NO. 36018-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JOHN JENKINS,

Respondent

v.

WEYERHAEUSER COMPANY,

Appellant.

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STATE OF WASHINGTON
BY
DEPUTY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases i

Statutes and Court Rules iv

Other References iv

I. ASSIGNMENTS OF ERROR 1

A. Assignments of Error 1

B. Issues related to Assignments of Error 1

II. STATEMENT OF THE CASE 2

A. Statement of Procedure 2

B. Statement of Facts 2

1. Workplace exposure and overtime 2

2. Audiograms 8

3. Effect of noise induced hearing loss (NIHL) on the aging process 10

4. Action by the trial court 11

5. Significance of Hearing Loss Exhibits 12

III. ARGUMENT SUMMARY 14

IV. ARGUMENT 16

A. Mr. Jenkins' 31 years of work in an "incredibly noisy" paper mill is a proximate cause of his 31.1% hearing disability. 16

1. Mr. Jenkins' hearing disability is the result of multiple (two) proximate causes: NIHL and ARHL and thus is covered under the Industrial Insurance Act. (IIA)..... 16

2. There is a significant range of individual susceptibility to hearing loss from harmful levels of noise..... 19

3. The NIHL is not a "condition" upon which aging acts..... 21

4. Weyerhaeuser's action of allowing the claim and providing hearing aides is inconsistent with their argument regarding *Miller* and *Dennis*..... *24*

B. Aging is a not a "new independent cause" of Mr. Jenkins hearing loss or hearing disability..... 26

1. An intervening act can only be a superseding cause if it is wholly unforeseeable..... 27

C. There is no basis for any apportionment of Mr. Jenkins' hearing loss..... 29

1. There are only two statutory provisions which allow reduction of a worker's permanent partial disability award for conditions unrelated to the underlying injury or disease and neither allow for the offset of the aging process..... 29

a. RCW 51.32.080(3) 30

b. RCW 51.32.100 31

D. The extent of permanent partial disability is established on the date the closing order is issued..... 32

E. Mr. Jenkins is entitled to an award for tinnitus.. 35

F. Should he prevail to any degree, Mr. Jenkins is entitled to attorney's fees on appeal. 35

V. CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Page

Bennett v. Dept. of Labor & Indust., 95 Wn.2d 531, 627 P.2d 104 (1981)..... 30

Boeing v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002)..... 8, 20, 36, 37

Brand v. Dep't of Labor & Indust., 139 Wn.2d 623, 989 P.2d 1111 (1999) 35, 36, 37

Bremerton v. Shreeve, 5 Wn. App 334, 777 P.2d 568 (1989) 17, 26

Cramer v Dep't of Highways, 73 Wn.2d 516, 520, 870 P.2d 999 (1994) 28

Dennis v. Dep't of Labor & Indust., 109 Wn.2d 467, 472, 745 P.2d 1295 (1987) 19, 21, 22, 23, 24, 26, 34

Dotson v. Dept. of Labor & Indust., 48 Wn.2d 855, 296 P.2d 1006 (1956) 33

Harry v. Buse Timber & Sales, Inc., 134 Wn. App 739, 132 P.3d 1122 (2006) 19

Joyce v Dep't of Corrections, 155, Wn.2d 306, 119 P.3d 825 (2005) 26

McCoy v. American Suzuki Motor Corp, 136 Wn.2d 350, 358, 961 P.2d 952 (1998) 26, 28

McIndoe v. Dep't. of Labor & Indust., 100 Wn. App. 64, 995 P.2d 616 (2000) 35

Page

Miller v. Dep't of Labor & Indust., 200 Wash. 674, 682-83, 94 P.2d 764 (1939) 21, 22, 23, 24, 26

Nicholson v. Postal Telegraph Cable Co., 162 Wash. 603, 229 P.2d 397 (1931) 22

Page v. Dep't of Labor & Indust., 52 Wn.2d 706, 710, 328 P.2d 663 (1958) 17, 35

Pollard v. Weyerhaeuser, 123 Wn. App 506, 98 P.3d 545 (2004) 19

Rehberger v. Dep't. of Labor & Indust., 154, Wash. 659, 283 Pac. 185 (1929) 30, 36

Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993) 36

Sepich v. Dept. of Labor & Indust., 75 Wn.2d 312, 450 P.2d 940 (1969) 32, 33

Smith v Acme Paving 16, Wn. App 389, 396, 558 P.2d 811 (1976) 27

Wendt v. Dep't of Labor and Indust, 18 Wn. App 674, 676, 571 P.2d 229 (1977) 26, 27

Weyerhaeuser v. Tri, 117 Wn.2d, 814 P.2d 628 (1991) 20, 34

Page

STATUTES AND RULES

RCW 51.04.010 ..... 27, 34

RCW 51.12.010 ..... 27, 34

RCW 51.32.080 34

RCW 51.32.080(3) 30

RCW 51.32.100 ..... 31, 34

RCW 51.32.130 35

RCW 51.32.180 20

RCW 51.52.130 ..... 36, 37

Title 51 (Industrial Insurance Act) 16, 27, 34

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First Edition, 1993 ..... 12, 14 19

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College Edition, 1966 32

WPI 155.10 33

WPI 3018 22

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The respondent did not cross appeal and thus makes no assignments of error.

B. Issues related to Assignments of Error

1. Can an employer, who damages a worker's hearing to the brink of permanent partial disability, evade liability because the normal aging process contributed a minor amount to the ultimate disability? (Appellant's Assignment of Error 1).

2. Can the aging process be an independent or superceding cause which breaks the causal chain? (Appellant's Assignment of Error 1).

3. Is a subsequent condition (aging), which is wholly foreseeable at the time that the worker is exposed to harmful workplace noise, an independent or superceding cause of disability which breaks the chain of proximate cause? (Appellant's Assignment of Error 1).

4. May this court apportion permanent partial disability for loss of without any factual basis or legislative authority to conduct such an apportionment? (Appellant's Assignment of Error 1).

II. STATEMENT OF THE CASE

A. Statement of Procedure

The respondent generally accepts the appellant's statement of procedure. However, the appellant implies that the Board of Industrial Insurance decided that Mr. Jenkins' claim should be allowed for treatment but not for permanent partial disability. Such an inference would be in error. (Appellant Brief, page 3). In fact, Weyerhaeuser did not appeal from that portion of the January 23, 2004, order allowing the claim and ordering that treatment be provided. They purposively limited their challenge to the causal relationship and extent of the permanent partial disability award. (CABR 35-36). Thus, Weyerhaeuser has admitted that they caused Mr. Jenkins' hearing loss, which did not manifest itself until November 2002, and that they are responsible for his hearing aides.

B. Statement of Facts

1. Workplace exposure and overtime.

John Jenkins worked for Weyerhaeuser for 31 years, from 1949 through 1980. When he first came to Weyerhaeuser he was a young 31-year-old with good health and normal hearing. (J. Jenkins, 59, 61-62). After 31 years of relentless exposure to immense industrial noise he has a

31.1 % bilateral hearing disability plus a 2% disability for tinnitus. By contrast, an average person his age would have minimal hearing disability and no tinnitus. (Exhibit 3).

Mr. Jenkins started as a helper in the digester room. To start the paper making process, huge steam kettles cook wood pulp under intense steam pressure. The digester room is extremely noisy because there is recurrent steam exhaust and the pulp is blown out of the digesters under fierce steam pressure. (Schoonver, 6-12; J. Jenkins, 41-43). This penetrating noise prevents normal conversation and there were frequent occasions when no conversation of any kind could occur. (*Ibid*). When a conversation did occur, a worker would have to get two inches from his co-worker's ear, and yell into that ear to be heard. (Schoonover, 9) Frequently the men simply had to read lips. (*Ibid*).

Several times a week a steam gasket would blow causing a high pitched scream for 15-20 minutes until the problem could be isolated and repaired. (*Ibid,* 11). Mr. Schoonover compared the noise to that of a jet engine. (*Ibid*, 12-13). It was only when the digesters were shut down, every month or two, that it was possible to carry on a normal conversation. Mr. Jenkins worked in the digesters for approximately one year. (J. Jenkins, 42).

Mr. Jenkins then transferred to the lime kiln. (*Ibid*, 43). There he was surrounded by high frequency noise because of the large "ID fan". This fan stood five feet high and ran at high speed. It was impossible to conduct a normal conversation around the fan. (*Ibid*). Although Mr. Jenkins was not provided any hearing protection, areas around the ID fan now require double hearing protection. (Schoonover, 16).

Mr. Jenkins next worked in the screen room which was also very noisy. (*Ibid*). The screen room has a large pump with a diaphragm that creates a vacuum to suck out the pulp. (J. Jenkins, 44-45). These pumps were so noisy that one could not carry on a normal conversation. Mr. Jenkins remembered that he worked in the digesters, the lime kiln and the screen room for a total of five years. (*Ibid*, 44).

During the first five years he worked on a rotating shift which required that he work 48 hours per week. (J. Jenkins, 45). In addition, there was frequent overtime, because the relief shift wouldn't show up and he would be required to work a sixteen-hour day.[1]

Mr. Jenkins remembers that he was transferred to the bleach plant in approximately 1954. (*Ibid*, 46). The bleach plant is four stories high.

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[1] A safe noise exposure is premised upon an eight-hour time weighted average at a maximum of 85 dB. Thus, when a worker works overtime, the "safe" level of noise exposure is decreased proportionally. (Souliere, 13, 54). In other words, working two hours of overtime decreases the safe level of noise exposure by 25% for that day. Even

The pulp enters from the screen room and goes into a chlorinator, which is the first step in bleaching the pulp from brown to white. The bleach plant was also a noisy workstation. (A. Jenkins, 27, 36; J. Jenkins, 45).

Throughout his career Mr. Jenkins worked in the bleach plant without any protection from the unrelenting noise. (J. Jenkins, 54). There are six stages of processing in the bleach plant, each contributing to the overall noise production. There are seven washers in the bleach plant and all were noisy. There was a large drum that pulled the pulp over it to de-water the pulp. (J. Jenkins, 45-47). Then there was another tank where chemicals were added with conveyor belts between each of the tanks. Finally, there was a steam cleaner to clean the washers. Sometime in the early 1970's a plywood shack was built on the top floor provided partial relief, although the workers still continued to work outside of the shack and on all four floors. (A. Jenkins, 27-30; 36-38; J. Jenkins, 45-47). A worker had to raise his voice to talk unless he was in the protected shack.

In addition to the normal noise created in the bleach plant, there were times when the digesters malfunctioned and blew a lid. One of the steam boilers was nicknamed "Buck Rogers" because it would bounce so hard when it blew off steam that it almost jumped off its foundation. It

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under normal conditions the paper mill produced noises that were well above safe levels for a standard eight-hour day. (Souliere, 11-12).

created so much noise and force that it would vibrate the floors and emit a high frequency whistle when it was releasing steam. (J. Jenkins, 48).

Until he retired in 1980, Mr. Jenkins continued to work a steady rotating shift. This work schedule resulted in a 48-hour week every third week. In addition, there were periods of straight over time. For example, he recalled a three-month period of time where he was stuck on twelve-hour shifts. (*Ibid*, 49-50). Overtime was also required for vacation relief and he would come in and work double shifts.

Mr. Jenkins was unable to use hearing protection while he performed his duties because he had to hear to properly monitor the machinery and the manufacturing process. To avoid "getting in trouble" with management he was not able to use any hearing protection throughout his 31 years of employment. (*Ibid*, 54).

Mr. Jenkins' testimony regarding his work environment was strongly confirmed by his two lay witnesses: James Schoonover and Arnie Jenkins. Mr. Schoonover was employed at the Weyerhaeuser pulp mill for 38 years. (CABR, 5). For seven years he worked in the same position as John Jenkins. Later, he worked for over 20 years throughout the mill as a millwright. (Schoonover, 7). Mr. Schoonover confirmed that the mill was so noisy that one had to yell to be heard. (*Ibid*, 9). On many occasions one simply had to read the lips of a coworker or get their lips

within two inches of the ears in order to communicate. (*Ibid*). It was a regular occurrence to have the large steam boilers blow a gasket and emit a high pitched scream. (*Ibid*, 11). When this occurred, he reported that workers could not carry on a conversation anywhere in the building until it was fixed, which would take 15 – 20 minutes. (*Ibid*). This type of problem could happen a couple of times per week, along with a variety of other mechanical breakdowns, which would cause high-pressure steam to be released. (*Ibid*, 12-16). Mr. Schoonover also confirmed that the screen room was extremely noisy due to the fans and the digester, and the actions of the diaphragm in the pump section. (*Ibid*, 17-18). Finally, Mr. Schoonover confirmed that Mr. Jenkins worked regular overtime. (*Ibid*, 21-22). On the occasions when there was a mechanical breakdown that required emergency repair, or vacation relief, a worker could work four to sixteen hours overtime in a single day. (*Ibid*, 20-22).

Arnie Jenkins is John Jenkins' 52-year-old son. He worked at the Weyerhaeuser pulp mill from 1970 to 1977. He worked in the sulfite mill, which employs a mechanical and chemical process similar to the work his father did. He confirmed that his father regularly worked many hours of overtime which he estimated an average of 12 hours per pay period. (A. Jenkins, 31-33). Arnie Jenkins estimated that they built the workers' shack around 1970, on the top floor of the #4 Kraft bleach unit in

the Kraft mill. (*Ibid*, 36). There was a shack on only one of the four floors. (*Ibid*, 38). In terms of potential other loud noises experienced by his father, he commented that he went hunting with his father on several occasions, however, he never recalled his father firing a weapon.

2. Audiograms

Predictably, Mr. Jenkins' damaged hearing deteriorated over time and by November 2002 he was in need of hearing aids. (J. Jenkins, 53). On November 4, 2002, he went to Sears, Roebuck and Co. to obtain a hearing evaluation and a hearing test (audiogram). (*Ibid*, 54). Dr. Souliere[2] testified that this test established a disability rating of 35.63% which he considered reliable. (Souliere, 45, 47-48). Dr. Souliere testified that this audiogram was performed in the standard format and closely conformed to his own testing in 2004 which established a 37.5% disability, less than a 2% increase two years later. (Souliere, 38-39, 47, 48-49). This progression was "well within experience for aging for this period of time." (Souliere, 47).

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[2]Dr. Souliere is a recognized expert regarding noise induced hearing loss (NIHL) and was one of the experts called by the Department of Labor and Industries in the leading case of *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P3d 793 (2002). He is the former Chief of Otolaryngology at Madigan Hospital where he treated men and women whose hearing was damaged by loud noise. Consequently, he has extensive experience treating noise induced hearing loss (NIHL) and tinnitus (persistent ringing in the ears). He has maintained a professional interest in NIHL since entering private practice in 1994 and has evaluated and treated many workers from paper mills and knows them to be very noisy workplaces. (Souliere, 5-10). (Exhibit 1).

Dr. Treyve confirmed that Mr. Jenkins' hearing was greatly and permanently damaged by the workplace noise exposure, describing it as "incredibly noisy with no ear protection". (Treyve, 26-27). Dr. Treyve's assistant performed an audiogram which measured Mr. Jenkins' binaural hearing loss at 28.8% loss.[3] (Treyve, 17-18, 26). Dr. Treyve emphatically agreed that this very substantial disability is "absolutely" due to the combination of the 30 years of harmful noise at Weyerhaeuser plus the aging process. (*Ibid*, 28).

The employer's expert, Dr. Richard Hodgson,[4] confirmed Dr. Treyve's testimony that Mr. Jenkins' ratable hearing loss was due to a combination of his exposure to significant levels of noise at the workplace for over 30 years plus the aging process. (Hodgson, 30-31).

When Mr. Jenkins retired in 1980, he had a cumulative 95 dB loss[5]

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[3] Dr. Souliere testified that there were anomalies in this audiogram and thus questioned its accuracy. (Souliere, 57).

[4] Dr. Hodgson never saw, examined or tested Mr. Jenkins. He did not know Mr. Jenkins' work pattern, shift schedule or overtime. Although he acknowledged that this would have been important information for him to consider. (Hodgson, 24, 32, 36, 37). The November 4, 2002, audiogram (showing 35.63% loss) and Dr. Souliere's testing, evaluation and audiogram were all withheld from him. (*Ibid*, 13).

[5] Throughout this brief the respondent carefully distinguishes between hearing loss, which is the damage done to the inner ear hair cells, ultimately killing those hair cells, versus a hearing disability which is the ratable disability as calculated by the American Medical Association Guides and for which compensation is awarded. (Exhibit 4). One can have significant noise induced hearing loss but, because of the peculiarities and limitations of the rating formula, have no ratable disability. Mr. Jenkins is an example of this phenomenon.

across the four measured frequencies[6] in the left ear and 90 dB loss in the right ear. (Hodgson, 20-21). Using the rating formula (Exhibit 4) this averages out to 23.75 dB loss on the left and 22.5 dB loss on the right, just below the 25 dB low fence and thus zero per cent impairment.[7] Thus, it is Weyerhaeuser's position that they filled his cup to the brim, but since the first drop did not spill until after Mr. Jenkins' retirement, they have no responsibility for his substantial disabilities or his daily difficulty in communicating with his friends and family.

3. Effect of noise induced hearing loss (NIHL) on the aging process.

Dr. Treyve confirmed that the substantial hearing loss caused by the work place noise accelerated "the manifestation of the aging process". In 1980 the damage to Mr. Jenkins' hearing was so severe that only a little more loss through the aging process would then make him ratable by our standards. (Treyve, 32).

Dr. Souliere explained that Mr. Jenkins' NIHL accelerated the harm from the aging process because the damage caused by the early years

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[6] Although human hearing ranges from 200 Hz to 20,000 Hz, only four frequencies are measured to establish disability: 500 Hz, 1000 Hz, 2000 Hz and 3000 Hz. (Exhibit 4). These frequencies are abbreviated as (5,1,2,3). Speech is heard in the frequencies of 250 Hz to 8000 Hz. (Appendix A.)

[7] Under the current formula a worker is not entitled to any compensation unless the damage to their hearing exceeds 25 dB averaged across the four rated frequencies. (Exhibit 4). This threshold correlates without the amount of loss that an average person will experience over their lifetime. (Exhibit 3) (Souliere, 21-22).

of NIHL results in the death and destruction of a large number of hair cells which "leaves a much smaller number of hair cells available for normal hearing and gives the patient much less a margin of safety, if you will, for aging." (Souliere, 24). These substantial early losses predisposed Mr. Jenkins to experience a hearing disability as he grew older. (Souliere, 33-34).

4. Action by the trial court.

This case was tried as a bench trial before the Honorable James Edgar F. Xavier Warme of the Cowlitz County bench. Judge Warme initially heard cross-motions for summary judgment and found that Mr. Jenkins' exposure to 31 years of harmful noise was a proximate cause of his hearing disability. At the subsequent bench trial Judge Warme weighed the evidence showing disability ratings of 37.5% (Souliere, 39). 35.63% (*Ibid, 51*), 27.19% (*Ibid*, 39) and 26.56% (*Ibid*, 49). Presumably he accepted Dr. Souliere's opinion that the anomalies in the audiograms with the lower ratings limited their usefulness. (*Ibid*, 57). After weighing all of the evidence, Judge Warme concluded that Mr. Jenkins' had a 31.1% hearing disability proximately caused by his exposure to noise at Weyerhaeuser. His conclusion closely mirrors the original decision by the Department of Labor and Industries to award Mr. Jenkins 27.19%. (CABR, 66). Separately, he accepted Dr. Souliere's testimony that Mr.

Jenkins also suffered a 2% disability for his separate condition of tinnitus. (Souliere, 27).

5. Significance of Hearing Loss Exhibits

Mr. Jenkins offered three exhibits that pertain to specific issues relating to hearing loss issues: Exhibits 2-4. These charts are taken from Dr. Robert Dobie's *Medical-Legal Evaluation of Hearing Loss*, First Edition, (1993), which was established as a learned treatise by Dr. Souliere. (Souliere, 18).

Exhibit 2 shows the effect of the exposure to noise on a person's normal hearing. "NIPTS" stands for "noise induced permanent threshold shift" which is the medical definition of permanent hearing loss due to harmful noise. The significance of this chart is that NIHL occurs across all frequencies from 250 Hz through 8000 Hz. (Souliere, 18-19). This chart directly contradicts and impeaches Dr. Hodgson's testimony that no significant noise induced hearing loss (NIHL) occurs below 1000 Hz. (Hodgson, 9).

The other significance of Exhibit 2 is to show that most of the permanent hearing loss occurs in frequencies from 2000 Hz to 8000 Hz and above. This fact is significant because the rating formula (Exhibit 4) only considers loss up through 3000 Hz, even though Mr. Jenkins was seriously harmed at higher levels that affect his hearing. In addition,

contrary to Weyerhaeuser's assertion, speech perception is also significantly affected above 3000 Hz. See discussion re Appendix A below.

Exhibit 3 shows the average hearing loss, on a population basis, due to aging. The left scale is the average of the hearing loss at the four frequencies: 500, 1000, 2000, and 3000 Hz. The lower scale is years of age. Exhibit 3 shows that, on a population basis, aging does not cross the 25 dB "low fence" and thus does not cause significant (i.e., ratable) hearing loss until beyond age 75. (Souliere, 21-22). There is no known data regarding the average loss after age 75 and thus one cannot extrapolate beyond age 75. (Souliere, 37-38). Dr. Treyve testified that, on an individual basis, hearing loss due to aging varies greatly and he has seen individuals in their 80's with minimal loss. (Treyve, 13-14).

Exhibit 4 establishes that only four frequencies are considered in the rating of hearing loss even though the actual harm easily extends beyond 3000 Hz and up to 8000 Hz and beyond (Exhibit 2; Appendix A). Second, the rating formula deducts 25 dB (known as the "low fence") off the top in terms of rating permanent partial disability. (Souliere, 21-22). Thus, if a person has losses of 25 dB in each of the four frequencies he has a 100 total dB loss. That sum is divided by four to equal an average of 25 dB loss and when the 25 dB low fence is then subtracted, the result is zero

ratable disability. This deduction explains why Mr. Jenkins suffered 31 years of damage to his hearing, and yet had no ratable disability when he retired in 1980. This formula has the effect of prematurely deducting for the loss due to aging that is experienced over a lifetime. (Souliere, 21-22; Exhibit 3). Under this formula an average person will have minimal or no ratable hearing loss over their lifetime. (Exhibit 3). These bedrock graphs and data support Dr. Souliere's opinion that Mr. Jenkins' age related hearing loss (ARHL) did not contribute to his ratable disability. (Souliere, 23).

Appendix A is another chart taken from Dr. Dobie's book. This chart demonstrates that the frequencies of speech range from 250 through 8000 Hz. Thus, the harm to the individual in every day activities, such as listening to a family member, is not adequately reflected in the rating formula, as the impact on the ability to hear speech significantly exceeds the four frequencies (5,1,2,3) of the rating formula. (Exhibit 4).

III. ARGUMENT SUMMARY

Mr. Jenkins has met his burden of proving that his thirty years of exposure to unrelenting and incredible workplace noise has resulted in a permanent loss to his hearing equal to 31.1% and a 2% rating tinnitus.

Throughout his 31years, Mr. Jenkins was never able to wear hearing protection even though, currently, some areas where he worked now require double hearing protection.

The three medical experts agree that there were two causes to Mr. Jenkins' hearing loss: noise induced hearing loss (NIHL) and age related hearing loss (ARHL). Neither his NIHL nor ARHL, independently, caused his hearing disability. Rather the two sources of harm combined to boost Mr. Jenkins over the 25 dB low fence, require treatment, and result in a permanent partial disability. NIHL and ARHL are additive. For example, a worker having a 15 dB average loss from NIHL, and a 15 dB average loss from ARHL has a combined 30 dB average loss, which places that worker 5 dB over the 25 dB "low fence". Thus, both NIHL and ARHL are a "proximate cause" of his need for treatment and his hearing loss. Even though the ARHL came second in time, it is neither a new or independent cause of Mr. Jenkins' hearing loss.

There is neither a factual basis nor legal authority for segregation or apportionment of any hearing disability due to age related hearing loss. The evidence establishes that Mr. Jenkins had none, or at best, a minor amount of permanent partial disability due to the aging process. Either way, this fact was taken into consideration by Judge Warme in evaluating

the evidence and awarding a 31.1% disability, where one audiogram showed a 35.63% loss and another showed at 37.05% loss.

IV. ARGUMENT

A. Mr. Jenkins' 31 years of work in an "incredibly noisy" paper mill is a proximate cause of his 31.1% hearing disability.

1. Mr. Jenkins' hearing disability is the result of multiple (two) proximate causes: NIHL and ARHL and thus is covered under the Industrial Insurance Act. (IIA).

It is beyond question that Mr. Jenkins' 31.1% hearing disability is the direct result of his work at the Longview Weyerhaeuser paper mill. All doctors agree that his hearing disability is due to two factors: his occupational noise exposure and the aging process.[8] (Souliere, 13, 24; Treyve, 33; Hodgson, 22, 31). Weyerhaeuser seeks to avoid responsibility for their actions by arguing that, although they took Mr. Jenkins right to the brink of disability, that since he retired before his cup spilled, they have no responsibility for his losses. This position is legally indefensible.

[8] Although Dr. Hodgson speculated that there may be other contributing causes, such as cardiovacular disease, he admitted that he has never met Mr. Jenkins, much less examined him. Dr. Hodgson conceded that he is a frequent examiner for Weyerhaeuser and their attorney, did not know the amount of overtime that Mr. Jenkins worked and ultimately conceded that any cause other than NIHL or ARHL was speculative. (Hodgson, 24, 26, 32, 39).

The medical testimony is completely consistent with Exhibit 3 which shows that, for the average person,[9] no ratable hearing disability is established until considerably after 75 years of age, and even then any disability would be very small.[10]

Worker compensation law has long established that a condition is appropriately accepted if there are multiple proximate causes to that condition. *Bremerton v. Shreeve*, 5 Wn. App 334, 777 P.2d 568 (1989). In Mr. Jenkins' case both Dr. Souliere and Dr. Treyve agree that there are only two causes of Mr. Jenkins' hearing disability: noise induced hearing loss (NIHL) and age related hearing loss (ARHL). (Souliere, 13, 24; Treyve, 33). Dr. Hodgson agreed, although he speculated regarding the remote possibility of other causes. (Hodgson, 22, 30-31). Judge Warme rejected this speculation by Dr. Hodgson. (CP 61, Findings of Fact 6, 7). The medical evidence is undisputed that neither Mr. Jenkins' NIHL or ARHL was sufficient to cause disability on its own. All parties agree that,

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[9] No doctor testified that Mr. Jenkins' aging process significantly deviated from the average and Dr. Souliere, noting the 2% difference between the 2002 and 2004 audiograms found this progression to be "well within experience for aging for this period of time." (Souliere, 47).

[10] Presumably Judge Warme took this possible aging contribution into consideration in his determination of a 31.1% disability award, given that the audiograms considered by the doctors were: 11/4/2002 – 35.63%; 1/10/03 – 26.56%; 8/7/03 – 27.19% and 9/20/04 - 37.5% and he selected no rating in its' entirety. (CP 61, Finding of Fact 8). As the fact-finder, Judge Warme was entitled to resolve the percentage of disability within the range of the medical testimony. *Page v. Dep't of Labor & Indust.*, 52 Wn.2d 706, 710, 325 P.2d 663 (1958).

when he retired in 1980, he had no ratable hearing disability. (Souliere, 19; Treyve, 23; Hodgson, 21). Judge Warme specifically found that Mr. Jenkins' NIHL was a proximate cause of his need for treatment and permanent partial disability. (CP 61, Finding of Fact 6).

With respect to whether aging was an independent cause of Mr. Jenkins' hearing disability, the only witness to address this issue was Dr. Souliere, who testified:

> The difference in hearing loss from 1980 to 2003 demonstrates the patient would not have had a ratable hearing loss due to aging alone, if not for his prior history of noise exposure. (Souliere, 23). (Emphasis added).

This testimony stands uncontradicted.

Thus "but for" Mr. Jenkins' industrial noise exposure he would not have any ratable hearing loss, and certainly would not have the huge 31.1 % loss that has been established. Any permanent partial disability due to aging would have been minor and this component was taken into consideration by Judge Warme. Thus, whether ARHL caused no permanent partial disability, or a minor amount of permanent partial disability, the outcome of this case is not affected as clearly both scenarios were considered by the finder of fact.

2. There is a significant range of individual susceptibility to hearing loss from harmful levels of noise.

NIHL presents an anomaly when compared to other occupational diseases in that hearing loss occurs at the time of exposure to loud noise and the progression of the NIHL ends with the cessation of the noise, although the damage is permanent. *Pollard v. Weyerhaeuser*, 123 Wn. App 506, 98 P.3d 545 (2004). As noted in *Dennis v. Dep't of Labor & Indust.*, 109 Wn.2d 467, 472, 745 P.2d 1295 (1987) in some instances disability from an occupational disease may manifest itself "swiftly", in other cases "slowly". In the context of hearing loss claims there are several variables that affect the harm that can be caused by harmful noise. As noted by Dr. Dobie, there is significant human variability in the experience of noise and, for reasons not fully understood, harmful noise will harm one person, but not harm a co-worker with the identical exposure:

> A group of factory workers with identical age, seniority and occupational noise exposure will demonstrate highly variable degrees of hearing loss..." Robert Dobie, MD, *Medical Legal Evaluation of Hearing Loss*, First Edition, 1993 at 153. (Emphasis added).

See, also Harry v. Buse Timber & Sales, Inc., 134 Wn. App 739, 132 P.3d 1122 (2006).

In addition to individual susceptibility, some noise exposures are so severe (e.g., an explosion) or extend late into a worker's life, such that they manifest themselves during employment. Other exposures occur either for a relatively shorter time or earlier in a worker's career and thus do not manifest themselves until after retirement.

When a hearing loss manifests[11] itself during the employment which caused the loss, the question of proximate cause is easy. More challenging is the circumstance where the hearing loss manifests itself while the worker is with a new employer (where he may or may not have been exposed to harmful noise) or after retirement. Regardless of whether the manifestation occurs with the employer who is responsible for the last injurious exposure, or at a later time, each worker should be treated equally. *See, Weyerhaeuser v. Tri*, 117 Wn.2d, 814 P.2d 628 (1991). In other words, if the workplace noise proximately caused the need for hearing aids and a 10% disability rating, each worker should receive those benefits regardless of whether the manifestation occurred during employment with the employer of last injurious exposure or during retirement.

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[11] Hearing loss manifests itself when it first requires treatment or results in ratable permanent partial disability. RCW 51.32.180; *Boeing v. Heidy*, *infra*. Here Judge Warme's affirmation of the Board finding, that Mr. Jenkins' hearing loss manifested itself in November 2002, is undisputed.

Realistically, all hearing loss and hearing disability is the result of multiple proximate causes, insofar as the normal aging process inevitably contributes some degradation of the hearing cells (although this process usually cannot be perceived by the individual). It is obvious that a person ages in the normal manner during their working career. Thus, by the time that an injurious noise exposure results in the need for hearing aids or a ratable disability, there will be a minor component of ARHL as well as the NIHL.

3. The NIHL is not a "condition" upon which aging acts.

Weyerhaeuser argues that, since Mr. Jenkins' NIHL occurred before the date of manifestation, it is a preexisting condition which is incorporated into the injury at the time of the manifestation. They cite *Miller v. Dep't of Labor & Indust.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939) and *Dennis* for this proposition. These cases stand for the principle that you take an injured worker as you find him and neither supports Weyerhaeuser's argument. In fact, Weyerhaeuser's argument is an attempt to stand *Miller* on its head to undercut the rule of multiple proximate cause, a rule that has been a bedrock legal principle for over a century.

It is worth noting that the principles established in *Miller* and *Dennis* are not new or unique to worker compensation law. Rather, the principle that you take a person (worker) as you find them, has been a core principle in establishing damages for many years and in many venues. *E.g.*, *Nicholson v. Postal Telegraph Cable Co.*, 162 Wash. 603, 229 P.2d 397 (1931) (holding that the infirm, weak and decrepit are as entitled to compensation for physical injuries as the strong and robust). *See also*, WPI 3018.

In *Miller*, a 26-year-old longshoreman injured his back while lifting a 500-pound drum. He failed to make a full recovery and, while receiving further treatment, it was determined that he had a pre-existing "congenital absence of the neural arch of the first sacral segment." 200 Wash. at 676. Mr. Miller declined surgery and thereafter was rated for his disability. The doctors testified that his permanent partial disability was "partly due to a congenital weakness as formerly described, and partly due to his injury to his already weakened structure." (*Ibid*, 678). In their judgment, Mr. Miller's permanent partial disability could be attributed 50 percent to the congenital condition and 50 percent to the injury and awarded him a net 40 degrees of impairment for the portion they attributed to the injury.

On appeal the *Miller* court rejected this attempt to allocate a portion of the disability to a congenital condition and held that "the accident or injury was the proximate cause of appellant's ultimate disability, and...his prior congenital weakness was but a condition upon which the injury became operative." (*Ibid*, 683). *Dennis* is in accord. (Where pre-existing arthritis is aggravated by work activities, disability is wholly attributable to employment). Simply stated: you take a worker as you find him.

Neither *Miller* nor *Dennis* address the issue presented in this case: namely how is a second proximate cause factored in when aging occurs after the harmful exposure and combines with that exposure to cause a need for treatment (hearing aids) or a ratable disability?[12]

Mr. Jenkins has two sources of hearing loss: NIHL and ARHL, neither of which, alone, resulted in either a need for treatment or a permanent partial disability. However, together they created a need for treatment as well as a ratable disability. Again, this anomaly is largely peculiar to hearing loss claims, as distinguished from other occupational diseases, and occurs because of the role of the 25 dB low fence which

[12] All doctors agree that NIHL and ARHL are "additive." This means that 20 dB of NIHL plus 20 dB of ARHL equals 40 dB of total loss. (Souliere, 34; Treyve, 32).

deducts 25 decibels of average loss across the four frequencies (500, 1000, 2000, 3000) before any assessment of ratable disability applies.

For example, a person can have a 15 dB average loss due to aging (by definition asymptomatic and non-ratable, Exhibit 4) and a 15 dB average loss due to occupational noise, equaling a gross loss of 30 dB (5 dB over the 25 dB "low fence", (Exhibit 3).) and thus would be symptomatic and ratable. It is Weyerhaeuser's position that, even though Mr. Jenkins' ARHL would not cause any ratable disability, they are nevertheless not responsible for any of his permanent partial disability. This is patently unfair on its face and does not comport with industrial insurance law.[13]

4. Weyerhaeuser's action of allowing the claim and providing hearing aides is inconsistent with their argument regarding *Miller* and *Dennis*.

Logically, it should be Weyerhaeuser's position that they are not responsible for providing Mr. Jenkins' hearing aides or his permanent partial disability, as he did not need hearing aides or have a ratable disability until 23 years after he retired. However, illogically, they have conceded that Mr. Jenkins' NIHL is a cause of his need for treatment and agree that his claim should be allowed and treatment provided, but deny

[13] Dr. Souliere was firm in his view that to conclude that none of Mr. Jenkins' hearing disability was due to his NIHL would be inappropriate. (Souliere, 25).

responsibility for the permanent partial disability which established the need for that treatment. By taking this action they necessarily admit that the NIHL was a proximate cause of his need for treatment as he did not manifest a need for treatment until November 2002, a Finding of Fact they have conceded. (CP 61, Findings of Fact 3, 4).

In part they base their argument on Dr. Treyve's speculation that Mr. Jenkins would have benefited from hearing aides in 1980 (if this were true it would establish a date of manifestation in 1980. *See,* footnote 11). However this speculative testimony was rejected by Judge Warme who concluded that the need for treatment arose in November 2002.

There is no logical explanation for their position that they are responsible for the hearing aides, as demonstrated by the 35.63% audiogram taken when he went in for hearing aides, but are not responsible for the disability itself. Mr. Jenkins was not in need of treatment at the time that he retired. The only possible explanation for the need for treatment, 23 years after he retired, is due to the multiple proximate causes of NIHL and ARHL.

To take Weyerhaeuser's position to its logical extreme: if a worker did not need hearing aides when he retires he should never be awarded hearing aides as, by definition, any post-retirement change in his hearing would be due to ARHL.

Accordingly, the proper analysis is not to stand *Miller* and *Dennis* on their heads, but rather to apply the well established rule of multiple proximate cause.

B. Aging is a not a "new independent cause" of Mr. Jenkins hearing loss or hearing disability.

Proximate cause has two prongs: cause in fact and legal cause. *Joyce v Dep't of Corrections*, 155, Wn.2d 306, 119 P.3d 825 (2005). *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d, 350, 961 P.2d 952 (1998). There can be more than one proximate cause of a condition or disability under Title 51. *Bremerton v Shreeve, infra.*

Where there is more than one cause of a disability the courts have been very critical of any attempt to limit the awarding of permanent partial disability based upon that disability caused "solely" by the industrial injury. In *Wendt v. Dep't of Labor & Indust.*, 18 Wn. App at 684, an instruction was given, which stated in part:

> "The plaintiff is entitled to compensation *only* for disability proximately caused by the industrial injury of April, 26, 1968." (Emphasis in original).

The giving of this instruction was held to be reversible error on the basis that it could be used to argue that the industrial injury must be the sole proximate cause of the disability. This is precisely Weyerhaeuser's

argument. This argument was properly rejected in *Wendt* and it should be rejected again here.

There is a well-established body of case law that discusses when a second cause is "new and independent" and therefore a superceding cause, as distinguished from when it is merely a co-proximate cause of the disability.

1. An intervening act can only be a superseding cause if it is wholly unforeseeable.

Weyerhaeuser argues that aging is an intervening and superseding condition that relieves them of all responsibility for Mr. Jenkins' permanent partial disability. This position is without merit.

In the context of a negligence case,[14] the court in *Smith v Acme Paving* 16 Wn. App 389, 396, 558 P.2d 811 (1976) emphasized that:

> Where a defendant's original negligence continues, and contributes to the injury, <u>the mere fact that another's intervening negligent act is a further cause of the accident does not prevent defendant's act from constituting a cause for which he is liable.</u>
>
> ... The intervening ... act of another will not supersede the original actor's negligence as a proximate cause of the injury where the original actor should reasonably foresee

[14]Industrial Insurance is, of course, a no fault system. RCW 51.04.010. This fact does not alter the fundamental principles of proximate cause, it merely eliminates two prongs of tort liability, namely the existence of a duty and the breach of that duty. Under the Industrial Insurance Act (IIA) responsibility is assigned once a worker establishes an employment relationship and the fact that an injury or occupational disease occurred in the course of employment, regardless of fault. RCW 51.12.010.

> the occurrence of such an event. Only when the intervening negligence is so highly extraordinary or unexpected that it can be said to fall without the realm of reasonable foreseeability as a matter of law, will it be held to supersede the defendant's negligence. (Emphasis added, citations omitted).

Accord: *Cramer v Dep't of Highways,* 73 Wn.2d 516, 520, 870 P.2d 999 (1994). Or, as stated in *McCoy v. American Suzuki Motor Corp*, 136 Wn.2d 350, 358, 961 P.2d 952 (1998):

> "... the defendant's actions are the cause in fact of plaintiff's injuries if the defendant's wrongdoing produced the injuries complained of and any intervening cause was reasonably foreseeable. (Emphasis added).

The *McCoy* court when on to hold:

> "Whether an independent cause is reasonably foreseeable is generally a question of fact for the jury. (Emphasis added).

Here, of course, the fact finder was Judge Warme, who expressly determined that "Aging is not a superseding intervening cause but is a consequence which is inevitable." (CP 27). He specifically found that the aging process was neither a new or independent cause. (CP 61, Finding of Fact 6). In other words, the aging process was foreseeable and thus is not a new, intervening cause. As Judge Warme explained: the industrial noise is the first proximate cause and "[a]ging is the second proximate cause". (CP 27).

Like all of us, Mr. Jenkins continued to age after his retirement. It was clearly foreseeable that his aging would combine with the NIHL and cause a need for treatment. Weyerhaeuser makes no attempt to assert that they did not reasonably foresee that Mr. Jenkins would age.

C. There is no basis for any apportionment of Mr. Jenkins' hearing loss.

At page 28 of their brief Weyerhaeuser argues that the additional non-industrial hearing loss represents "an approximately 50%" of the 31.1% rating and asks this court to reduce Mr. Jenkins award proportionally. First, there is no medical testimony to support Weyerhaeuser's assertion of "an approximately 50%" sharing of responsibility. This argument and mathematical division are entirely the creation of counsel and is not supported in the record. Thus, there is no factual basis to support any percentage apportionment.

Regardless, there is no legal authority for apportioning (which necessarily presumes a finding of proximate cause) in the manner that the employer proposes.

1. There are only two statutory provisions which allow reduction of a worker's permanent partial disability award for conditions unrelated to the underlying injury or disease and neither allow for the offset of the aging process.

a. RCW 51.32.080(3).

This section reads:

> "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." (Emphasis added).

As can be seen, this section requires that a worker have a preexisting permanent partial disability prior to the industrial injury or occupational disease, before the statute applies.

Moreover, the disability must be active and symptomatic and must not have remitted or become dormant. *Bennett v. Dep't. of Labor & Indust.*, 95 Wn.2d 531, 535 N.1, 627 P.2d 104 (1981) (three prior back surgeries did not justify offset of 40% of a 60% award for current low back injury where worker had fully recovered and returned to hard labor); *Rehberger v. Dep't. of Labor & Indust.*, 154, Wash. 659, 283 Pac. 185 (1929) (prior 70% disability award for a previous leg injury did not justify reduction of current disability award for the same leg where evidence showed worker had fully recovered from his prior injury and that the disability had become latent or dormant).

When Mr. Jenkins began working for Weyerhaeuser in 1949 he was 31 years old and had normal hearing. There is no medical testimony to suggest that, at any time prior to his exposure to harmful noise at Weyerhaeuser, he had impairment to his hearing. Thus, Mr. Jenkins did not "already" have any permanent partial disability at the time that he was harmed by Weyerhaeuser's occupational noise. Consequently, there is no statutory authority for segregating any preexisting permanent partial disability as none existed at the time that the occupational noise manifested itself in disability.

b. RCW 51.32.100.

This statute provides:

> If it is determined that an injured worker <u>had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery</u> from such injury, <u>it shall be ascertained</u>, as nearly as possible, the period over which the injury would have caused disability were it not for the diseased condition and <u>the extent of permanent partial disability which the injury would have caused were it not for the disease, and compensation shall be awarded only therefor</u>. (Emphasis added.)

This statute is written to cover that rare situation where a preexisting and symptomatic disease interferes with the normal healing of an injury. The classic example is preexisting advanced diabetes which prevents the

healing of a laceration which would otherwise heal in days or weeks. It is apparent that this section does not apply for several reasons.

First, aging is not a disease. "A disease" is defined as "a particular destructive process in an organism, with a specific cause and characteristic symptoms; specific illness; ailment." *Webster's New World Dictionary.* Although the medical testimony established that Mr. Jenkins' age related hearing loss contributed to his ratable loss, none of the doctors characterized it as a "disease."

Second, no physician testified that Mr. Jenkins had a preexisting disease that delayed or prevented complete recovery. There is no medical testimony that there was any delay or retarding of recovery due to a preexisting disease. Once a permanent threshold shift (i.e., permanent hearing loss) is caused by harmful noise, it is irreversible and there is no treatment that will reverse the loss. The only "treatment" is to provide hearing aids, a prosthetic device that amplifies the exterior sound to overcome the reduced ability to hear

D. The extent of permanent partial disability is established on the date the closing order is issued.

The final closing order in this case was issued on January 23, 2004. The historic and longstanding rule is that permanent partial disability is determined at the time that the claim is closed. *Sepich v. Dept. of Labor &*

Indust., 75 Wn.2d 312, 450 P.2d 940 (1969); *Dotson v. Dept. of Labor & Indust.*, 48 Wn.2d 855, 296 P.2d 1006 (1956); See, also, WPI 155.10. In *Sepich*, the court stated at page 320:

> We have held, in appeals from orders closing claims with a lesser award than that sought by respondent, that the issue is the correctness of the order of the Supervisor on the date it was issued (*i.e.* the closing date). (Emphasis added, citations omitted).

There is no statutory authority for the proposition that changes due to the aging process can be taken into consideration and apportioned in the permanent partial disability accordingly. If this were true, then every permanent partial disability rating in every worker compensation claim would be subject to apportionment.

Even if apportionment were appropriate, the proposed method, of splitting it 50-50, is unreasonable. In light of Exhibit 3, it is clear that Mr. Jenkins' aging would have caused little, if any, ratable hearing disability. To fairly determine how much harm was caused by NIHL, the proper mechanism would be to first deduct all ARHL and then determine that whatever remained was due to NIHL. As has been previously discussed, Dr. Souliere performed exactly this task and determined that ARHL was insufficient to cause any disability, consequently all of Mr. Jenkins' permanent partial disability is due to NIHL.

The request for apportionment should be rejected for two additional reasons. First, it is inconsistent with the rule of liberal interpretation. RCW 51.12.010. As stated in *Dennis* at 470:

> RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided (by the Act) regardless of questions of fault and to the exclusion of every other remedy." To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. (Emphasis added, citations omitted).

Second, prior requests to apportion permanent partial disability in hearing loss claims have been rejected by the courts. In *Weyerhaeuser v Tri, supra*, the court rejected this employer's attempt to apportion hearing disability on the grounds that there was no legal authority for that action. The court noted that the IIA allows apportionment in only three circumstances: RCW 51.32.080 and .100 – discussed above, and for second-injury fund pensions, which does not apply here. Consequently, they rejected Weyerhaeuser's attempt to judicially amend the IIA.

As there is neither a factual nor legal basis for any attempt to apportion Mr. Jenkins' permanent partial disability, the request should be rejected.

E. Mr. Jenkins is entitled to an award for tinnitus.

Tinnitus is a medical condition characterized by ringing in the ears which is separate and distinct from hearing loss. It is due to damage to the outer hair cells, and like hearing loss, can be caused both by noise and by aging. (Souliere, 26). In Dr. Souliere's opinion, Mr. Jenkins demonstrated tinnitus, which he felt was causally related to Mr. Jenkins' significant workplace noise exposure. Dr. Souliere rated Mr. Jenkins' tinnitus at 2%. This rating was accepted by Judge Warme. Even Dr. Hodgson acknowledged a 1% tinnitus rating. (Hodgson, 27). Dr. Treyve noted that Mr. Jenkins had experienced tinnitus since at least 2000 and probably before that. (Treyve, 16).

As the finder of fact, Judge Warme was entitled to accept Dr. Souliere's opinion that Mr. Jenkins was entitled to a 2% rating for his tinnitus as a permanent partial disability award. *Page*. There is clearly substantial evidence to support Judge Warme's findings in this regard.

F. Should he prevail to any degree, Mr. Jenkins is entitled to attorney's fees on appeal.

RCW 51.32.130 provides for attorney's fees before the Court of Appeals, following an appeal by an employer, if Mr. Jenkins succeeds in defending his entitlement to benefits. *McIndoe v. Dep't. of Labor & Indust.*, 100 Wn. App. 64, 995 P.2d 616 (2000); *Brand v. Dep't of Labor*

& Indust., 139 Wn.2d 623, 989 P.2d 1111 (1999). Accordingly, fees and costs for representation before this court should be awarded if any of Mr. Jenkins' claim is sustained.

The suggestion that, should the trial court be partially reversed, a remand for reconsideration of attorney fees would be appropriate is without merit. This argument clearly disregards the reasoning of *Brand* and *Heidy.*

In *Brand*, the issue was whether attorney's fees should reflect the overall recovery made by the worker. In that case, Mrs. Brand sought a pension valued at $113,583. Instead, the jury awarded her a slight increase in her permanent partial disability, equal to $3120 or approximately 2.7% of the sum she had requested. The Department argued that Mrs. Brand's attorney's fees should be reduced to reflect this very modest recovery. The *Brand* court rejected this argument noting that the general purpose of most fee shifting statutes is to punish frivolous litigation and encourage meritorious litigation. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993). The court further observed that the amount of the recovery, in a worker compensation case, is but little if any guide. *Rehberger v. Dept. of Labor & Indust., supra.*

Importantly, the *Brand* court favorably noted the 1993 amendment to RCW 51.52.130, which specifically allowed for the recovery of fees

when a worker successfully defends against an appeal from the Board order. *Brand*, at 667-668. Thus, the *Brand* court held that the worker's degree of overall recovery is inconsequential and that the overall recovery is not a relevant factor in calculating the attorney's fees award. The court specifically rejected the argument that attorney's fees should be limited to those fees that are attributable to successful claims. (*Ibid*, 671).

Although the employer cites and discusses *Heidy,* it is apparent that they have completely ignored the holding. Discussing the plain language of RCW 51.52.130 the Supreme Court noted that Mr. Heidy sustained his right to relief even though he lost on two of three related issues. The Court rejected Boeing's attempt to twist the *Brand* holding and affirmed the award of full attorney's fees by the trial court. Thus, unless Judge Warme is reversed on all issues, and the Board of Industrial Insurance Appeals' order is reinstated in its entirety, there is no legal basis for a remand.

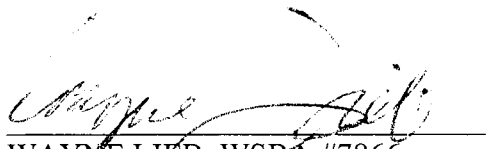
V. CONCLUSION

For the reasons stated Mr. Jenkins respectfully requests that this court affirm Judge Warme, and the Department of Labor and Industries, and declare that his 31 years at the Weyerhaeuser paper mill was a

proximate cause of his 31.1% hearing permanent partial disability and his 2% tinnitus disability and affirm the trial court in all other respects.

Respectfully submitted this 9th day of July, 2007.

PUTNAM & LIEB



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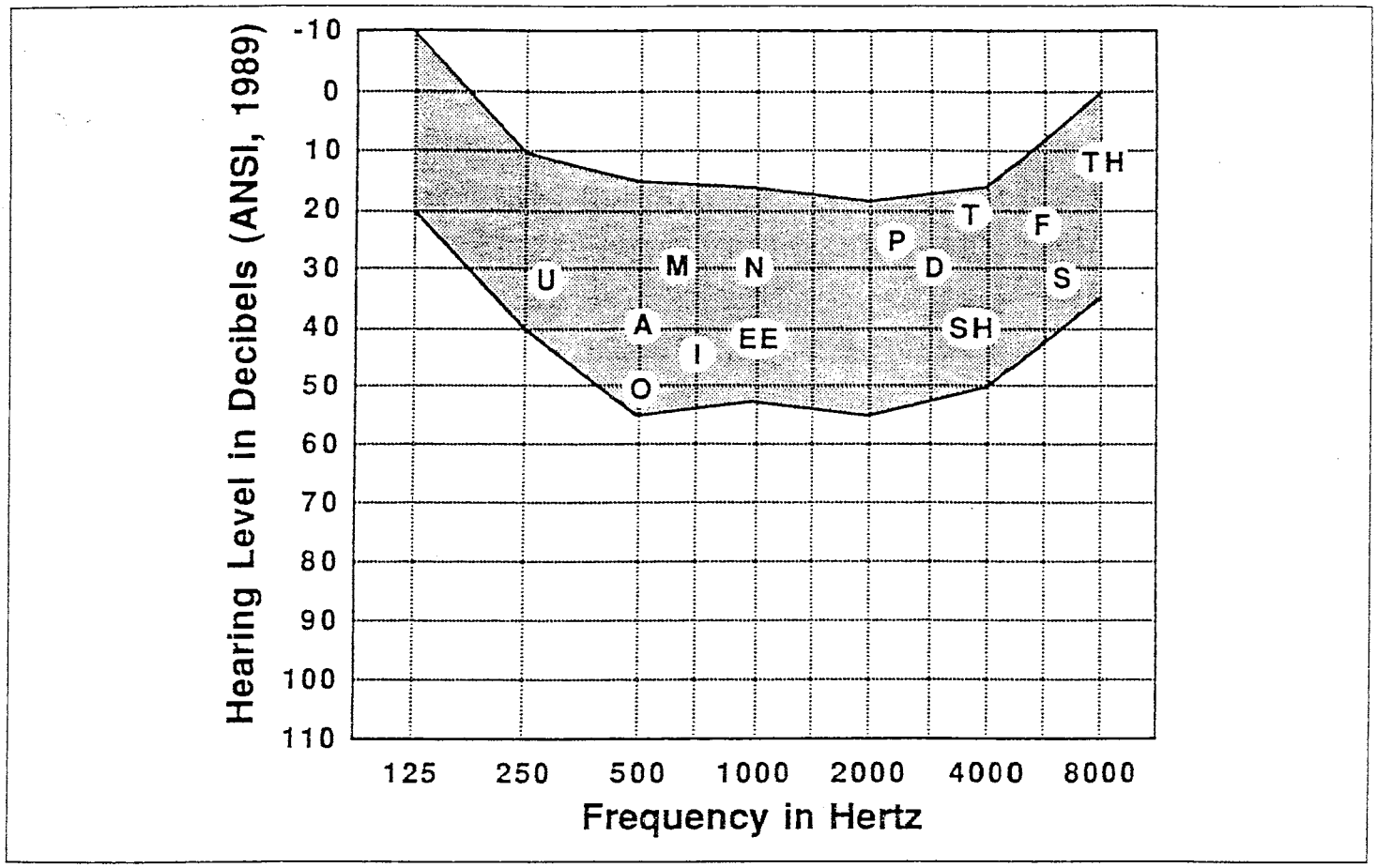

Figure 3–9. Peak energies for several speech sounds, along with the typical energy envelope for running speech (shaded area) are superimposed on the audiogram.

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

JOHN JENKINS, Respondent, vs. WEYERHAEUSER COMPANY, Appellant.	NO. 36018-7-II **DECLARATION OF MAILING**

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a United States Citizen and over the age of 18 years.

On July 9, 2007, I deposited in the US mail Brief of Respondent to Craig Staples, PO Box 70061, Vancouver, Washington, 98665, and John Wasberg, Assistant Attorney General, 800 Fifth Avenue, Suite 2000, MS TB-14, Seattle, Washington, 98104-3188.

DATED this 9th day of July, 2007, at Olympia, Washington.

Brandi Morgan