez*, No. 870640, 1988 WL 169412, *2 (Bd. Ind. Ins. Appeals November 1, 1988) (recognizing that the scheduling of the medical witness's hearing time in a location convenient for that witness is permissible under RCW 51.52.102 and WAC 263-12-115(7). Represented

parties regularly agree to take testimony by perpetuation depositions to reduce litigation costs, but perpetuation depositions are not available when a party is pro se. *See* WAC 296-23-387. Here, the Department would have been required to pay travel costs from Olympia to Kitsap or Jefferson County for Dr. Randolph's travel time at the normal testimony rate. The industrial appeals judge ruled that when balancing those costs against the advantages of holding the hearing time for the Department's case in Haggenmiller's chosen location in Kitsap County that the cost savings prevailed. CP 43.

Haggenmiller argues that he should not have had to pay for costs to travel to the second hearing date, including mileage and toll bridges. App. Br. 2. As the industrial appeals judge recognized, Haggenmiller could have appeared by telephone rather than traveling to make a live appearance. CP 43-44.

Moreover, Haggenmiller fails to explain how holding a hearing in Olympia before the same fact-finder who previously held proceedings in his chosen location unfairly disadvantages him. Without factual support or explanation, Haggenmiller argues that he was prejudiced "by not having his own medical witness present". App. Br. 2. Haggenmiller did not request to have his own medical witness present for Dr. Randolph's testimony below. Indeed, Haggenmiller chose not to have Dr. Kessler

appear live for the presentation of Dr. Kessler's own testimony. Furthermore, the trial court adopted the Board's unchallenged finding based on Dr. Kessler's opinion. CP 477; CP 50 (Finding of Fact 5). He cannot show prejudice given that the Board and the trial court deferred to his witness's opinion.

### B. Haggenmiller Fails To Establish He Has A Claim Based On An Action Involving Public Participation And Petition Because The Department's Filings He Objects To Were Responses To His Multiple Untimely Post-Judgment Filings In His Industrial Insurance Appeal

No basis exists for a claim under the anti-SLAPP statute, even assuming it could be asserted in a workers' compensation appeal. Haggenmiller asserts that "[t]he Department's pleading requesting relief against Haggenmiller amounts" to a SLAPP lawsuit. App. Br. 29. It is unclear to what pleading he refers, but he suggests that "Department's Motions to Strike, relief, court call cost, are each one a "claim" under WAC 4.24.525(1)(a)". App. Br. 36. In any case, to succeed on a special motion to strike under Washington's anti-SLAPP statute, Haggenmiller must make an initial prima facie showing that his "suit arises from an act in furtherance of his right to petition or free speech in connection with a matter of public concern." *Alaska Structures, Inc. v. Hedlund*, __ Wn. App. __, 323 P.3d 1082, 1083 (2014).

In deciding an anti-SLAPP motion, this Court follows a two-step process under a de novo review. *Id.* The first prong of the analysis requires the court to review the parties' pleadings, declarations, and other supporting documents to determine whether the gravamen of the underlying claim is based on a protected activity—that the claim *targets* protected activity, i.e., activity "involving participation and petition". *Hedlund*, 323 P.3d 1082, 1085; *see also Spratt v. Toft*, ___ Wn. App. ___, 324 P.3d 707, 711 (2014). Only after this first prong is met does the burden shift to responding party "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b).

The gravamen of the Department's motion to strike and responses to Haggenmiller's various motions is not about whether there is a violation of Haggenmiller's free speech right, but whether Haggenmiller followed the correct procedures in his industrial insurance appeal after summary judgment was entered in the Department's favor. He did not.

After summary judgment was granted in favor of the Department, Haggenmiller filed a timely appeal to this Court. CP 576-79; CP 599. Over the course of the next four months, Haggenmiller filed multiple motions in the trial court, which the Department opposed.

RAP 7.2 provides that the trial court only has authority to act in an appealed case as provided in the rule. RAP 7.2(e) allows only post-

judgment motions as allowed by the civil rules in this context. Here, Haggenmiller did not file any motion that complied with the civil rules. He filed six motions. First, Haggenmiller sought vacation of the order ex parte and the court denied it. CP 520-43, 565-66. The Department did not participate in this motion. Second, Haggenmiller sought late CR 59 relief, which the Department properly objected to. CP 567-68, 572-74. There is no authority under RAP 7.2(e) and CR 59 to file a late motion for reconsideration. The third, fourth, fifth, and sixth motions were all for default. CP 606, 651, 666, 675, 721-23. There is no authority under RAP 7.2(e) and CR 55 to seek an order of default after judgment has been entered. The Department responded appropriately to these motions.

Finally, below Haggenmiller argued that it was the Department's challenges to his untimely post-judgment motions that constituted SLAPPs, but now in addition he also suggests that the Department has in some way attempted to prevent him from appealing his case to this Court. App. Br. 35. The Department has filed no pleadings or other documents in opposition to Haggenmiller's right to appeal. *See* RCW 4.25.525(1)(a) (Claim includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading of filing requesting relief).

The Department filed its responses not to oppose Haggenmiller's right to challenge the trial court's decision, but to prevent him from

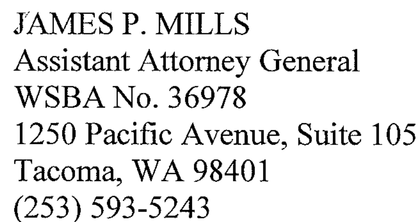
continuing to file an onslaught of frivolous filings before a tribunal that was no longer considering the matter.

## VI. CONCLUSION

The Department is entitled to summary judgment because no doctor testified that Haggenmiller has greater than 24.83 percent permanent partial disability and Haggenmiller failed to provide any medical evidence in support of his other allegations. Thus, viewing the evidence in the light most favorable to Haggenmiller, no material dispute remains for a fact-finder to resolve here. Haggenmiller is also not entitled to the various costs he asserts he incurred during litigation or relief under Washington's anti-SLAPP statute because the Department was entitled to respond to his untimely motions. Accordingly, the Department requests that this Court affirm the superior court decisions and deny Haggenmiller's requests for fees and costs.

RESPECTFULLY SUBMITTED this 21st day of July, 2014.

ROBERT W. FERGUSON
Attorney General



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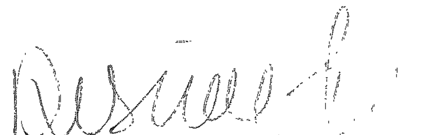

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