

Original

No. 36018-7-II

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

DMH

JOHN JENKINS,

Respondent,

v.

WEYERHAEUSER COMPANY,

Appellant.

REPLY BRIEF OF APPELLANT

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DMH 9/4/07

TABLE OF CONTENTS

	<u>Page</u>
A. FACTS/FAIRNESS	1
B. APPLICATION OF GUIDES	6
C. PROXIMATE CAUSATION	9
D. TINNITUS	18
E. EXTENT OF PERMANENT PARTIAL DISABILITY	19
F. CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Boeing Company v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002)	16, 20, 22, 23
<i>Bremerton v. Shreeve</i> , 55 Wn.App. 334, 777 P.2d 568 (1989)	9, 12, 13
<i>Dennis v. Department of Labor and Industries</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987)	12
<i>DuPont v. Department of Labor and Industries</i> , 46 Wn.App. 471, 730 P.2d 1345 (1986)	6
<i>Erickson v. Department of Labor and Industries</i> , 48 Wn.2d 458, 294 P.2d 644 (1956)	21
<i>Favor v. Department of Labor and Industries</i> , 53 Wn.2d 698, 336 P.2d 382 (1959)	16
<i>Miller v. Department of Labor and Industries</i> , 200 Wash. 674, 94 P.2d 764 (1939)	12
<i>Page v. Department of Labor and Industries</i> , 52 Wn.2d 706, 328 P.2d 663 (1958)	19
<i>Rikstad v. Holmberg</i> , 76 Wn.2d 265, 456 P.2d 355 (1969)	14
<i>Riojas v. Grant County Public Utility District</i> , 117 Wn.App. 694, 72 P.3d 1093 (2003)	15
<i>Roundup Tavern, Inc. v. Pardini</i> , 68 Wn.2d 513, 413 P.2d 820 (1966)	18
<i>State v. Giedd</i> , 43 Wn.App. 787, 719 P.2d 946 (1986)	14
<i>Thompson v. Department of Labor and Industries</i> , 2 Wn.App. 785, 470 P.2d 224 (1970)	19
<i>Travis v. Bohannon</i> , 128 Wn.App. 231, 115 P.3d 342 (2005) ...	15

	<u>Page</u>
<i>Weyerhaeuser v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991)....	22
<i>Wendt v. Department of Labor and Industries</i> , 18 Wn.App. 674, 571 P.2d 229 (1977)	9, 12, 13

STATUTES

	<u>Page</u>
RCW 51.04.010	1
RCW 51.32.080(3)(a)	7, 8
RCW 51.32.050	21
RCW 51.32.100	21

OTHER AUTHORITIES

<i>Guides to the Evaluation of Permanent Impairment</i> , 5 th Ed..	passim
WPI 155.06	9

Weyerhaeuser submits the following in reply to claimant's Brief of Respondent.

A. FACTS/FAIRNESS

Claimant's statement of facts contains a substantial amount of argument, in violation of RAP 10.2(4) (*see* BR 10-14). He ardently characterizes his noise exposure as extreme and condemns Weyerhaeuser for an alleged lack of concern. (BR 2-10). Weyerhaeuser acknowledges that its employment conditions exposed claimant to significant noise. Industry standards and medical knowledge about hearing loss were different 30 to 60 years ago, when claimant worked at Weyerhaeuser. At the same time, claimant's portrayal of his work environment wrongly presents exceptional situations as the norm and thus exaggerates his typical exposure, particularly in reference to the last 10 years of his employment. His condemnation of Weyerhaeuser for alleged fault is both unfounded and misplaced in this no-fault system. RCW 51.04.010.

More important, the precise nature of claimant's noise exposure has no direct bearing on the primary issue of proximate causation on this appeal. It is undisputed that noise-related hearing loss does not progress once the exposure ends. (Soulriere 23;

Treyve 23, 31; Hodgson 20). Therefore, whatever might be said about claimant's noise exposure at Weyerhaeuser, that exposure indisputably caused no more than the level of hearing loss that existed when claimant retired in 1980 (which also likely included a substantial level of presbycusis).¹ It is also undisputed that claimant had no ratable hearing impairment when he retired from Weyerhaeuser in 1980. (Souliere 23, 34, 40; Hodgson 20, 22, 40; Treyve 23-25, 32). The primary question on appeal is whether the noise-related part of claimant's hearing loss that existed as of 1980 was a proximate cause of the disability that developed 22 years later. The nature of claimant's prior noise exposure, while not irrelevant, has no direct bearing on resolution of this proximate causation question because the *maximum* amount of noise-induced hearing loss is not in dispute.

Claimant continues by asserting that Weyerhaeuser has attempted to "avoid" any responsibility for its contribution to his hearing loss. (BR 10, 16). This assertion does not withstand scrutiny. It is undisputed that when claimant retired in 1980, his hearing loss from *all* causes was 95 decibels in the left ear and 90 decibels in the right ear; that is, below the ratable level of 105

¹ See BA 7-8, 23; *infra* 4).

decibels. (Hodgson 20-21; Souliere 14, 39, 45; Trevye 20, 23). It is also undisputed that by September 2004, claimant had approximately 200 decibels of hearing loss in each ear and that the previous work exposure caused none of the additional loss. (CP 73; *Guides*, Table 11-2; Souliere 38). Claimant did not seek hearing aids or any other treatment for his hearing loss until 2002, 22 years after he retired and after the very substantial worsening of his condition. (J. Jenkins 62). Clearly, this information provided Weyerhaeuser a very legitimate basis for questioning whether the work exposure was a *proximate* cause of claimant's ultimate disability. *As claimant himself notes*, the same facts logically support the conclusion that the work exposure was not a proximate cause of the need for treatment – hearing aids – that developed 22 years after he retired. (BR 24-25). Although Weyerhaeuser clearly could have challenged claimant's entitlement to hearing aids, it elected not to do so. Weyerhaeuser's decision to pay for the hearing aids refutes claimant's assertion that Weyerhaeuser has sought to avoid any responsibility for his hearing loss. That decision provides no basis, legal or otherwise, for undermining Weyerhaeuser's right to contest whether its employment

proximately caused any permanent partial hearing loss disability.²

Claimant also attempts to minimize the role of the non-industrial factors – chiefly aging – in causing his ultimate hearing loss. He asserts, for example, that the average person of his age would have “minimal” age-related hearing loss and that the aging process contributed a “minor” amount to his ultimate disability, citing as authority Exhibit 3, which he offered into evidence. (BR 1, 3). Exhibit 3 actually refutes claimant’s position. The exhibit confirms that age-related hearing loss accelerates in the average person from age 50 to age 75. (Ex. 3; Souliere 36). It also shows that the average 62-year old male – claimant’s age at retirement – has 12-16 decibels of hearing loss in each of the four measured frequencies, or a total of between 48 and 64 decibels. (*Id.*). The exhibit thus indicates that presbycusis probably constituted more than half of the total hearing loss (90 to 95 dB) that claimant had when he retired. In short, considering only the presbycusis that existed when claimant retired, it is not accurate to characterize it as a “minimal” or “minor” cause relative to the noise exposure.

In addition, claimant’s Exhibit 3 shows that the overall contribution of presbycusis was far greater. The exhibit reveals that

² See *infra* 17-18.

the average 75 year-old male has approximately 84-88 total decibels of hearing loss in the four frequencies, or not much under the ratable threshold. Given the demonstrated progression of presbycusis from ages 62-75, it is reasonable to extrapolate that the average 84-year old – claimant's age for the September 2004 audiogram – would have substantially more hearing loss, which most likely would be well over the ratable level.³

More important, as noted, the evidence that is specific to claimant shows that in the 24 years after his retirement he sustained an additional hearing loss of approximately 105 and 110 decibels in his left and right ears, respectively. (CP 73; *Guides*, Table 11-2; Souliere 38; Hodgson 20-21). That is, the post-retirement hearing loss from indisputably non-industrial causes – primarily aging – exceeded the hearing loss that claimant had from all the prior causes combined (noise exposure at Weyerhaeuser, aging, and noise exposure in the military and while hunting). (Treyve 17, 30; Hodgson 37, 39; Ex. 3).⁴ The non-industrial, post-retirement hearing loss thus constituted more than half of the total

³ Exhibit 3 does not address presbycusis above age 75.

⁴ Contrary to claimant's assertion, Dr. Treyve and Dr. Hodgson attributed claimant's hearing loss to aging, workplace noise, medical factors and possibly recreational and military noise. (Treyve 17, 25, 30; Hodgson 37, 39). (BR 17).

hearing loss that existed in September 2004. Considering the likely level of pre-retirement presbycusis, aging probably accounted for approximately three-quarters of claimant's total hearing loss. That is neither "minor" nor "minimal."

The objective data also contradicts claimant's repeated assertions that it is "undisputed" his presbycusis would not have caused a disability in the absence of the workplace noise exposure. (BR 15, 17, 18, 23). As noted, the hearing loss that developed just between 1980 and 2004 exceeded the ratable threshold in both ears. This hearing loss, due primarily to presbycusis, thus constituted a "disability."⁵ The likely level of pre-retirement presbycusis increases the level of the overall disability resulting from presbycusis and other non-industrial causes. Because the non-industrial factors caused a hearing loss disability, there is no basis for concluding that claimant would not have sustained a disability "but for" the workplace noise exposure.

B. APPLICATION OF THE GUIDES

Claimant never has disputed that he had the burden of

⁵ No audiogram was performed in January 2004, when the claim was closed. The September 2004 audiogram results are relevant in addressing the level of disability in January 2004. *DuPont v. Department of Labor and Industries*, 46 Wn.App. 471, 478-79, 730 P.2d 1345 (1986).

proving the workplace noise exposure was a proximate cause not merely of some hearing loss, but of hearing loss that rises to the level of a permanent partial *disability*. He also has not denied that this disability must be established in accordance with nationally recognized standards for rating impairment, and that AMA *Guides to the Evaluation of Permanent Impairment*, 5th Ed. are used to rate such impairment in this state. RCW 51.32.080(3)(a). (See BA 14). Claimant instead attacks the *Guides* on the basis they do not consider frequencies other than 500, 1000, 2000 and 3000 Hz. in measuring hearing impairment. (BR 12-14). Dr. Treyve's testimony demonstrates that the *Guides* use these four frequencies to measure hearing impairment because they are most involved in the primary function of hearing: the ability to hear speech. (Treyve 21). Claimant wrongly attempts to impeach Dr. Treyve's testimony by reference to a chart from a book by Dr. Richard Dobie, which he appends to his brief. (BA 14, App. A). The chart is not a part of this record and it constitutes hearsay testimony that is not properly cited or considered.

Equally important, claimant may not establish the existence of ratable hearing impairment, proximately caused by his employment, merely by casting stones at the *Guides*. He must

affirmatively prove the existence of such impairment through nationally recognized standards. RCW 51.32.080(3)(a). Claimant has referenced no rating standards other than the *Guides* and he has not provided any other basis for proving the existence of a disability.

Similarly, claimant attacks application of the *Guides* to his claim because the *Guides* do not recognize a disability until more than 100 decibels of hearing loss is established over the four measured frequencies. (BR 13). He asserts that this "low fence" offsets hearing loss due to aging, suggesting that this justifies discounting the primary role of aging in causing his hearing loss. (*Id.*). Judge Warne apparently agreed. (CP 101, finding 5). The *Guides* require more than a 25-decibel average hearing loss because hearing loss below that level does not significantly interfere with the ability to hear everyday sounds and, thus, does not rise to the level of an impairment or disability. *Guides* 250. (See BA 22). Moreover, as noted, claimant's presbycusis probably accounted for at least half of the hearing loss that he had at retirement and most of the more than 100 decibel loss that he indisputably developed after retirement (with the remainder of the latter loss attributable to other non-industrial causes). The 25-

decibel "low fence" does not begin to account for the total presbycusis. It provides no basis for discounting the clear predominant role of the aging process in causing claimant's hearing loss, or for disregarding application of the *Guides*.

C. PROXIMATE CAUSATION

Claimant acknowledges that he must prove the employment noise exposure was a *proximate* cause of hearing loss disability. Yet, he does not directly address the definition of that term, much less explain how the facts here satisfy that definition.

"Proximate causation" 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." (Emphasis added.)

Bremerton v. Shreeve, 55 Wn.App. 334, 339-40, 777 P.2d 568 (1989); *Wendt v. Department of Labor and Industries*, 18 Wn.App. 674, 683-84, 571 P.2d 229 (1977); WPI 155.06. This definition recognizes three interrelated elements of proving proximate causation, none of which is satisfied here.

First, the cause must produce the disability in a direct sequence. This element is not satisfied here because, as claimant acknowledges, he indisputably did not have ratable

hearing impairment when he retired and his prior noise exposure did not contribute to any of the subsequent hearing loss. (BR 19). The workplace exposure thus caused no disability in a direct sequence.

Second, the definition of proximate cause requires that there be no "new independent cause" that independently produces the disability. Again, it is undisputed that claimant developed a hearing loss disability only because non-industrial factors – primarily aging – intervened to cause a very substantial level of additional hearing loss, which by itself constituted a disability. The intervention of this non-industrial cause severed any causal connection between the prior work exposure and claimant's ultimate disability.

And third, proximate causation does not exist unless the record shows no disability would have developed without the occupational cause. Here, as discussed, claimant's post-retirement hearing loss alone constituted a disability; that disability was even greater when the pre-retirement presbycusis is considered. Therefore, it cannot be said that claimant would not have developed hearing loss disability without the workplace noise exposure. This refutes claimant's assertion that the work

exposure was a “but for” cause of his disability, and precludes a finding of proximate causation. (BR 18-19).⁶

Claimant proceeds to argue that individuals vary significantly in their susceptibility to noise-induced hearing loss, citing another extract from Dr. Dobie’s book which is not in the record. (BR 19). Dr. Dobie’s opinion clearly constitutes hearsay that is not properly offered or considered; it is also irrelevant. Claimant’s susceptibility to hearing loss is relevant only to the question of the extent to which noise contributed to his hearing loss. There is no dispute that claimant’s noise exposure caused some hearing loss; there likewise is no dispute that it caused no more than the level existing when claimant retired, and probably substantially less given the expected contribution from presbycusis. Claimant’s potential susceptibility to the noise does not alter the fact that he had no ratable impairment when the workplace noise exposure ceased and that this exposure did not cause any of the very substantial hearing loss that he later developed.

⁶ Dr. Souliere’s contrary testimony addressed only claimant’s hearing loss as of 2003 and did not consider the additional more than 10 percentage points of impairment that developed between January 2003 and September 2004. (Souliere 23, 38-39, 49).

Claimant's discussion of variable hearing loss manifestation is also misdirected. The circumstances to which claimant refers bear only on the difficulty of determining the cause of a hearing loss disability in some cases. The circumstances here present no such difficulty. The noise exposure indisputably caused less than a ratable level of hearing loss.

Claimant also wrongly argues that *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987) and *Miller v. Department of Labor and Industries*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939) stand only for the proposition that the employer takes the worker as it finds him and have no bearing on the proximate causation issue here. (BR 21-22). Although both cases stand for that proposition, they also discuss at length how successive causes should be viewed in a proximate causation analysis. 109 Wn.2d at 471; 200 Wash. at 682-83. The Supreme Court's analysis in both cases demonstrates that the work exposure here was not a proximate cause of any hearing loss disability.

Claimant also contends that this case involves multiple proximate causes, in accordance with in *Wendt v. Department of Labor and Industries*, *supra* and *Bremerton v. Shreeve*, *supra*. (BR

26-27). Those decisions confirm only that a disability may have more than one proximate cause. The court's decisions do not change the definition of "proximate cause" or otherwise obviate the need for proof that the work exposure was at least a *proximate* cause. On the contrary, the *Wendt* court rejected use of a jury instruction that would have created a standard of "significant contributing cause," stating that it was inconsistent with the definition of "proximate cause." 18 Wn.App. at 681-82. The court reiterated that even under the "multiple proximate cause" theory, the workplace exposure still must constitute a *proximate* cause. 18 Wn.App. at 681-82.

Here, claimant essentially relies on a "significant contributing cause" standard in emphasizing that the work exposure caused a significant part of his hearing loss. That is not sufficient, even under *Wendt* and the multiple proximate cause theory. The work exposure must do more than contribute to the ultimate condition; it must also cause "in a direct sequence . . . the disability in question," without the intervention of any new independent cause. 18 Wn.App. at 683-84; *Bremerton v. Shreeve, supra*, 55 Wn.App. at 339-41. Claimant did not satisfy the "proximate cause" standard

because he developed his disability – ratable impairment – only through the intervention of other, non-industrial causes.

Claimant further argues that his age-related hearing loss was not “a new independent cause” because it was foreseeable. (BR 27-29). No applicable authority supports this argument. Foreseeability is an element of a causation analysis in tort actions. The Industrial Insurance Act is a special legislative creation to which many tort principles do not apply. Claimant cites no authority for the proposition that foreseeability is properly considered in determining causation in a workers’ compensation matter.

Equally important, even where foreseeability is relevant, it is not a factor in determining in the first instance whether a particular occurrence was a proximate cause of the claimed injury or disability. Foreseeability is not an element of proximate causation. *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969); *State v. Giedd*, 43 Wn.App. 787, 792, 719 P.2d 946 (1986). Proximate causation must first be established between the claimed occurrence and the ultimate disability before foreseeability is properly considered. Foreseeability becomes an issue only when proximate causation is otherwise established and there is evidence of a new, intervening cause that breaks the chain of causation and

independently produces the claimed disability. *Travis v. Bohannon*, 128 Wn.App. 231, 241, 115 P.3d 342 (2005); *Riojas v. Grant County Public Utility District*, 117 Wn.App. 694, 697, 72 P.3d 1093 (2003). In that event, the issue is whether the new cause represents a superseding cause that is sufficient to relieve the defendant of liability. Resolution of that issue turns on whether the new cause was reasonably foreseen by the defendant; only intervening acts which are not reasonably foreseen are deemed superseding causes. *Riojas, supra*. By breaking the chain of causation and independently causing the claimed disability, such a superseding cause operates to render the original injury no longer a proximate cause of the disability. *Id.*; *Travis, supra*.

In short, foreseeability is relevant only in determining whether a new, intervening cause constitutes a superseding cause once the plaintiff has proved the original occurrence proximately caused the disability. The foreseeability of a subsequent cause does not operate to relieve a claimant from his initial burden of proving the claimed injury or exposure proximately caused the ultimate disability – that is, in a direct sequence, without the intervention of any other cause. The evidence here supports only the conclusion that workplace noise exposure did not cause any

disability in a direct sequence; but that such disability developed only through the intervention of other causes, primarily the aging process. Because claimant has not established proximate causation, the foreseeability of presbycusis is irrelevant.

For the same reasons, Judge Warne erred in disregarding the primary causal role of the aging process in causing claimant's hearing loss on the basis "aging is inevitable." (CP 41). Inevitability and foreseeability are related concepts that, for the purposes of this case, are subject to the same legal analysis. The inevitability of claimant's presbycusis is not relevant and does not alter the fact that the workplace noise exposure was not a proximate cause of any hearing loss disability. As stated previously, exclusion of age-related disability from a causation analysis makes employers responsible for non-industrial impairment and thus violates one of the foundational principles of the IIA – that it was not intended to provide workers health insurance at the expense of their employers. *Favor v. Department of Labor and Industries*, 53 Wn.2d 698, 703, 336 P.2d 382 (1959). (See BA 18-19). The Supreme Court's decision in *Boeing Company v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002) demonstrates that where as here, evidence that is specific to the

claimant establishes the extent of an age-related disability, that disability must be must be considered like any other non-industrial cause and may not be excluded from a proximate causation analysis. (See BA 19).

Finally, claimant attaches unwarranted significance to Weyerhaeuser's decision not to contest his entitlement to hearing aids and to Judge Warne's finding that the work exposure proximately caused his need for such treatment. (CP 101, finding 6; BR 25). As stated, Weyerhaeuser had ample reason to question proximate causation as to claimant's need for treatment and its associated responsibility for hearing aids. Claimant provides no authority for the proposition that Weyerhaeuser's decision not to pursue the treatment issue should be construed against it in this proceeding. Nor is there any evidence that the amount of hearing loss that might benefit from hearing aids necessarily rises to the level of, or is synonymous with, ratable hearing impairment. Therefore, a finding of proximate causation as to treatment does not necessitate a finding of proximate causation as to permanent partial disability. More important, since Weyerhaeuser did not dispute claimant's entitlement to treatment, the cause of the need for treatment never has been at issue in this proceeding. Judge

Warne's finding regarding that issue was therefore unnecessary and inappropriate, and of no consequence in determining proximate causation with respect to claimant's permanent partial disability.

Roundup Tavern, Inc. v. Pardini, 68 Wn.2d 513, 516, 413 P.2d 820 (1966).

D. TINNITUS

Claimant's argument on this issue does not address the authorities that govern the granting of a permanent partial disability award for tinnitus. Tinnitus must be rated in accordance with the *Guides*, which do not support a rating in the absence of a compensable hearing impairment. (BA 25-26). As discussed, the record does not support the conclusion that claimant has hearing impairment proximately related to his employment. Even *assuming* compensable hearing impairment existed, claimant needed to prove the work exposure was a *proximate* cause of the tinnitus that commonly results from aging and did not develop until 20 years after he retired. The fact there is some medical evidence that the work was a cause of claimant's tinnitus does not establish the work exposure as a *proximate* cause. Because no medical evidence supports that conclusion that the work exposure caused ratable hearing loss or tinnitus in a direct sequence, without the

intervention of the aging process, no award for tinnitus is appropriate.

E. EXTENT OF PERMANENT PARTIAL DISABILITY

Claimant contends there is no factual basis for segregating any of his disability. (BR 29). In workers' compensation cases, the fact-finder is not bound by the ratings proffered by expert witnesses and may select any rating supported by the evidence. *Page v. Department of Labor and Industries*, 52 Wn.2d 706, 710, 328 P.2d 663 (1958); *Thompson v. Department of Labor and Industries*, 2 Wn.App. 785, 787-88, 470 P.2d 224 (1970). Drs. Treyve and Hodgson testified that the work exposure caused no ratable impairment. (Treyve 24; Hodgson 19-20). Dr. Souliere agreed that claimant had no ratable loss at retirement; that the work exposure did not cause any subsequent hearing loss; that by August 2003 claimant had 27.19 percent hearing impairment; and that by September 2004 claimant's total hearing loss was 37 percent. (Souliere 14, 39, 40, 45). As discussed, nearly half of the 27.19 percent impairment, and more than half of the 37 percent impairment, resulted from non-industrial causes after claimant retired. The hearing loss that developed between 1980 and

September 2004 was, by itself, sufficient to constitute a ratable disability, contrary to claimant's assertions. (BR 33). In addition, approximately half of the hearing loss that claimant had at retirement probably resulted from the aging process, which, combined with the post-retirement presbycusis, leaves approximately one-quarter of claimant's total hearing loss as due to the work exposure. (Ex. 3).⁷ This evidence provides an ample basis for selecting an impairment rating that is between zero and 37 percent. *Assuming* it is appropriate to grant claimant a permanent partial disability award because the work exposure contributed to some, non-ratable hearing loss, then it is more appropriate to segregate the greater portion of his ultimate disability that indisputably resulted from non-industrial causes. *Boeing Company v. Heidi, supra*. Judge Warne erred by excluding claimant's presbycusis from consideration and not segregating any of that non-industrial disability.⁸

⁷ Given these facts, it is not logically possible to conclude, as claimant does, that presbycusis caused none of his disability and that all the disability is due to the workplace noise exposure. (BR 33).

⁸ Judge Warne's statements and findings provide no basis for concluding he segregated any presbycusis, as claimant suggests. (BR 17, n. 10). The judge's finding of 31.1 percent impairment essentially split the difference between the 2003 and 2004 audiograms. His statements about the role of aging belie any segregation of presbycusis. (CP 40-41).

Claimant argues that Weyerhaeuser must compensate him for his non-industrial disability because the segregation statutes, RCW 51.32.080(5) and 51.32.100, authorize segregation of only a preexisting disability. The terms of these statutes are not applicable here because there is no issue of claimant having a disability prior to his work exposure. However, these statutes do recognize, and are derived from, the principle that an employer should not be required to compensate a claimant for disability not proximately caused by the work exposure. The *Heidy* court confirmed this. *Heidy*, 147 Wn.2d at 86. (See quote at BA 19). Segregation of disability is not limited to disability that preexists the work exposure. The appellate courts have long held that disability benefits may not be granted for disability that resulted from a subsequent cause. *Erickson v. Department of Labor and Industries*, 48 Wn.2d 458, 294 P.2d 644 (1956). All of claimant's hearing loss disability arose subsequent to his employment, long after the noise exposure had ceased contributing to his hearing loss; and, more than half of claimant's ultimate hearing loss (as of September 2004) was due to a subsequent, non-industrial cause or causes.

Claimant does not address the *Heidy* court's analysis, but instead merely asserts that there is no authority for segregating age-related disability from a permanent partial disability award. The above-noted quote from *Heidy* squarely refutes that assertion. *Heidy*, 147 Wn.2d at 86. Claimant wrongly contends that *Weyerhaeuser v. Tri*, 117 Wn.2d 128, 814 P2d 629 (1991) supports his contrary position. In *Tri*, the sole issue was whether liability for a claimant's hearing loss should be assigned to one employer under the last injurious exposure rule or apportioned among all the employers whose workplace conditions contributed to the claimant's disability. In addressing that issue, the court expressly distinguished between assignment of *liability* between employers and determinations of the *amount of compensation* for permanent partial disability benefits in accordance with the segregation provisions. 117 Wn.2d at 133. *Tri* did not address the latter issue and thus provides no support for claimant's position.

Where, as here, the evidence specific to claimant demonstrates the extent of hearing loss due to other causes – such as aging and medical causes – “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 trial court's disregard of claimant's presbycusis and granting of a 31.1 percent permanent partial disability award flies in the face of this principle. More important, the trial court's failure to consider the predominant causal role of presbycusis led to a clearly erroneous finding on the issue of proximate causation.

F. CONCLUSION

For the above reasons, the court should reverse the trial court's award of permanent partial disability benefits for hearing loss and tinnitus and reinstate the Board's decision that claimant is not entitled to a permanent partial disability award. The trial court's associated award of attorney fees and costs must also be reversed.

Alternatively, the court should conclude that the trial court wrongly failed to segregate claimant's non-industrial disability and that the 33.1 percent permanent partial disability rating for hearing loss and tinnitus is 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.

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DATED: September 4, 2007.

A handwritten signature in black ink, appearing to be 'CS', written over a horizontal line.

Craig A. Staples, WSBA # 14708
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CERTIFICATE OF MAILING

I certify that on September 4, 2007, I served the Reply 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:

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I further certify that I filed the original and a 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:

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