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No. 39291-7-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS**

**DIVISION II**

**OF THE STATE OF WASHINGTON**

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IRENE HOOD and the  
DEPARTMENT OF LABOR & INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondents,

v.

WEYERHAEUSER COMPANY & SUBSIDIARIES,

Appellant.

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**BRIEF OF APPELLANT**

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in granting judgment for Mrs. Hood and the Department of Labor and Industries. (CP 148).<sup>1</sup>
2. The trial court erred in concluding that calculation of Mrs. Hood's death benefits should be based on Mr. Hood's wages as of his March 30, 1990 voluntary retirement. (CP 148).
3. The trial court erred in awarding Mrs. Hood and the Department assessed attorney fees and costs. (CP 148-50).

### B. Issues Pertaining to Assignments of Error

1. Did the legislature intend that death benefits serve the purpose of replacing future wages lost due to death resulting from an occupational disease or injury? (Assign. of Err. 1 and 2).
2. Does a surviving spouse have any expectation of her husband receiving future wages after he has voluntarily retired? (Assign. of Err. 1 and 2).

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<sup>1</sup> Unless otherwise noted, all references to the Clerk's Papers on these consolidated appeals are to those for Cause No. 06-2-01943-2. (The records for the consolidated cases are nearly identical.) The judgment is found beginning at CP 149 on Cause No. 06-2-01910-6.

3. Are death benefits for an occupational disease based on the worker's wages as of the date his disease became manifest? (Assign. of Err. 1 and 2).

4. When a surviving spouse is deemed entitled to death benefits, but the worker had voluntarily retired before the manifestation of his occupational disease, are the benefits properly calculated on the basis of the statutory minimum? (Assign. of Err. 1 and 2).

5. Are Mrs. Hood and the Department entitled to assessed attorney fees and costs? (Assign. of Err. 3).

## II. STATEMENT OF THE CASE

Leslie M. Hood worked as a millwright for Weyerhaeuser from 1964 until he retired on March 30, 1990. (CABR 127).<sup>2</sup> He was exposed to asbestos during the course of his employment. (*Id.*). He was in good physical health at the time of his retirement and he retired solely due to his age (67) and his desire to relax. (CABR 94-98). Mr. Hood apparently returned to Weyerhaeuser in a self-employed capacity on two subsequent occasions in 1990; however, after that he did not seek any employment or earn any

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<sup>2</sup> "CABR" is the certified appeal board record, which is included as Clerk's No. 5 in the Clerk's Papers for both superior court cause numbers.

wages from employment. (CABR 94).

On January 24, 1997, Mr. Hood first sought treatment for pulmonary concerns and was diagnosed with mesothelioma related to his workplace exposure to asbestos. (CABR 127). Mr. Hood died from the mesothelioma on August 28, 1999. (*Id.*). His widow, Irene M. Hood, filed a claim for death benefits in June 2001. (CABR 6). There has been no claim of surviving dependent children. (See CABR 121).

The Department of Labor and Industries determined that workplace exposure to asbestos had caused Mr. Hood's disease and therefore allowed the claim and found the date of manifestation for the disease was January 24, 1997. (CABR 3, 6). Following Weyerhaeuser's appeal, the Board concluded that Mr. Hood had voluntarily retired on March 30, 1990, but that Mrs. Hood was entitled to death benefits. (CARB 127-29). The Board also determined that the date of manifestation for the mesothelioma was January 24, 1997, the date of first treatment and diagnosis. (CP 121, 127). No party appealed the Board's decision.

In the meantime, on April 22, 2003, the Department issued an order in which it determined that calculation of the death benefits

should be based on pre-retirement monthly wages of \$4,223.60. (CABR 6). Following Weyerhaeuser's protest and a Board-sanctioned agreement establishing its timeliness, the Department affirmed its decision by order dated June 30, 2005. (*Id.*) Weyerhaeuser and Mrs. Hood both appealed that decision to the Board. (*Id.*).

In January 2006, Weyerhaeuser filed a motion for summary judgment with supporting affidavits on the issue of the rate of Mrs. Hood's death benefits. (CABR 54). Mrs. Hood thereafter filed a motion for partial summary judgment on the issue whether the Department had failed to include the value of health care insurance premiums in the calculation of Mr. Hood's monthly wages. (*Id.*).

By order dated September 6, 2006, the Board noted it was undisputed that Mr. Hood had retired in 1990 based solely on his age and desire to relax, and that he subsequently made no attempt to obtain any gainful employment. (CABR 3). The Board found:

"The evidence submitted by the parties establishes that there are no genuine issues as to any material fact in these appeals.

Leslie W. Hood voluntarily retired in 1990 and did not hold any gainful employment from the date of his retirement until his death in 1999.

The date of manifestation for Mr. Hood's occupational disease of mesothelioma is January 24, 1997.

Irene M. Hood is the surviving spouse of a deceased worker eligible for benefits." (CABR 6-7).

The Board concluded that under RCW 51.32.180 the rate of Mrs. Hood's death benefits must be calculated based on Mr. Hood's wages as of the January 24, 1997 date of manifestation. (CABR 4-5; Attached App-A). The Board determined that because Mr. Hood had voluntarily retired prior to the date of manifestation, and was receiving no wages as of that date, RCW 51.32.050(2)(a)(i) controlled the rate of the death benefits and provided for payment of the statutory minimum. (CABR 5; attached App-A; *see text infra* 22-23). In accordance with that provision, the Board concluded that the death benefits were payable in the amount of \$185.00 per month. (CABR 5, 7). The Board therefore granted Weyerhaeuser's motion for summary judgment. (CABR 7). The Board denied Mrs. Hood's motion for partial summary judgment because Mr. Hood no longer received employment-related health care benefits as of the January 24, 1997 date of manifestation. (CABR 7, 56).<sup>3</sup>

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<sup>3</sup> The parties had stipulated that the value of the health benefits received prior to Mr. Hood's retirement in 1990 was \$200.00 per month. (CABR 56).

Mrs. Hood filed a notice of appeal in the Cowlitz County Superior Court on September 29, 2006. (Cause No. 06-2-01943-2, CP 1). On October 6, 2006, the Department also filed a notice of appeal in the superior court. (Cause No. 06-2-01910-6, CP 1). A December 15, 2006 order consolidated the appeals based on a joint motion of the parties. (CP 10).

Mrs. Hood thereafter filed a motion for summary judgment and Weyerhaeuser filed a cross-motion for summary judgment. CP 12, 24). Hearings on the motions were held before the Honorable James E. Warne on October 29, 2007, June 30, 2008 and January 26, 2009. (RP 1, 26, 33). By order and judgment entered on April 20, 2009, Judge Warne concluded that Mrs. Hood's death benefits should be based on Mr. Hood's wages as of the date of Mr. Hood's retirement, March 30, 1990, in the amount of \$4,423.60, which included the value of health care benefits (\$200.00 per month) and the value of dental insurance (\$73.42 per month). (CP 148; see *also* RP 52). Judge Warne also directed Weyerhaeuser to pay assessed attorney fees and costs to Mrs. Hood in the amount of \$14,940.00 and statutory fees and costs to the Department in the amount of \$480.00. (CP 149-50). Weyerhaeuser has appealed to

this court from the trial court's decision. (CP 152).

### III. SCOPE OF REVIEW

Appeals from Board of Industrial Insurance Appeals decisions to the superior and appellate courts are based solely on the record developed before the Board. RCW 51.52.115; *Rector v. Department of Labor and Industries*, 61 Wn.App. 385, 810 P.2d 1363, *rev denied* 117 Wn.2d 1004, 815 P.2d 266 (1991). The scope of this court's review on workers' compensation appeals is the same as in other civil matters; that is, the court generally reviews for errors of law and substantial evidence. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964). The court also applies the same standard as the trial court in reviewing decisions made on summary judgment. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Granting a motion for summary judgment is appropriate when there is no genuine issue as to any material fact and as a matter of law the moving party is entitled to judgment. *Olympia Fish Products v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). The court reviews questions of law *de novo*. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995); *Rose v. Department of Labor*

*and Industries*, 57 Wn. App. 751, 790 P.2d 201, *rev denied* 115 Wn.2d 1010 (1990).

#### IV. ARGUMENT

**A. The Trial Court Erred In Concluding That Mrs. Hood's Benefits Should Be Based On Mr. Hood's Wages As Of His Retirement On March 30, 1990.**

**1. Death Benefits Serve Only a Wage-Replacement Purpose.**

The Industrial Insurance Act (IIA) is based on a compromise between workers and employers, through which workers are entitled to speedy and sure relief and employers are immunized from common law liability. *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994). This compromise provided advantages to workers by eliminating the common law defenses of employers and the need for workers to prove the elements of a common law cause of action. 123 Wn.2d at 423. In exchange, employers are shielded from exposure for common law damages and their liability is limited to the workers' compensation benefits provided by the IIA. *Id.*

The primary purpose of the IIA, and the benefits it provides,

is to insure against the loss of future wage earning capacity.<sup>4</sup> *Kilpatrick v. Department of Labor and Industries*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994); *Leeper v. Department of Labor and Industries*, 123 Wn.2d 803, 814, 872 P.2d 507 (1994). The statutes that authorize payment of periodic benefits for work-related disabilities reflect this purpose by basing the payment of disability compensation only on a percentage of lost “wages.” This includes payment for temporary total disability (time loss) benefits, RCW 51.32.090, and permanent total disability (pension) benefits, RCW 51.32.060. (Attached, App-A). Workers who continue to receive their wages following an injury are ineligible for time loss benefits, which further confirms the wage-replacement purpose of such benefits. RCW 51.32.090(6).

Death benefits payable to surviving spouses and dependents under RCW 51.32.050 also serve only a wage-replacement purpose. (Attached, App-A). As noted, the IIA does not provide common law damages, including non-economic damages such as a spouse’s loss of consortium. *Flanigan, supra*, 123 Wn.2d at 423. Death benefits share the same wage-

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<sup>4</sup> Another purpose is to provide medical services for work-related conditions. RCW 51.36.010.

replacement purpose as time loss and pension benefits. Death benefits are therefore expressly based solely on “the wages of the deceased worker” and calculated as a percentage of such wages in the same manner as time loss and pension benefits. RCW 51.32.050(2); see RCW 51.32.060(1). The statute also provides that the surviving spouse loses eligibility for death benefits upon remarriage, which is the point at which the spouse no longer is dependent on the wages of the deceased. RCW 51.32.050(2)(a), (c). This further confirms that death benefits are provided only for future wages lost due to the workplace injury or disease.

**2. Wage-Replacement Benefits Are Not Available To Voluntarily Retired Workers and Their Survivors.**

Prior to 1986, the IIA did not directly address the impact of voluntary retirement on a claimant’s entitlement to workers’ compensation benefits. The 1986 Legislature amended the Act to specifically preclude the provision of time loss and pension benefits for voluntarily retired workers.<sup>5</sup> Laws of 1986, ch. 58 § 5 (RCW 51.32.060(6)); Laws of 1986, ch. 59, §§ 2 and 3 (51.32.090(8)). In

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<sup>5</sup> A claimant is considered “voluntarily retired” if he is not receiving wages from gainful employment and has made no bona fide attempt to return to employment after retirement, and his industrial injury or disease was not a proximate cause of the decision to retire. WAC 296-14-100.

*Kaiser Aluminum v. Overdorff*, 57 Wn.App. 291, 788 P.2d 8 (1990), the Court of Appeals addressed whether, prior to these amendments, a voluntarily retired worker was eligible for time loss benefits under the IIA.<sup>6</sup> The claimant had sustained an injury but continued to work until he voluntarily retired. He subsequently required surgery for his injury-related condition and sought reopening of his claim and payment of time loss benefits. 57 Wn.App. at 292. The court noted that many other states view such benefits as based solely on lost income. *Id.* at 295. It cited with approval an Oregon Court of Appeals decision in which the court stated: "If the claimant has retired voluntarily following the injury, he can suffer no loss of wages, because, by definition, he has no expectation of receiving wages." *Stiennon v. State Accident Insurance Fund Corp.*, 68 Or App 735, 683 P.2d 556, 558, *rev denied*, 298 Or. 238, 691 P.2d 482 (1984). The *Overdorff* court embraced this analysis, stating that the IIA likewise premised time loss benefits on lost wages or income resulting from work-related conditions. 57 Wn.App. at 295. The court concluded:

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<sup>6</sup> The court determined that the amendment of RCW 51.32.090 was not applicable in that case because it became effective after the claimant's injuries. 57 Wn.App. at 294.

“\* \* \* [I]t is implicit an individual suffer a potential adverse economic impact before he may qualify for time loss benefits. Mr. Overdorff by his own admission, was not actively engaged in the work force after his retirement and up to the point of surgery. Thus, he lacked the requisite adverse economic impact, *i.e.*, lost wages or income, to warrant the award of time loss benefits.

*Id.* at 296.

In *Weyerhaeuser Company v. Farr*, 70 Wn.App. 759, 855 P.2d 711 (1993), *rev denied* 123 Wn.2d 1017, 871 P.2d 600 (1994), the Court of Appeals addressed whether before the 1986 amendments the IIA precluded a voluntarily retired worker from receiving pension benefits. The claimant had sustained a workplace back injury, subsequently returned to work and his claim was then closed with a permanent partial disability award. He thereafter sought reopening of the claim, based on a worsening of his back condition, and an award of pension benefits. 70 Wn.App. at 761. The Department reopened the claim and on appeal the Board found the claimant entitled to a pension. On review in the Court of Appeals, the court noted the *Overdorff* decision and stated it saw no significant distinction between benefits for temporary total disability and those for permanent total disability. 57 Wn.App. at 763. The court reasoned:

“Temporary total disability awards are determined by the same schedule applicable to permanent disability awards. RCW 51.32.090(1). The schedule is tied to the actual amount of the worker's wages. RCW 51.32.060(1)(a)-(l). Moreover, as in Oregon, an award for permanent total disability is authorized only for a “worker.” RCW 51.32.060(1). A “worker” is one “who *is engaged* in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment”. (Emphasis added.) RCW 51.08.180. As the [Oregon Supreme Court] observed [in *SAIF Corp. v. Stephen*, 308 Or. 41, 774 P.2d 1103 (1989)], “[a] person who voluntarily withdraws from the work force is not entitled to [permanent total disability] benefits ... because she or he is no longer a worker” under the statutory definition. 774 P.2d at 1106.

“We find these analogies persuasive and conclude that permanent total disability benefits under RCW 51.32 are intended as a replacement for lost income, and that a person who is voluntarily withdrawn from the work force is no longer a “worker” as defined in the statute. Accordingly, we hold that under Washington law, a person who voluntarily withdraws from the work force and subsequently becomes totally disabled is not entitled to permanent total disability benefits.”

70 Wn.App. at 765.

In short, the Court of Appeals has determined, independent of the 1986 amendments to RCW 51.32.060 and 51.32.090, that the IIA does not provide wage replacement benefits after a worker has voluntarily retired. The court thus established that the 1986 amendments effected no change in the substantive law, but merely codified what the Court of Appeals later confirmed was always the law. See *Farr*, 70 Wn.App. at 764, n. 3.

The Court of Appeals' analysis in *Overdorff* and *Farr* applies with equal validity to benefits for the death of a worker after he has voluntarily retired. As discussed, death benefits share the same wage-replacement purpose as time loss and pension benefits. Like the latter forms of compensation, death benefits are expressly based solely on the amount of the worker's "wages," using the same type of schedule as the one used for time loss and pension benefits. *Compare* RCW 51.32.050(2) *with* RCW 51.32.060(1).<sup>7</sup> The surviving spouse of a voluntarily retired, deceased worker does not suffer a loss of wages because, by definition, he or she has no expectation of receiving wages. *See Stiennon v. State Accident Insurance Fund Corp.*, *supra*, 683 P.2d at 558. Moreover, like time loss and pension benefits, death benefits are authorized only for a deceased "worker." RCW 51.32.050(2)(a). A "worker" is one "who is engaged in . . . employment." RCW 51.08.180. A person who voluntarily withdraws from the work force no longer is a "worker" under the IIA. *Farr*, *supra*, 70 Wn.App. at 765. Therefore, when a worker voluntarily retires, death benefits are not available to the surviving spouse and children because the deceased voluntarily

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<sup>7</sup> The pension schedule is also applicable to time loss benefits. RCW 51.32.090(1).

had chosen to withdraw from the labor market and had no further expectation of wages. A claim for such benefits in the absence of wage loss seeks a remedy where there is no damage recognized under the Act. A voluntarily retired worker cannot lose wages and, therefore, his or her survivors are ineligible for wage-replacement compensation under the IIA.

In reaching its contrary conclusion, the trial court apparently relied on the Department's informal Policy 15.91, entitled "Pension Benefits and Voluntary Retirement." (CP 163-64). It states that voluntarily retired workers are not entitled to pension benefits, but also summarily adds that the beneficiary of a voluntarily retired worker is entitled to benefits for an injury or disease-related death. (*Id.*). This informal policy does not apply here because it became effective July 1, 1997, well after the January 24, 1997 manifestation of Mr. Hood's disease. (CABR 127, 163). *Ashenbrenner v. Department of Labor and Industries*, 62 Wn.2d 22, 380 P.2d 730 (1963). Even if it were applicable, because it represents only an informal policy, rather than a duly-promulgated regulation, the policy is not entitled to deference. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, n. 7, 153 P.2d 846 (2007). In fact, the policy conflicts

with the Department's own formal regulation, WAC 296-14-350(2), which authorizes benefits when, at the time a disease becomes manifest (a) "the worker was employed" or (b) "the worker was not employed, for causes other than voluntary retirement," but makes no provision for benefits when the worker was not employed due to his voluntary retirement before the date of manifestation of his disease. (Attached, App-A; see *text infra* 21-22). Most important, however, the informal policy is invalid because it conflicts with the above-discussed IIA provisions and their interpretive case law. *Bostain, supra*; *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001). These statutory and appellate authorities establish that voluntary retirement precludes a subsequent claim for wage-replacement benefits.

For the above reasons, the court should conclude that, ordinarily, when a worker voluntarily retires and later dies from an occupational disease or injury, the surviving spouse and dependents are not eligible for death benefits. Weyerhaeuser acknowledges that in this proceeding, it may not contest Mrs. Hood's eligibility for death benefits because the Board found her entitled to such benefits in the former proceeding. (CABR 127-29).

However, the wage-replacement purpose of death benefits bears directly on the extent of her entitlement to such benefits and on interpretation of the applicable statutes and regulations. Mrs. Hood's death benefits may not properly be based on her husband's pre-retirement wages because there was no expectation of his receiving wages after he voluntarily retired.

**3. Benefits For Occupational Diseases Are Calculated On the Basis Of the Worker's Wages As Of the Date Of Manifestation For the Disease.**

A surviving spouse's claim for death benefits is derivative of the injured worker's claim. Therefore, the benefit schedule for the spouse's claim uses the same date of injury as the worker's claim. *Kilpatrick v. Department of Labor and Industries*, 125 Wn.2d 222, 227-28, 883 P.2d 1370 (1994).

For occupational disease claims, RCW 51.32.180(b) provides:

“ . . . for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.”

This section codified the prior date of manifestation rule for occupational diseases, confirming that the manifestation date is the counterpart to the date of injury on injury claims and that manifestation occurs when the disease actually first requires medical treatment or interferes with the worker's job performance. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009); *Department of Labor and Industries v. Landon*, 117 Wn.2d 122, 125-26, 814 P.2d 626 (1991).

The Supreme Court has specifically confirmed that the date of manifestation governs calculation of a surviving spouse's death benefits based on an occupational disease claim for asbestos-related diseases and other long-latency diseases. *Kilpatrick v. Department of Labor and Industries, supra*; see also *Harry, supra* (holding that the date of last injurious exposure governs only cumulative trauma conditions like hearing loss). In *Kilpatrick*, the workers each developed multiple compensable asbestos-related diseases that resulted in their deaths. Their surviving spouses filed claims for death benefits and sought calculation of their benefits under increased benefit levels resulting from legislation that became effective after the date of manifestation for each worker's

first asbestos-related disease, but before the manifestation date for a later-developing disease that contributed to his death. 125 Wn.2d at 224-26. The spouses argued, in pertinent part, that their claims did not accrue until after the death of the worker and, therefore, should be viewed as separate claims that were brought after the effective date of the legislation. 125 Wn.2d at 227-28.

The Supreme Court rejected this analysis, stating:

“\* \* \* [I]t is well settled in this state that survivor's benefits are fixed at the rate schedule in effect on the date of the worker's injury, or in the case of occupational disease, date of manifestation. *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963); *Barlia v. Department of Labor & Indus.*, 23 Wn.2d 126, 160 P.2d 503 (1945); *Lynch v. Department of Labor & Indus.*, 19 Wn.2d 802, 145 P.2d 265 (1944). In *Ashenbrenner*, *Barlia*, and *Lynch*, a surviving spouse sought to obtain the Legislature's postinjury increase in survivor's benefits, arguing the spousal claim did not accrue until the death of the worker. In each case we reaffirmed the rule that a survivor's claim is independent from the worker's claim to the extent the worker cannot waive the survivor's rights to benefits. *Barlia*, 23 Wn.2d at 129. However, the survivor's claim is derivative of the worker's injury claim for the purpose of determining the applicable schedule of benefits.

Because the survivor's claim derives from the injury claim, the date of injury controls the schedule of benefits. In the context of occupational disease, the counterpart to date of injury is date of manifestation. *Department of Labor & Indus. v. Landon*, [*supra* at]

125-26 [ ]. Thus, **the date of manifestation controls the schedule of benefits for the worker's claim for an asbestos-related disease and for the survivor's claim for death benefits.**

The Department is correct that for the purpose of determining benefit schedules, a survivor's claim is a derivative of the injured worker's claim. **Thus, the relevant date for determining survivor's benefits is the date of the worker's injury, or in case of disease, the date of manifestation.**" (Emphasis added.)

125 Wn.2d at 228. The court's statements demonstrate that calculation of a surviving spouse's benefits is determined as of the date of manifestation for the worker's asbestos-related disease.

Nevertheless, in the proceeding below, Mrs. Hood and the Department argued that the benefits here should be calculated based on Mr. Hood's wages at retirement, rather than the date of manifestation for his mesothelioma. The trial court agreed and directed payment of the death benefits based on Mr. Hood's wages at retirement on March 30, 1990. (CP 148). The date of retirement corresponds with, and is legally indistinguishable from, the date of Mr. Hood's last injurious exposure. No valid authority supports use of the date of last injurious exposure in calculating entitlement to death benefits. The Supreme Court recently confirmed that in amending RCW 51.32.180 in 1988 the legislature rejected use of

the worker's date of last injurious exposure in favor of the date of manifestation for determining the schedule of benefits for asbestos-related diseases and other long-latency diseases. *Harry v. Buse Timber, supra*, 166 Wn.2d at 12; citing *Department of Labor & Indus. v. Landon, supra*. Considered together, the Supreme Court's decisions in *Kilpatrick, Landon* and *Harry* demonstrate that calculation of a surviving spouse's benefits for death resulting from an occupational disease is not properly based on the date of last injurious exposure, but on the date the worker's disease became manifest.

The Department's own regulations support the same conclusion. WAC 296-14-350 addresses wage calculation for occupational diseases and provides, in relevant part:

"(2) The compensation schedules and wage base for claims **shall be based on the schedule in effect on the date of disease manifestation**. Compensation shall be based on the monthly wage of the worker as follows:

(a) **If the worker was employed** at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based on the monthly wage paid on that date regardless of whether the worker is employed in the industry that gave rise to the disease or in an unrelated industry.

**(b) If the worker was not employed, for causes other than voluntary retirement,** at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based upon the last monthly wage paid.

**(3) Benefits shall be paid in accordance with the schedules in effect on the date of manifestation.** Manifestation is the date the disease required medical treatment or became totally or partially disabling, whichever occurred first, without regard to the date of the contraction of the disease or the date of filing the claim. (Emphasis added.)

This regulation confirms that for occupational diseases the date of manifestation governs calculation of the claimant's entitlement to benefits. As discussed above, the regulation also makes no provision for death benefits when the worker was voluntarily retired on the date of manifestation. This omission bears witness to the fact that benefits are not authorized once the worker voluntarily retires. The Department's duly-promulgated regulation is entitled to deference. *Bostain v. Food Exp., Inc., supra*.

For the above reasons, the court should hold that calculation of Mrs. Hood's death benefits must be based on Mr. Hood's wage level as of the January 24, 1997 manifestation of his mesothelioma. The court should therefore conclude the trial court erred in directing calculation of the death benefits based on the wage level on Mr.

Hood's retirement date.

**4. Where, As Here, a Surviving Spouse Is Deemed Entitled To Death Benefits Even Though the Worker Was Voluntarily Retired On the Date Of Manifestation, the Benefits May Not Exceed the Statutory Minimum.**

Death benefits are calculated under RCW 51.32.050(2). As of the January 24, 1997 date of manifestation,<sup>8</sup> that section provided in relevant part:

“(a) Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage payments according to the following schedule:

(i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars;

\*\*\*\*\*”

The statute thus provides that for workers like Mr. Hood, with a surviving spouse but no dependent children, death benefits are calculated based on 60 percent of the relevant “wages” or \$185.00,

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<sup>8</sup> The 2007 legislature amended the statute effective July 1, 2008. Laws of 2007, ch. 284 § 4. The amendment is not applicable here because Mr. Hood's disease became manifest in 1997. *Asbenbrenner v. Department of Labor and Industries*, *supra*. The amendment modifies the determination of the statutory minimum by linking it to a percentage of the state's average monthly wage rather than providing a fixed sum. See RCW 51.32.050(2)(d)(ii).

whichever is more. As discussed, the relevant date for determining the wage level here is the January 24, 1997 date of manifestation of Mr. Hood's mesothelioma. Mr. Hood had neither any wages nor any expectation of wages as of that date because he had voluntarily retired nearly 7 years earlier. Accordingly, Mrs. Hood's entitlement to death benefits may not be calculated based on any wages; instead, she may receive only the statutory minimum of \$185.00 per month. The Board correctly so found. The trial court erred in concluding the benefits should be calculated on the basis of the wage level at Mr. Hood's retirement. Its decision should be reversed and the Board's decision should be reinstated.

**B. Claimant and the Department Are Not Entitled To Assessed Attorney Fees and Costs.**

Assessed attorney fees and costs are authorized only when a party prevails on appeal. RCW 4.84.010; RCW 51.52.130. As stated, this court should reverse the trial court's decision and conclude that Weyerhaeuser is entitled to judgment. In that event, because neither Mrs. Hood nor the Department will have prevailed, the awards of assessed attorney fees and costs must be also reversed.

## V. CONCLUSION

For the above reasons, Weyerhaeuser requests the court to reverse the trial court's decision, grant judgment in favor of Weyerhaeuser and reinstate the Board's decision. The awards of assessed fees and costs should also be reversed.

DATED: September 29, 2009.

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

Craig A. Staples, WSBA #14708  
Jack S. Eng, WSBA #8420  
Attorneys for Weyerhaeuser Co.

## APPENDIX A

### **Former RCW 51.32.050 - Death benefits.**

(1) Where death results from the injury the expenses of burial not to exceed two hundred percent of the average monthly wage in the state as defined in RCW 51.08.018 shall be paid.

“(2)(a) Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage payments according to the following schedule:

“(i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars;

“(ii) If there is one child of the deceased worker and in the legal custody of such spouse, sixty-two percent of the wages of the deceased worker but not less than two hundred twenty-two dollars;

“(iii) If there are two children of the deceased worker and in the legal custody of such spouse, sixty-four percent of the wages of the deceased worker but not less than two hundred fifty-three dollars;

“(iv) If there are three children of the deceased worker and in the legal custody of such spouse, sixty-six percent of the wages of the deceased worker but not less than two hundred seventy-six dollars;

“(v) If there are four children of the deceased worker and in the legal custody of such spouse, sixty-eight percent of the wages of the deceased worker but not less than two hundred ninety-nine dollars; or

“(vi) If there are five or more children of the deceased worker and in the legal custody of such spouse, seventy percent of the wages of the deceased worker but not less than three hundred twenty-two dollars.”

(b) Where the surviving spouse does not have legal custody of any child or children of the deceased worker or where after the death of the worker legal custody of such child or children passes from such surviving spouse

to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children. The amount of such payments shall be five percent of the monthly benefits payable as a result of the worker's death for each such child but such payments shall not exceed twenty-five percent. Such payments on account of such child or children shall be subtracted from the amount to which such surviving spouse would have been entitled had such surviving spouse had legal custody of all of the children and the surviving spouse shall receive the remainder after such payments on account of such child or children have been subtracted. Such payments on account of a child or children not in the legal custody of such surviving spouse shall be apportioned equally among such children.

(c) Payments to the surviving spouse of the deceased worker shall cease at the end of the month in which remarriage occurs: PROVIDED, That a monthly payment shall be made to the child or children of the deceased worker from the month following such remarriage in a sum equal to five percent of the wages of the deceased worker for one child and a sum equal to five percent for each additional child up to a maximum of five such children. Payments to such child or children shall be apportioned equally among such children. Such sum shall be in place of any payments theretofore made for the benefit of or on account of any such child or children. If the surviving spouse does not have legal custody of any child or children of the deceased worker, or if after the death of the worker, legal custody of such child or children passes from such surviving spouse to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children.

(d) In no event shall the monthly payments provided in subsection (2) of this section exceed the applicable percentage of the average monthly wage in the state as computed under RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(e) In addition to the monthly payments provided for in subsection (2)(a) through (c) of this section, a surviving spouse or child or children of such worker if there is no surviving spouse, or dependent parent or parents, if there is no surviving spouse or child or children of any such deceased worker shall be forthwith paid a sum equal to one hundred percent of the average monthly wage in the state as defined in RCW 51.08.018, any such children, or parents to share and share alike in said sum.

(f) Upon remarriage of a surviving spouse the monthly payments for the child or children shall continue as provided in this section, but the monthly payments to such surviving spouse shall cease at the end of the month during which remarriage occurs. However, after September 8, 1975, an otherwise eligible surviving spouse of a worker who died at any time prior to or after September 8, 1975, shall have an option of:

(i) Receiving, once and for all, a lump sum of twenty-four times the monthly compensation rate in effect on the date of remarriage allocable to the spouse for himself or herself pursuant to subsection (2)(a)(i) of this section and subject to any modifications specified under subsection (2)(d) of this section and RCW 51.32.075(3) or fifty percent of the then remaining annuity value of his or her pension, whichever is the lesser: PROVIDED, That if the injury occurred prior to July 28, 1991, the remarriage benefit lump sum available shall be as provided in the remarriage benefit schedules then in effect; or

(ii) If a surviving spouse does not choose the option specified in subsection (2)(f)(i) of this section to accept the lump sum payment, the remarriage of the surviving spouse of a worker shall not bar him or her from claiming the lump sum payment authorized in subsection (2)(f)(i) of this section during the life of the remarriage, or shall not prevent subsequent monthly payments to him or to her if the remarriage has been terminated by death or has been dissolved or annulled by valid court decree provided he or she has not previously accepted the lump sum payment.

(g) If the surviving spouse during the remarriage should die without having previously received the lump sum payment provided in subsection (2)(f)(i) of this section, his or her estate shall be entitled to receive the sum specified under subsection (2)(f)(i) of this section or fifty percent of the then remaining annuity value of his or her pension whichever is the lesser.

(h) The effective date of resumption of payments under subsection (2)(f)(ii) of this section to a surviving spouse based upon termination of a remarriage by death, annulment, or dissolution shall be the date of the death or the date the judicial decree of annulment or dissolution becomes final and when application for the payments has been received.

(i) If it should be necessary to increase the reserves in the reserve fund or to create a new pension reserve fund as a result of the amendments in chapter 45, Laws of 1975-'76 2nd ex. sess., the amount of such increase in pension reserve in any such case shall be transferred to the reserve fund from the supplemental pension fund.

(3) If there is a child or children and no surviving spouse of the deceased worker or the surviving spouse is not eligible for benefits under this title, a sum equal to thirty-five percent of the wages of the deceased worker shall be paid monthly for one child and a sum equivalent to fifteen percent of such wage shall be paid monthly for each additional child, the total of such sum to be divided among such children, share and share alike: PROVIDED, That benefits under this subsection or subsection (4) of this section shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018, as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(4) In the event a surviving spouse receiving monthly payments dies, the child or children of the deceased worker shall receive the same payment as provided in subsection (3) of this section.

(5) If the worker leaves no surviving spouse or child, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty percent of the average monthly support actually received by such dependent from the worker during the twelve months

next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

If any dependent is under the age of eighteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent reaches the age of eighteen years except such payments shall continue until the dependent reaches age twenty-three while permanently enrolled at a full time course in an accredited school. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

(6) For claims filed prior to July 1, 1986, if the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving a surviving spouse, or child, or children, the surviving spouse or child or children shall receive benefits as if death resulted from the injury as provided in subsections (2) through (4) of this section. Upon remarriage or death of such surviving spouse, the payments to such child or children shall be made as provided in subsection (2) of this section when the surviving spouse of a deceased worker remarries.

(7) For claims filed on or after July 1, 1986, every worker who becomes eligible for permanent total disability benefits shall elect an option as provided in RCW 51.32.067.

**(over)**

**RCW 51.32.060 - Permanent total disability compensation — Personal attendant.** (Note: amended in 2007 primarily by modifying statutory minimums and maximums by linking them to the state's monthly wage rather than providing fixed sums; Laws 2007, ch. 284 § 2).

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

- (a) If married at the time of injury, sixty-five percent of his or her wages.
- (b) If married with one child at the time of injury, sixty-seven percent of his or her wages.
- (c) If married with two children at the time of injury, sixty-nine percent of his or her wages.
- (d) If married with three children at the time of injury, seventy-one percent of his or her wages.
- (e) If married with four children at the time of injury, seventy-three percent of his or her wages.
- (f) If married with five or more children at the time of injury, seventy-five percent of his or her wages.
- (g) If unmarried at the time of the injury, sixty percent of his or her wages.
- (h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages.
- (i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages.
- (j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages.
- (k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages.

(1) If unmarried with five or more children at the time of injury, seventy percent of his or her wages.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the

monthly payment computed under this subsection (5)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

**RCW 51.32.090 - Temporary total disability — Partial restoration of earning power — Return to available work — When employer continues wages — Limitations.** (Note: amended in 2007 primarily by modifying statutory minimums and maximums by linking them to the state's monthly wage rather than providing fixed sums; Laws 2007, ch. 284 § 2 and 2007 ch. 190 § 1).

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her

physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(7) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

**RCW 51.32.180 - Occupational diseases — Limitation.**

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) This section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the

disease or infection occurred prior to January 1, 1937; and (b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.

**WAC 296-14-350 - Claim allowance and wage determination in occupational disease cases.**

(1) The liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure to the injurious substance or hazard of disease during employment within the coverage of Title 51 RCW which gave rise to the claim for compensation. Such Title 51 RCW insurer shall not be liable, however, if the worker has a claim arising from the occupational disease that is allowed for benefits under the maritime laws or Federal Employees' Compensation Act.

(2) The compensation schedules and wage base for claims shall be based on the schedule in effect on the date of disease manifestation. Compensation shall be based on the monthly wage of the worker as follows:

(a) If the worker was employed at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based on the monthly wage paid on that date regardless of whether the worker is employed in the industry that gave rise to the disease or in an unrelated industry.

(b) If the worker was not employed, for causes other than voluntary retirement, at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based upon the last monthly wage paid.

(3) Benefits shall be paid in accordance with the schedules in effect on the date of manifestation. Manifestation is the date the disease required medical treatment or became totally or partially disabling, whichever occurred first, without regard to the date of the contraction of the disease or the date of filing the claim.

**CERTIFICATE OF MAILING**

I certify that on September 29, 2009, I served the foregoing BRIEF OF APPELLANT on the following persons by mailing them each 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:

Grady B. Martin  
Law Office of William D. Hochberg  
P.O. Box 1357  
Edmonds, WA 98020

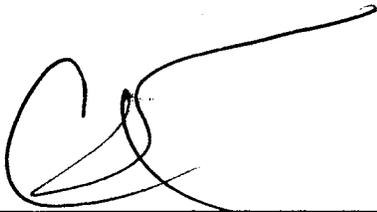
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

I further certify that I filed the original and a true copy of the same document by first class mail on the above date in a sealed envelope, with postage prepaid, and addressed to the following:

David C. Ponzoha, Clerk  
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By: \_\_\_\_\_



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