

Original

No. 36018-7-II

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

JOHN JENKINS,
Respondent,
v.
WEYERHAEUSER COMPANY,
Appellant.

STATE OF WASHINGTON
BY *[Signature]*
CLERK OF COURT
JUL 11 1991

BRIEF OF APPELLANT

Craig A. Staples, WSBA #14708
P.O. Box 70061
Vancouver, WA 98665
(360) 887-2882

Attorney for Weyerhaeuser Company

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
A. <u>Assignments of Error</u>	1
B. <u>Issues Pertaining to Assignments of Error</u>	1
II. STATEMENT OF THE CASE	2
A. <u>Statement of Procedure</u>	2
B. <u>Statement of Facts</u>	4
III. SUMMARY OF ARGUMENT	10
IV. SCOPE OF REVIEW	12
V. ARGUMENT	12
A. <u>The Trial Court Erred In Concluding That the Workplace Noise Exposure Was a Proximate Cause of Any Permanent Partial Hearing Loss Disability</u> ...	12
B. <u>The Trial Court Erred In Concluding That Claimant Is Entitled To a Permanent Partial Disability Award For Tinnitus</u>	25
C. <u>The Trial Court Erred In Concluding That the Workplace Noise Exposure Was a Proximate Cause of 31.1 Percent Hearing Impairment</u>	27
D. <u>Claimant Is Not Entitled To Assessed Attorney Fees and Costs</u>	29
VI. CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Allen v. Department of Labor and Industries</i> , 48 Wn.2d 317, 293 P.2d 391 (1956)	27, 29
<i>Boeing Company v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002)	19, 20, 27, 28, 29
<i>Bremerton v. Shreeve</i> , 55 Wn.App. 334, 777 P.2d 568 (1989)	13, 14, 15, 23, 25
<i>Dennis v. Department of Labor and Industries</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987)	13, 16, 17, 25
<i>Favor v. Department of Labor and Industries</i> , 53 Wn.2d 698, 336 P.2d 382 (1959)	13, 19
<i>Groff v. Department of Labor and Industries</i> , 65 Wn.2d 35, 395 P.2d 633 (1964)	12
<i>Hastings v. Department of Labor and Industries</i> , 24 Wn.2d 1, 163 Wn.2d 142 (1945)	13
<i>Miller v. Department of Labor and Industries</i> , 200 Wash. 674, 94 P.2d 764 (1939)	16, 17
<i>Olympia Brewing Co. v. Department of Labor and Industries</i> , 34 Wn.2d 498, 208 P.2d 1181 (1949)	13, 25
<i>Rose v. Department of Labor and Industries</i> , 57 Wn. App. 751, 790 P.2d 201, rev den 115 Wn.2d 1010 (1990)	12
<i>Ruse v. Department of Labor and Industries</i> , 138 Wn.2d 1, 977 P.2d 570 (1999)	12
<i>Wendt v. Department of Labor and Industries</i> , 18 Wn.App. 674, 571 P.2d 229 (1977)	15, 24
<i>Zipp v. Seattle School Dist. No. 1</i> , 36 Wn.App. 598, 676 P.2d 538 (1984)	13, 25

STATUTES

Page

RCW 51.08.140	13, 25
RCW 51.32.080(3)(a)	14, 21, 25, 27, 29
RCW 51.32.080(5)	27, 29
RCW 51.52.050	13, 25
RCW 51.52.130	29

OTHER AUTHORITIES

<i>Guides to the Evaluation of Permanent Impairment, 5th Ed.</i> ..	passim
WPI 155.06	15, 24

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in concluding that claimant is entitled to a 33.1 percent permanent partial disability award for hearing loss and tinnitus. (CP 99).

2. Claimant is not entitled to an award of assessed attorney fees and costs. (CP 101).

B. Issues Pertaining to Assignments of Error

1. Was the workplace noise exposure a proximate cause of any permanent partial hearing loss disability, or did claimant develop such disability only through the intervention of non-industrial causes after he retired?

2. Was the employment exposure a proximate cause of tinnitus that constituted ratable impairment under the *AMA Guides to the Evaluation of Permanent Impairment, 5th Ed.*?

3. *Assuming* the work exposure proximately caused some ratable hearing loss, must the non-industrial hearing impairment that developed after claimant retired be segregated from his permanent partial disability award?

4. Is claimant entitled to assessed attorney fees and costs?

II. STATEMENT OF THE CASE

A. Statement of Procedure

In February 2003, Respondent John Jenkins (“claimant”), filed an application for workers’ compensation benefits for hearing loss that he related to his employment with the Appellant, Weyerhaeuser Company (“Weyerhaeuser” or “employer”). (CABR 28).¹ By order dated September 10, 2003, the Department of Labor and Industries allowed and closed the claim with a 27.19 percent permanent partial disability award for binaural hearing loss, payable under the 1979 schedule of benefits. (*Id.*). The Department affirmed its decision on January 23, 2004. (*Id.*). Weyerhaeuser appealed that decision to the Board of Industrial Insurance Appeals and claimant filed a cross-appeal. (CABR 29).

The Board conducted hearings commencing in October 2004. The Board’s appeals judge issued a proposed decision and order dated February 2, 2005, in which she concluded that the work exposure at Weyerhaeuser was not a proximate cause of ratable

¹ “CABR” is the certified appeal board record.

hearing impairment. (*Id.*). The appeals judge therefore directed that the claim be allowed only for hearing aids, without an award of permanent partial disability benefits. (CABR 30). Claimant petitioned the Board for review of the appeals judge's proposed decision. (CABR 16).

On March 24, 2005, the Board issued an order that denied claimant's petition for review and adopted the proposed decision as the Board's final order. (CABR 1). Claimant appealed to the Cowlitz County Superior Court from the Board's decision.

Weyerhaeuser thereafter filed a motion for judgment as a matter of law, seeking affirmation of the Board's decision. (CP 13). Claimant filed a cross-motion, requesting reversal of the Board's decision and reinstatement of the Department's order. (CP 25-31). The motions came on for hearing before The Honorable James E. Warne on March 20, 2006. On March 22, 2006, Judge Warne issued a memorandum opinion in which he concluded that claimant's work exposure was a proximate cause of permanent partial hearing loss disability. (CP 40-41). Judge Warne therefore granted claimant's motion for judgment on that issue and denied Weyerhaeuser's motion. (CP 41).

Judge Warne conducted a bench trial on October 12, 2006 to address the remaining issues. By judgment entered February 5, 2007, Judge Warne determined that claimant was entitled to a 33.1 percent permanent partial disability award for hearing loss and tinnitus, payable in accordance with a manifestation date of November 2002. (CP 99-103). Weyerhaeuser appeals to this court from the trial court's decision.

B. Statement of Facts

Claimant worked for Weyerhaeuser from 1949 to 1980, when he retired at age 62. (J. Jenkins 40, 59).² Claimant was exposed to noise at work, although beginning in 1970 the noise exposure lessened because he worked approximately half his shift in a glass-enclosed room that shielded him from some of the mill noise. (J. Jenkins 55-56). All three medical experts agreed that claimant had no ratable hearing impairment when he retired from Weyerhaeuser in 1980. (Souliere 14, 39, 45; Treyve 20, 23; Hodgson 19-20, 28, 40). Accordingly, the trial court found that

² All hearing and deposition transcripts are contained in the CABR. Record references are to the last name of the witness, followed by the page number for the hearing or deposition transcript. Mr. Jenkins' testimony is found in the transcript of the October 12, 2004 hearing. The other witnesses referenced in this brief testified by deposition.

claimant did not have a permanent partial hearing loss disability as of that time. (CP 100, finding 3).

Generally, a person notices his hearing loss shortly before it reaches a ratable level. (Souliere 40-41). Claimant reported that he first noticed his hearing loss around 2002 and that it progressively worsened in recent years. (J. Jenkins 61-63). He stated he did not seek any treatment for his hearing loss until he obtained hearing aids in November 2002. (J. Jenkins 62). The trial court determined that the hearing loss did not become manifest to claimant until November 2002. (CP 102).

In January 2003, claimant had 26.56 percent binaural hearing impairment. (Souliere 49). By August 2003, claimant had a ratable hearing impairment of 28.8 percent bilaterally. (Treyve 26). And by September 2004, claimant had 39.5 percent binaural hearing impairment. (Souliere 9). At the time of hearing in October 2004, claimant was 86 years old. (J. Jenkins 59).

Dr. Souliere testified on claimant's behalf. He examined claimant in September 2004 at the request of claimant's counsel after the Board appeal was filed. (Souliere 29). Dr. Souliere testified that noise-related hearing loss does not progress once a

person no longer is exposed to noise. (Souliere 23, 31-33). He said such hearing loss can increase only if another cause intervenes to cause an additional loss of hearing. (Souliere 34). Dr. Souliere testified that the additional hearing loss merely adds to, "on top of," the existing loss of hearing. (Souliere 34). He confirmed that claimant's September 1980 audiogram established that claimant had no ratable hearing impairment when he retired in December 1980. (Souliere 14, 39, 45). Dr. Souliere also testified that the work exposure could not have caused the substantial hearing loss that had developed since 1980; instead, he attributed the additional loss of hearing to the aging process and medical factors. (Souliere 40).

Dr. Treyve performed an independent medical examination in August 2003 and testified at Weyerhaeuser's request. He stated that noise-induced hearing loss does not increase once the person is removed from the noise source. (Treyve 12). Similarly, he confirmed that workplace noise does not accelerate age-related hearing loss (presbycusis) and that presbycusis contributes to an existing hearing loss in a purely additive manner. (Treyve 32). Dr. Treyve testified that the September 1980 audiogram accurately

represented claimant's hearing loss at retirement in December 1980 and demonstrated no ratable hearing impairment. (Treyve 20, 23). Dr. Treyve attributed claimant's then-existing hearing loss to occupational noise exposure, presbycusis and possibly claimant's pre-employment noise exposure in the military and recreational gun usage. (Treyve 17, 30). He noted that claimant's hearing loss had increased "dramatically" since his retirement in 1980. (Treyve 24). Dr. Treyve testified that the increased hearing loss could not have been due to the prior workplace noise exposure; rather, the increase likely resulted from the aging process and medical factors. (Treyve 23-25, 32).

Dr. Hodgson reviewed claimant's records and testified on behalf of Weyerhaeuser. He confirmed that hearing loss related to noise exposure does not progress once the noise ceases. (Hodgson 10). Dr. Hodgson testified that the September 1980 audiogram accurately represented the level of claimant's hearing loss at his retirement in December 1980 and demonstrated no ratable hearing impairment. (Hodgson 19-20). He, too, related claimant's then-current hearing loss to workplace noise exposure, presbycusis and possibly noise during claimant's military service

and from his recreational use of firearms. (Hodgson 37, 39). Dr. Hodgson stated the noise exposure at Weyerhaeuser would not have contributed to any of the increased hearing loss after December 1980. (Hodgson 20). Dr. Hodgson said the more recent increase in claimant's hearing loss was consistent with claimant's advanced age. (Hodgson 22, 40).

Dr. Treyve and Dr. Hodgson confirmed that claimant likely already had presbycusis when he retired at age 62 in 1980. (Treyve 20; Hodgson 17, 19). They also stated that the rate of presbycusis progressively increases over time. (Treyve 14; Hodgson 13, 22). Dr. Souliere agreed that presbycusis progressively worsens with advancing age. (Souliere 36-37). He noted that large population studies have shown the average male has approximately 12 decibels of hearing loss in each of the four measured frequencies at age 60 and that the average 75 year old male has more than 20 decibels of hearing loss in each of the frequencies. (Souliere 36; Ex. 3).³

Hearing loss is not ratable until the decibel sum for the four measured frequencies reaches 105 decibels. (Hodgson 21). See

³ The exhibits are part of the CABR.

also AMA *Guides to the Evaluation of Permanent Impairment*, 5th Ed. at 247-50. When claimant retired in 1980, his total hearing loss from all causes was 95 decibels in the left ear and 90 decibels in the right ear. (Hodgson 20-21). When claimant's hearing loss was next measured more than 22 years later in January 2003, he had 26.56 percent binaural impairment, which is equivalent to approximately 170 decibels of hearing loss in each ear. (Souliere 49; AMA *Guides to the Evaluation of Permanent Impairment*, 5th Ed., Table 11-2, p. 248, located at CP 73). By September 2004, claimant had 37 percent impairment bilaterally, which is approximately 200 decibels of hearing loss in each ear. (*Guides*, Table 11-2, CP 73). That is, the decibel totals in 2004 were more than twice the decibel levels, from all causes, when claimant retired in 1980, and those totals had increased by 105 to 110 points in each ear during the 24-year interim period.

Claimant also reported the onset of ringing in his ears (tinnitus) in approximately 1999 or 2000. (Treyve 16). In August 2003, he described the tinnitus as not particularly bothersome. (*Id.*). By September 2004, claimant reported the tinnitus was constant. (Souliere 26). Dr. Souliere testified that tinnitus, like

hearing loss, stems from damage to the sensory hair cells of the inner ear, which can result from both noise exposure and the aging process. (Souliere 26). The aging process can therefore cause increased tinnitus over time. (Souliere 45). A permanent impairment rating for tinnitus is based on its impact on the ability to hear speech. (*Guides* at 246). Tinnitus is not ratable under the *Guides* in the absence of ratable hearing loss. (Hodgson 25).

III. SUMMARY OF ARGUMENT

Claimant had the burden of proving that noise exposure at Weyerhaeuser was a proximate cause of ratable hearing loss. He could not satisfy this burden merely by showing that the work exposure was a significant contributing cause of the ratable hearing loss that developed more than 20 years later. The cause must be proximate in the sense that the work exposure caused the disability without the intervention of any other cause.

The three medical experts agreed that: (1) claimant did not have ratable hearing impairment when he retired at age 62 in 1980; (2) the workplace noise exposure did not contribute to any subsequent worsening of claimant's hearing loss; and (3) claimant developed ratable hearing loss only through the intervention of the

aging process and medical factors. This evidence does not support the trial court's finding that the work exposure was a *proximate* cause of ratable hearing impairment. The trial court's proximate causation finding resulted from legal and analytical errors in applying the proximate causation standard and its erroneous interpretation of the *Guides*. Chief among these errors was the court's failure to treat the effects of aging like any other non-industrial cause.

Tinnitus is not ratable in the absence of ratable hearing impairment. Because the work exposure did not proximately cause ratable hearing impairment, there is no basis for a tinnitus rating. Moreover, no evidence supports the conclusion that the work exposure was a proximate cause of the tinnitus that claimant developed nearly 20 years after he retired.

Non-industrial impairment must be segregated from a claimant's permanent partial disability award. The record demonstrates that more than half of claimant's overall hearing loss developed after he retired from the intervention of the aging process and medical factors. Therefore, *assuming* claimant is entitled to a permanent partial disability award for his hearing loss,

the undisputed, non-industrial part of the hearing loss must be segregated from his impairment rating.

IV. SCOPE OF REVIEW

The scope of this court's review on workers' compensation appeals is the same as in other civil matters. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 395 P.2d 633 (1964). That is, the court reviews the trial court's decision for errors of law and to determine if the trial court's findings are supported by substantial evidence, and whether the court's conclusions flow from the findings. *Id.* at 41; *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). The court reviews questions of law *de novo*. *Rose v. Department of Labor and Industries*, 57 Wn. App. 751, 790 P.2d 201, *rev den* 115 Wn.2d 1010 (1990).

ARGUMENT

A. The Trial Court Erred In Concluding That the Workplace Noise Exposure Was a Proximate Cause of Any Permanent Partial Hearing Loss Disability.

The legislature did not intend the Industrial Insurance Act (IIA) "to provide workmen with life, health or accident insurance at

the expense of the industry in which they are employed.” *Favor v. Department of Labor and Industries*, 53 Wn.2d 698, 703, 336 P.2d 382 (1959). Although the IIA’s statutory provisions are to be interpreted liberally, this “liberal construction doctrine” applies only to questions of statutory interpretation, not to issues of fact. *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 13, 163 Wn.2d 142 (1945). On factual issues, claimants must be held to strict proof of their right to receive benefits. *Id.*; *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949).

Claimant had the burden of proving his entitlement to permanent partial disability benefits. RCW 51.52.050 (Appendix A); *Olympia Brewing Co., supra*. This required him to demonstrate, through expert medical testimony, that noise exposure at Weyerhaeuser was a proximate cause of hearing loss that constituted a permanent partial disability. RCW 51.08.140 (Appendix A); *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *Bremerton v. Shreeve*, 55 Wn.App. 334, 341, 777 P.2d 568 (1989) (proof of a disability required); *Zipp v. Seattle School Dist. No. 1*, 36 Wn.App. 598, 601,

676 P.2d 538 (1984) (expert medical testimony required). For such occupational diseases, it is the disability, not the disease, which supports an award of permanent partial disability benefits.

Bremerton v. Shreeve, supra, 55 Wn.App. at 341. Therefore, it is not sufficient if the work exposure merely caused a condition that does not rise to the level of a disability. *Id.*

For conditions such as hearing loss, the legislature has directed that permanent partial disability be established in accordance with nationally recognized standards for rating impairment. RCW 51.32.080(3)(a) (Appendix A). Both the Department of Labor and Industries and the Board of Industrial Insurance Appeals use the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed., for rating hearing impairment.

Therefore, to establish entitlement to a permanent partial disability award, claimant needed to prove that noise exposure at Weyerhaeuser was a proximate cause of hearing loss that constituted a ratable impairment under the *Guides*. “Proximate cause” means a cause which *in a direct sequence, unbroken by any new independent cause*, produces the disability in question and without which such disability would not have developed. *Bremerton*

v. Shreeve, supra, 55 Wn.App. at 339-40; *Wendt v. Department of Labor and Industries*, 18 Wn.App. 674, 683-84, 571 P.2d 229 (1977); WPI 155.06 (Appendix A). It is not sufficient to show the work exposure was a significant contributing cause of the ultimate disability; the cause must be proximate in the sense that the work exposure caused the disability without the intervention of any other cause. *Bremerton v. Shreeve, supra*; *Wendt*, 18 Wn.App. at 681-82. Necessarily, proximate causation does not exist if the exposure merely contributes to a condition that later become a disability only through the intervention of another cause or causes.

Claimant presented no medical testimony that could support the conclusion that the work exposure was a *proximate* cause of any permanent partial hearing loss disability; that is, ratable hearing loss. This record supports only the conclusion that the workplace noise exposure contributed to some, non-ratable hearing loss that did not constitute a disability and never would have become a disability but for the intervention of other causes; namely, the aging process and medical factors. That is because the three medical experts agreed that: (1) claimant did not have ratable hearing impairment when he retired; (2) the workplace noise exposure did

not contribute to any subsequent worsening of claimant's hearing loss; and (3) claimant developed ratable hearing loss only through the intervention of the aging process and medical factors. (Souliere 23, 34, 40; Hodgson 20, 22, 40; Treyve 23-25, 32). The unanimous medical testimony on these points precludes a finding that the work exposure was a *proximate* cause of any ratable hearing loss.

Claimant's work-related hearing loss constituted only a *condition* upon which the subsequent aging process and medical factors operated to cause a disability. The appellate courts of this state have long recognized that such a preexisting condition does not constitute a proximate cause of the ultimate disability. See *Dennis v. Department of Labor and Industries, supra*, 109 Wn.2d at 471; citing *Miller v. Department of Labor and Industries*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939).

Usually, the appellate courts have dealt with the situation where there is a preexisting, non-industrial condition, upon which a work-related injury or exposure operates to produce the disability for which benefits are sought. In *Dennis*, the court addressed how proximate causation is determined in these situations:

"It is a fundamental principle which most, if not all, courts accept. that. if the accident or injury complained of is the proximate cause of the disability for which compensation is

sought. the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's **prior physical condition is not deemed the cause of the injury. but merely a condition upon which the real cause operated.** (Emphasis added.)

Dennis at 471; *citing Miller, supra*. The court's statements clearly demonstrate that in these situations the prior condition is not a *proximate* cause of the later disability, but only a *condition* upon which the more recent cause operated. The later cause thus constitutes the sole *proximate* cause.

Applied here, the *Dennis* court's analysis compels the conclusion that claimant's workplace noise exposure caused only a *condition* upon which the aging process and medical factors operated to produce ratable impairment. The noise-related hearing loss was not a *proximate* cause of any ratable impairment. The aging process and medical factors were *the sole* proximate causes of claimant's disability. The Board correctly recognized this, finding that claimant's disability was due primarily to age-related causes, and was not proximately caused by the previous occupational noise exposure. (CABR 29, finding 5).

Judge Warne's contrary proximate causation finding resulted from legal and analytical errors in applying the proximate

causation standard and his erroneous interpretation of the *Guides*. Chief among these errors was his failure to treat the effects of aging like any other non-industrial cause. Judge Warne's memorandum opinion clearly reflects his discomfort in viewing the effects of aging like other non-industrial causes. (CP 40-41). He correctly found that claimant's hearing loss was not ratable at retirement and became so only through the intervention of presbycusis (as well as medical factors). (CP 40). However, Judge Warne then noted, "There is no deep pocket available to pay for aging." (CP 40-41). The import of this statement is not entirely clear, but it suggests the view that the effects of aging should be treated differently than causes for which a responsible party can be assigned. Judge Warne proceeded to conclude, "Aging is not a superseding intervening cause but is a consequence which is inevitable." (CP 41). The judge's statement reflects the erroneous belief that the effects of aging should not be analyzed like other non-industrial causes because they are "inevitable." This error infected Judge Warne's analysis of the proximate causation issue.

No authority supports Judge Warne's analysis of aging as a cause. As stated, the appellate courts have long recognized that

the legislature did not intend the IIA to provide workers life or health insurance at the expense of their employers. *Favor v. Department of Labor and Industries, supra*, 53 Wn.2d at 703. This necessarily means that employers may not be held responsible for age-related disability under the auspices of the IIA. More recently, the Supreme Court confirmed that while age-related hearing loss may not be segregated based solely on generalized population statistics, hearing impairment due to aging is properly segregated based on proof that is specific to the individual claimant. *Boeing Company v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002). In addressing whether age-related hearing loss may properly be segregated, the court stated:

“If it is determined that a worker’s disability is work-related and the employer can establish, on an individualized basis, that the full amount or a portion of a worker’s disability is not work-related, the employer need not compensate that worker for the portion of the worker’s disease or injury that is not work-related.”

Heidy, 147 Wn.2d at 86. The court’s analysis demonstrates that the effects of aging are properly viewed as a non-industrial cause – and that disability resulting from such a cause is not compensable.

Judge Warne wrongly reasoned that the inevitability of aging precluded a finding that claimant’s post-retirement

presbycusis constituted an independent intervening cause that broke the chain of causation between the employment exposure and claimant's ultimate disability. (CP 41). The fact that an age-related disability is "inevitable" is not relevant to the proximate cause inquiry. Otherwise, no age-related disability would ever be segregated. The *Heidy* court's analysis refutes this conclusion. The effects of aging must be treated like any other non-industrial cause in determining proximate causation. Judge Warne's failure to do so infected his analysis of this record and led directly to his erroneous finding on proximate causation.

In making his proximate causation finding, Judge Warne also wrongly relied on his observation that the *Guides'* hearing loss formula addresses only four frequencies (500, 1000, 2000 and 3000 Hz) and his finding that claimant likely sustained noise-related hearing loss outside of those frequencies. (CP 101, finding 5). The inference of this analysis (which claimant explicitly argued below) is that application of the *Guides* to claimant is unfair and that this should be considered in his favor in addressing the proximate causation issue. Judge Warne's analysis on this point was improper.

To begin with, Judge Warne's view of the *Guides* is misdirected. The *Guides* reasonably consider only the 500, 1000, 2000 and 3000 Hz. frequencies because those frequencies are most involved in the ability to hear speech, which is the primary function of hearing. (Treyve 15). Consideration of those frequencies thus best reflects or measures hearing impairment.

More important, as stated above, the legislature has directed that permanent partial disability be established in accordance with nationally recognized standards for rating impairment. RCW 51.32.080(3)(a) (Appendix A). The Department and Board both use the *Guides* for rating hearing loss (and many other disabilities). Claimant did not propose any other nationally recognized rating standards for rating his hearing impairment. The *Guides* must therefore be applied in rating claimant's disability. There is no authority or proper basis for considering perceived deficiencies in the *Guides* in addressing entitlement to permanent partial disability benefits.

Judge Warne's proximate causation analysis also wrongly relied on the fact that the *Guides* formula does not provide an impairment rating until the total decibel loss exceeds 100 decibels.

(CP 101, finding 5). He erroneously reasoned that this “low fence” “offsets” hearing loss due to aging, thus supporting his discounting of the clear, primary causal role that presbycusis played in the ultimate development of claimant’s hearing loss disability. (*Id.*). Judge Warne’s view of the *Guides* and his analysis was erroneous.

The *Guides* assign no impairment rating until the average loss exceeds 25 decibels because with this initial hearing loss “there is no change in the ability to hear everyday sounds under everyday living conditions.” (*Guides* at 250). The hearing loss formula is therefore no different than ratings standards for other medical conditions, which do not assign an impairment rating until the condition reaches a level where it actually interferes with a person’s ability to perform activities of daily living. (See *Guides* at 4). Accordingly, the hearing loss formula does not operate to “offset” or segregate any *impairment* due to age-related hearing loss, as Judge Warne found. The 25-decibel “low fence” therefore provides no basis for excluding, or subjecting to a different causation analysis, claimant’s considerable level of presbycusis. Judge Warne’s flawed assessment of the hearing loss formula contributed to his erroneous application of the proximate causation

standard.

Judge Warne's proximate causation finding also flowed from his erroneous finding that "but for [claimant's] exposure to industrial harmful noise [he] would not have a rateable (sic) hearing loss as of January 23, 2004" (the date of the Department order on appeal). (CP 101, finding 6). To begin with, the record contradicts this finding. Claimant had some presbycusis when he retired in 1980 at age 62. (Treyve 20; Hodgson 17, 19; see *also* Ex. 3). As noted above, from that point forward he developed an additional hearing loss of 105 decibels or more in each ear. This post-retirement hearing loss itself constituted a ratable hearing impairment, without even considering the non-industrial hearing loss that claimant had when he retired. It is therefore incorrect to find, as Judge Warne did, that claimant would not have had ratable hearing loss "but for" the employment noise exposure.

More important, "but for" causation is not alone sufficient to establish proximate causation. In addition to "but for" causation, proximate causation requires proof that the work exposure was a cause that *directly produced the disability in question, without the intervention of a new cause.* *Bremerton v. Shreeve, supra, 55*

Wn.App. at 339-40; *Wendt v. Department of Labor and Industries*, 18 Wn.App. at 683-84; WPI 155.06 (Appendix A). This record permits only the conclusion that claimant's noise exposure did not cause, and would not have caused, ratable impairment without the post-retirement intervention of new, independent causes – presbycusis and medical factors. Therefore, even *assuming* that claimant would not have experienced ratable impairment in the absence of the noise-related hearing loss, that is not a proper basis for finding proximate causation. Judge Warne erred in his contrary analysis.

In summary, the unanimous testimony of the medical experts establishes that the work exposure caused a non-ratable level of hearing loss that would not have increased without the intervention of non-industrial causes. Claimant developed a disability only because the aging process and medical factors intervened after he retired and over a period of more than 20 years eventually produced ratable hearing loss. This record provides no proper basis for finding that the work exposure caused *in a direct sequence, unbroken by any new independent cause* any ratable hearing loss. There is, therefore, no basis for the trial court's

finding that the work exposure was a proximate cause of any permanent partial hearing loss disability. The trial court's decision should therefore be reversed and the Board's contrary decision should be reinstated.

B. The Trial Court Erred In Concluding That Claimant Is Entitled To a Permanent Partial Disability Award For Tinnitus.

Claimant had the burden of proving his entitlement to permanent partial disability benefits for tinnitus. RCW 51.52.050 (Appendix A); *Olympia Brewing Co., supra*. This required him to demonstrate, through expert medical testimony, that noise exposure at Weyerhaeuser was a proximate cause of tinnitus that constituted a permanent partial disability. RCW 51.08.140 (Appendix A); *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *Bremerton v. Shreeve*, 55 Wn.App. 334, 341, 777 P.2d 568 (1989) (proof of a disability required); *Zipp v. Seattle School Dist. No. 1*, 36 Wn.App. 598, 601, 676 P.2d 538 (1984) (expert medical testimony required).

Tinnitus, like hearing loss, must be rated in accordance with nationally-recognized impairment rating standards. RCW 51.32.080(3)(a) (Appendix A). The Department and Board both

use the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed., for rating tinnitus. Under the *Guides*, tinnitus is not ratable in the absence of ratable hearing loss. (Hodgson 25; *Guides* at 246).

As discussed, this record does not support the conclusion that the workplace noise exposure proximately caused any ratable hearing loss. In the absence of such hearing loss, no permanent partial disability award may be granted for claimant's tinnitus. (*Id.*).

Further, the record provides no basis for finding that the work exposure at Weyerhaeuser proximately caused claimant's tinnitus. The record shows that tinnitus results from the same causes and pathology as hearing loss. (Souliere 26). Age-related damage to the sensory cells of the inner ear can cause the onset of tinnitus and its worsening over time. (Souliere 45). Claimant reported that his tinnitus did not develop until 1999 or 2000. (Treyve 16). No evidence supports the conclusion that the work exposure that ended in 1980 was a proximate cause of the tinnitus that developed approximately 20 years later. In fact, the trial court did not even find that the work exposure was a proximate cause of the tinnitus. (See CP 101). There is no basis for a permanent

partial disability award for tinnitus in the absence of such a finding; nor is there any evidence to support that finding. The award of 2 percent permanent partial disability for claimant's tinnitus must therefore be reversed.

C. The Trial Court Erred In Concluding That the Workplace Noise Exposure Was a Proximate Cause of 31.1 Percent Hearing Impairment.

The legislature and appellate courts of this state have long directed that non-industrial disability be segregated from a claimant's permanent partial disability award. RCW 51.32.080(5) (Appendix A); *Allen v. Department of Labor and Industries*, 48 Wn.2d 317, 293 P.2d 391 (1956). The Supreme Court has confirmed that hearing impairment due to aging is properly segregated based on proof that is specific to the individual claimant. *Boeing Company v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002). Judge Warne erred in not segregating claimant's non-industrial hearing loss and instead rating claimant's compensable hearing loss at 31.1 percent – or nearly 5 percentage points higher than all the hearing loss that claimant had in January 2003, more than 22 years after he retired. (CP 101, finding 7).

The record demonstrates that when claimant retired in 1980, his total hearing loss from all causes – employment noise exposure, non-industrial noise exposure and aging – was 95 decibels in the left ear and 90 decibels in the right ear. (Hodgson 20-21). Judge Warne’s finding of 31.1 percent binaural hearing impairment is equivalent to nearly 185 decibels of hearing loss in each ear, or approximately 90 to 95 decibels more hearing loss than claimant had when he retired. (Souliere 49-50; *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed., Table 11-2, p. 248, located at CP 73). This additional, non-industrial hearing loss represents approximately 50 percent of the 31.1 percent rating (without considering the non-industrial hearing loss that existed when claimant retired). The medical experts agreed that none of the hearing loss that developed after 1980 was related to claimant’s prior work exposure. (Souliere 40; Treyve 23-25, 32; Hodgson 20).

In *Heidy*, the court stated:

“If it is determined that a worker’s disability is work-related and the employer can establish, on an individualized basis, that the full amount or a portion of a worker’s disability is not work-related, the employer need not compensate that worker for the portion of the worker’s disease or injury that is not work-related.”

147 Wn.2d at 51. As stated, the record does not support the conclusion that the work exposure was a proximate cause of any ratable impairment. However, *assuming* proximate causation has been established, the evidence indisputably shows that at least half of the hearing loss that supports Judge Warne's 31.1 percent rating resulted from non-industrial causes. *At a minimum*, that non-industrial disability must be segregated from claimant's permanent partial disability award. *Heidy, supra; Allen, supra; see also* RCW 51.32.080(5)(Appendix A).

D. Claimant Is Not Entitled To Assessed Attorney Fees and Costs.

Assessed attorney fees and costs are authorized only when the claimant prevails on appeal. RCW 51.52.130 (Appendix A). As stated, this court should reverse the trial's courts decision and conclude that the work exposure was not a proximate cause of any permanent partial disability. In that event, the award of assessed attorney fees and costs must also be reversed because claimant would not have prevailed on any issue. Alternatively, if the court finds that the trial court's impairment rating was excessive, and thereby reverses the trial court's decision in part, then the matter

should be remanded for the trial court to reconsider the amount of reasonable assessed attorney fees.

V. CONCLUSION

The court should hold that the work exposure at Weyerhaeuser was not a proximate cause of any permanent partial disability for hearing loss or tinnitus. The court should therefore reverse the trial court's award of permanent partial disability benefits, and the associated attorney fees and costs, and reinstate the Board's conclusion that claimant is not entitled to a permanent partial disability award.

Alternatively, the court should conclude that claimant's non-industrial hearing loss must be segregated and that the 33.1 percent permanent partial disability rating for hearing loss and tinnitus is therefore excessive. The court should therefore reverse and remand the trial court's decision with a directive to segregate claimant's non-industrial hearing loss and to reconsider the amount of reasonable attorney fees in light of the court's ruling.

DATED: May 17, 2007.



Craig A. Staples, WSBA # 14708
Attorney for Weyerhaeuser

APPENDIX A-1

RCW 51.08.140 - "Occupational disease."

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

RCW 51.32.080 - Permanent partial disability — Specified — Unspecified, rules for classification — Injury after permanent partial disability.

"* * * * *"

(3)(a) Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability, and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment. In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides for determining various bodily impairments.

* * * * *

(5) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

RCW 51.52.050 - Service of departmental action — Demand for repayment — Reconsideration or appeal.

"* * * * *"

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or

APPENDIX A-2

other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

RCW 51.52.130 - Attorney and witness fees in court appeal.

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal 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, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

WPI 155.06 - PROXIMATE CAUSE—ALLOWED CLAIM

The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such [condition] [disability] [death] would not have happened.

[There may be one or more proximate causes of a [condition] [disability]

APPENDIX A-3

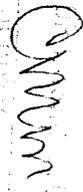
[death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [and] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].]

CERTIFICATE OF MAILING

I certify that on May 17, 2007, I served the foregoing Brief of Appellant on the following persons by mailing each of them a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

Wayne Lieb
Putnam & Lieb
P.O. Box 337
Olympia, WA 98507-0337

Penny Allen, AAG
Office of the Attorney General
Labor and Industries Division
P.O. Box 40121
Olympia, WA 98504-0121

STATE OF WASHINGTON
BY 
DEPUTY ATTORNEY GENERAL
07 MAY 21 AM 9:13
COURT OF APPEALS
DIVISION II

I further certify that I filed the original and a true copy of the same document on the same date by mailing it by first class mail with the U.S. Postal Service in a sealed envelope, with postage prepaid, and addressed to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

By: 
Craig A. Staples WSBA #14708
Attorney for Weyerhaeuser Company