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DONALD R. CARPENTER

NO. 79613-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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DONALD HARRY,

Respondent,

v.

BUSE TIMBER & SALES, INC., and DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioners.

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**DEPARTMENT'S ANSWER TO BRIEF OF AMICUS CURIAE  
WASHINGTON STATE LABOR COUNCIL**

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## I. INTRODUCTION

This Answer by the Department of Labor and Industries (L&I) responds to the amicus brief filed by the Washington State Labor Council and several labor organizations (collectively referenced as WSLC).

WSLC suggests that RCW 51.32.180(b) is ambiguous as to how to establish a compensation rate for an occupational disease claim. The language cited by WSLC, however, does not overcome the unambiguous legislative direction that each occupational disease claim has but one rate. RCW 51.32.180(b) mandates that "*the rate of compensation*" shall be established "as of *the date the disease* requires medical treatment or becomes totally or partially disabling, *whichever occurs first . . .*, without regard ... to the date of filing *the claim.*" This unambiguously provides a single rate for an occupational disease claim, using the date of first treatment or first disability. Under the established facts, the 1974 schedule of benefits applies to Harry's claim because his hearing loss *first* became disabling in 1974; this is the first date referenced by RCW 51.32.180(b) and it thus sets the compensation rate.

WSLC's policy arguments suggest that their result is needed for fair treatment, because a worker might possibly make separate claims over time and obtain better compensation for the separate claims. However, every worker is equally entitled to make separate claims so there is no

substance to the claim of unequal treatment. Moreover, no legislative basis exists for the proposition that a single claim should trigger multiple compensation rates based on the testing method that has documented progressive hearing loss over the course of occupational exposure to noise.

Indeed, despite opportunities to do so, including its crafting of legislation about hearing loss, the Legislature has not created a special compensation rate standard for hearing loss. Instead, hearing loss is treated as an occupational disease, subject to the same statutory provisions as other occupational diseases. Under RCW 51.32.180, all occupational disease claims trigger one compensation rate based on the first date of disability or treatment, not the tiered compensation rates urged by the amicus WSLC.

## II. ARGUMENT

### A. **RCW 51.32.180(b) Sets a Single Compensation Rate for an Occupational Disease Claim, Not Multiple Rates**

Relying on isolated language from RCW 51.32.180(b), WSLC asserts that the language stating that the rate of compensation shall be established "without regard . . . to the date of the filing of the claim" means that RCW 51.32.180(b) contemplates multiple claims. WSLC Brief at 5-6, 9. This is contradicted by the entire statutory language that establishes *a single* compensation rate as of the date the occupational

disease first required treatment or first became disabling:

(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*.

RCW 51.32.180(b) (emphasis added).

The language "without regard to . . . the date of filing the claim" does not imply that the statute covers multiple or successive "claims." Rather, the intent is to prevent the schedule of benefits from being established when the worker elects to file a claim, which can be decades after the disease has manifested. *Accord Dep 't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 124, 814 P.2d 626 (1991). Read in context, this phrase means simply that the date of filing is not the benefit schedule date.

The operative terms in RCW 51.32.180(b) say that the benefit schedule "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 contraction of the disease or the date of filing the claim." The conjunctive "and" links the phrase "without regard to date of contraction or date of filing the claim." This means both phrases must be interpreted together. The only grammatical and reasonable reading is that the date of "first" treatment or "first" disability

is determinative, not the date of claim filing or date of contraction of the disease.

For a "claim" the compensation rate is established on the date that the disease for which the claim was filed first required treatment or first became disabling. This is shown by terms that speak to a singular rate for each claim: "*the* rate of compensation" for "*the* disease" and "*the* claim" that are combined with the word "first."

From this language, it is plain that the Legislature considered but rejected setting the compensation rate based on other options such as the date of claim filing and date of contraction. The Legislature also did not set the benefits as of the date of injurious exposure, last or otherwise. *See Landon*, 117 Wn.2d at 127. It selected the date the condition either first required treatment or first became "totally or partially disabling." Similarly, the statutory language confirms that Legislature considered various types of disability. The "totally or partially disabling" language contemplates, as WSLC states at 12-14, several variations of disability, which include temporary total disability, permanent total disability, and permanent partial disability. Thus, despite the different fact patterns of disability possible in a claim, the Legislature elected to use the first date of *any* of these types of disability to establish the applicable benefit schedule for any occupational disease claim covered by RCW 51.32.180.

WSLC suggests a rule of law where the compensation rate for Harry's occupational disease should be based on the benefit schedules in effect on the various dates that audiograms documented permanent partial disability changes. See WSLC Brief at 6, 14=15. But WSLC has not shown that RCW 51.32.180(b) "does not provide guidance on whether a claim may be said to have multiple dates on which it became partially disabling." WSLC Brief at 8. RCW 51.32.180 is not ambiguous in this regard. A claim for occupational disease can have only one "first" date on which the disease required treatment or became partially disabling.<sup>3</sup>

**B. Multiple Audiogram Tests Do Not Lead to Multiple Compensation Rates**

WSLC argues that in order to treat the occupational disease of hearing loss the same as industrial injuries, RCW 51.32.180(b) should be interpreted to require multiple benefit schedules whenever there are multiple audiograms. WSLC supports its interpretation by citing the general rule of RCW 51.16.040, which provide for the same benefits for occupational diseases and industrial injuries. WSLC Brief at 9. Neither RCW 51.16.040 nor RCW 51.32.180 provides for multiple compensation

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Even if there were any ambiguity, the most reasonable construction of RCW 51.32.180(b) is that it does not allow multiple compensation dates for the same disease. Any interpretation of RCW 51.32.180(b) must give effect to the Legislature's intent manifested in the complete statutory language. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

rates for Harry's claim. RCW 51.32.180 provides the specific rule for establishing the benefit schedule in an occupational disease claim and thus controls the issue. The broad principle of providing the same benefits for industrial injuries and occupational diseases in RCW 51.16.040 does not overcome RCW 51.32.180's directive to establish one date for the applicable benefit schedule for an occupational disease claim.

WSLC next argues that each audiogram should trigger a new benefit schedule because "each audiogram documents a partially disabling, permanent, [and] functional loss ...." WSLC Brief at 14. The statutory language that sets one compensation rate for one disease claim controls this issue. WSLC's proposed rule of law should be rejected because it makes the compensation schedule dependent on the type of disease and whatever testing method documents the progress of hearing loss. RCW 51.32.180(b) applies equally to all occupational disease claims and nothing in the text of RCW 51.32.180(b) supports WSLC's argument that there should be special treatment for one disease, such as using multiple compensation rates that are triggered by evidence tracking progressive hearing loss.

Furthermore, the record does not support WSLC's claim that "Harry suffered a pathologically distinct and partially disabling condition, that is, an increase in his permanent hearing loss." WSLC Brief at 15.

The undisputed finding of fact is that Harry sustained "*an* occupational hearing loss" in the singular. See FF 2. The only diagnosis is that Harry incurred *a single* disease: "relatively symmetrical down-sloping sensory neural hearing loss." BR Riddell 11. Harry underwent 21 industrial audiograms from 1974 to 2000, and received copies of the tests. BR Lipscomb 15; BR Harry 21. Despite ample testimony about these audiograms, the record contains no evidence that Harry had multiple or separate diseases, hearing loss related or otherwise, at the time of each audiogram.

WSLC also argues that "additional exposure is a separate proximal incident" and that where there is "more than one [proximate] event, separate compensation rates must be established." WSLC Brief at 9-10. Many occupational diseases have multiple proximate causes over time and WSLC offer no statutory authority that would support subdividing Harry's single occupational disease claim for hearing loss by treating the industrial exposure to noise as independent harms.

Related to this argument, WSLC also claims "the [Department's and employer's arguments] would establish the schedule of benefits for binaural hearing loss a decade before this hearing loss was either partially or totally disabling." WSLC Brief at 15. First, this is contrary to the record here, where 1974 is established as the first date when Harry's

hearing loss was partially disabling. Second, WSLC relies on the flawed premise that if a worker has a disease with increasing disability levels with continuing exposure, this means the person has suffered separate diseases. Nothing supports interpreting the statute as if increasing disability levels caused by exposure to noise means that the worker had multiple diseases. Many occupational diseases involve continuous exposure to a work activity with multiple proximate cause events that bring about increased levels of disability. *E.g. Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 734, 981 P.2d 878 (1999) (prolonged standing on cement floor caused foot disability, worker first sought treatment in 1989, then in 1992, and after not working in 1994 the worker returned to work but could no longer tolerate standing). No case evaluates a single occupational disease claim as multiple diseases based on the long-term proximate causes.

***C. Pollard Does Not Address Nor Hold That Multiple Compensation Rates Apply in a Single Hearing Loss Claim***

WSLC invites this Court to expand the Court of Appeals decision in *Pollard v. Weyerhaeuser Company*, 123 Wn. App. 506, 98 P.3d 545 (2004), *review denied*, 154 Wn.2d 1014 (2005). WSLC states that "the Court [in *Pollard*] specifically held noise related hearing loss which was not causally related to earlier noise-related. hearing loss is a separate and distinct occupational disease. Each distinct occupational disease will

become partially disabling on a separate date." WSLC Brief at 11 (discussing *Pollard*, 123 Wn. App. 506). *Pollard* did not consider a claim for a one-time period of hearing loss from continuous work place exposure. 123 Wn. App. at 508-510.

In *Pollard* the worker had filed two different claims for hearing loss: the first claim covering hearing loss incurred before 1982 and the second claim encompassing further hearing loss disability from 1982 to 1999. *Pollard*, 123 Wn. App. at 508-509. The *Pollard* Court applied a different compensation rate to the latter claim. The opinion reasons that these were two different claims for hearing loss that occurred in two different time periods and that the separate claims made it appropriate to apply two different compensation rates. See *Pollard*, 123 Wn. App. at 512-14. *Pollard* is thus consistent with RCW 51.32.180(b) in that a single rate applies to each separate claim for an occupational disease. *Pollard*, however, is not a ruling by this Court and the case does not address the circumstance where a single hearing loss claim must be evaluated under the language of RCW 51.32.180.<sup>2</sup>

A worker can file separate claims for hearing loss and, under *Pollard*, obtain a higher benefit level for the second claim. *Pollard*, 123

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<sup>2</sup> *Pollard* is somewhat anomalous and should be viewed as an exception to RCW 51.32.180(b)'s focus on a single compensation rate for a single disease. Certainly, a further "exception to the exception" should not be created.

Wn. App. at 513-14. WSLC argues for the same result if a worker files a single claim like Harry or files multiple claims like Pollard, which cover the same time period of hearing loss. See WSLC Brief at 11.<sup>3</sup> But there is a material difference under the statute. Unlike the worker in *Pollard* who filed a claim in 1982 and then another claim in 1999 for two different time periods, Harry has filed one claim for all of his past hearing loss.

Moreover, the *Pollard* Court dealt with this WSLC argument. Rejecting the argument that grounding its decision on the existence of separate claims created inequities, the *Pollard* Court observed, there is "no legally significant disparity because each worker has equal opportunity, whether or not he takes advantage of it . . . ." *Pollard*, 123 Wn. App. at 513-14. This same reasoning applies here.

**D. The Definition of Occupational Disease and the Statute of Limitations for Occupational Hearing Loss Reinforce the Legislature's Intent To Provide for a Single Rate for an Occupational Disease Claim in RCW 51.32.180(b)**

WSLC argues that RCW 51.32.180(b) does not give guidance on how to evaluate a claim that "may be said to have multiple dates on which it became partially disabling." WSLC Brief at 8. However, as shown above, RCW 51.32.180 is not ambiguous in this regard because it provides

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<sup>3</sup> WSLC also cites *McIndoe v. Department of Labor and Industries*, 144 Wn.2d 252, 26 P.3d 903 (2001) for this proposition. WSLC Brief at 16. *McIndoe*, however, did not involve the question of what compensation rate applies to a disability in a single claim; rather, it involved the unrelated question of whether separate claims for separate body parts can be separately compensated in certain circumstances. 144 Wn.2d at 256.

for a single date -- when the disease became either partially disabling or required treatment.

The WSLC brief relies also on the definition of occupational disease (RCW 51.08.140) and the occupational disease statute of limitations (RCW 51.28.055). WSLC Brief at 8. Because the statute of limitations permits a delay in claim filing for years, WSLC claims this creates a need for multiple compensation rates. The language of these two statutes, however, demonstrates how the Legislature sees but one compensation rate for a hearing loss claim, even when it is delayed for years.

RCW 51.08.140 defines an occupational disease as "such disease or infection as arises naturally and proximately out of employment." This statutory language does not imply that multiple exposures to a proximate cause should be treated as multiple diseases; it indicates only that a disease must arise out of employment.

RCW 51.28.055(2) specifically addresses hearing loss claims and provides:

(2)(a) Except as provided in (b) of this subsection, to be valid and compensable, claims for hearing loss due to occupational noise exposure must be filed within two years of the date of the worker's last injurious exposure to occupational noise in employment covered under this title or within one year of September 10, 2003, whichever is later ... .

Tailored to the nature of hearing loss claims, RCW 51.28.055(2) provides that a worker must file an occupational hearing loss claim within two years of the "last injurious exposure" regardless of whether notified by a doctor or not. RCW 51.28.055(2) views occupational hearing loss as a singular condition, as shown by examining the "last injurious exposure" language. The legislation contemplates one claim, even after many years, not the artificial division of a hearing loss claim among all the proximate causes implicated by audiogram records.

It is not unique to hearing loss for a worker to file an occupational disease claim that goes back years. In the seminal occupational disease case, *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 469, 483, 745 P.2d 1295 (1987), the worker suffered from 38 years of continual use of tin snips that exacerbated his pre-existing osteoarthritis. The arises-naturally-and-proximately out the course of employment definition of occupational disease (as discussed in the 1987 *Dennis* case, which involved over 38 years of work place exposure) was well established when the Legislature drafted the 1988 amendment to RCW 51.32.180. The entire context of RCW 51.32.180(b) is that it sets a compensation rate for an occupational disease that arises naturally and proximately out of the

course of employment, whatever that time period may be and whatever increase in disability occurred during that time period.<sup>4</sup>

*Boeing Company v. Heidy*, 147 Wn.2d 78, 88, 51 P.3d 793 (2002), further emphasizes that hearing loss is to be treated the same as other occupational diseases. *Heidy* declined to add a worker-knowledge element to hearing loss cases because this would be inconsistent with the statutory mandate to set the benefits schedule as of "the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first." *Id.* at 88 (quoting RCW 51.32.180(b)). *Heidy* is also significant because even as it evaluated hearing loss claims that covered decades, it described the hearing loss as a progressive disease in the singular. *See Heidy*, 147 Wn.2d at 88.

The Legislature amended RCW 51.28.055 in 2003, a year *after Heidy*. Laws of 2003, 2d Spec. Sess. ch. 2, § 1. The Legislature is

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<sup>4</sup> WSLC cites *Kilpatrick v. Department of Labor and Industries*, 125 Wn.2d 222, 883 P.2d 1370 (1994), but that case is distinguishable. *Kilpatrick* addressed the benefit rate when a worker had two separate and distinct occupational diseases related to asbestos exposure and died from the later disease. The opinion relied heavily on the fact that each "disease involves a unique pathology, requires a different treatment, and is not, in fact, an aggravation or continuation of a different asbestos-related condition." *Id.* at 230. In contrast, although hearing loss can be documented by multiple audiograms, it does not reflect unique pathologies, does not require different treatment, and additional hearing loss is the continuation and is cumulative to the prior hearing loss.

*Kilpatrick* is significant because the opinion explained that it is inappropriate to focus on the date of exposure -- the relevant occurrence for setting the rate is the manifestation of disease. *Id.* at 230. The WSLC argument, however, focuses on the audiograms as a way of showing additional exposure to noise. WSLC Brief at 10. The statute, however, focuses on the first manifestation of disability or first need for treatment of the disease and does not reconstruct the history of exposures.

presumably aware of *Heidy's* characterization of hearing loss as a progressive disease with potential claims that cover decades of hearing loss. See generally *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) (the Legislature's action in not amending after a Supreme Court decision reflects acquiescence to the Court's interpretation of the statute). The Legislature, however, did not create a special hearing loss exception to RCW 51.32.180(b) when it adopted the statute of limitations for hearing loss in 2003 in RCW 51.28.055. Laws of 2003, 2d Spec. Sess. ch. 2, § 1.

**E. The "Tiered Approach" Is Inconsistent With the Statute of Limitations and Last Injurious Exposure Rule**

The "tiered approach" supported by WSLC should also be rejected because it conflicts with the hearing loss statute of limitations. Presently, a worker such as Harry may file a claim for all of the worker's occupational hearing loss regardless of when the hearing loss occurred during a claim. But if each period of exposure that an audiogram documents is viewed as causing a separate disease then in order to qualify for compensation under RCW 51.28.055(2), a worker would have to file a claim within two years of the last injurious exposure to that noise during that discrete time period. This could bar the worker from receiving compensation for any occupational hearing loss other than the period delineated by the most recent audiograms. This corollary to the "tiered

approach" could result in workers not being compensated for all of their hearing loss.

The "tiered approach" is also incongruous with the last injurious exposure rule that establishes insurer liability. See *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 135, 814 P.2d 629 (1991). In *Tri*, eight workers had sustained hearing loss during the course of working for Weyerhaeuser when the company was insured by the state fund and later became self-insured. Tri worked for Weyerhaeuser from 1950 to 1984 and sustained during the course of his employment substantial hearing loss both before and after Weyerhaeuser became self-insured in 1972. *Tri*, 117 Wn.2d at 131. The question was who would be the responsible insurer given the two insurers. This Court rejected apportioning responsibility between the different insurers or employers; rather the Court held that the insurer at the time of last injurious exposure would be responsible. 117 Wn.2d at 134-36.

The "proof problem" with occupational disease claims that cover decades necessitated the last injurious exposure rule. "The problem is that it is difficult, if not impossible, to go back in time and determine the degree or extent to which each and every exposure affected the ultimate disability." *Tri*, 117 Wn.2d at 135 (quoting *In re Renfro*, BIIA Dec. 86 2392 (1988); see also *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 576,

141 P.3d 1. (2006) (assignment of liability in occupational disease claims "is particularly, difficult because the worker often received multiple exposures over a long period of time") (quotations omitted).

The "tiered approach" thus undermines the Legislature's intent regarding the occupational hearing loss statute of limitations and the last injurious exposure rule. RCW 51 reflects a public policy allowing a worker to file an occupational disease claim that covers disability caused by a disease that spans decades. If the Legislature had also wanted to establish multiple benefits schedules under these circumstances, it would have expressly done so.

**F. The Legislature Is Responsible for Policy Decisions About Using Multiple Compensation Rates in a Claim**

Allowing multiple compensation rates for a claim for an occupational disease should be left to the Legislature because of the far-reaching implications of the "tiered approach." WSLC's administrative economy claim is highly debatable. *See* WSLC Brief at 17-19. At a minimum, determining the validity of each individual audiogram would necessitate protracted administrative consideration and result in increased litigation.

The "administrative economy" argument also ignores that establishing a new schedule with each small change in subsequent

audiograms will create confusion and an undue administrative burden. Selecting a schedule of benefits is already a complex inquiry. Harry had 21 audiograms, with 12 choices for schedules of benefits during the time frame (1974 through 2001) of Harry's claim, namely 1971, 1979, 1986, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001. *See RCW* 51.32.080(l)(b)(ii); Laws of 1971, Ex. Sess., ch. 289, § 10; Laws of 1979, ch. 104, § 1; Laws of 1986, ch. 58, § 2.

Harry's audiograms demonstrate fluctuation from test to test in the amount of Harry's impairment. The causes of such fluctuation might be that Harry was an inconsistent test taker or some other variation. *See BR Lipscomb* 13-15. Weight and credibility issues often arise with industrial audiograms. E.g., *Heidy*, 147 Wn.2d at 87. Changing the schedule of benefits changes with each audiogram would result in what WSLC purportedly seeks to avoid: "a tremendous increase in workload to process allowance, identify chargeable employer, process medical bills, assess audiograms for validity, and extent of hearing loss and to provide . . . impairment award[s] ...." WSLC Brief at 18.

WSLC raises a number of policy consideration regarding workers not filing claims. WSLC Brief at 19-20. Encouraging claim filing is a policy issue for the Legislature, which has already addressed this concern

in a number of statutes. *See* RCW 51.28.010 to .025. This concern does not mean that the plain terms of RCW 51.32.180(b) do not apply.

### III. CONCLUSION

The Court should reject WSLC's arguments and reverse the Court of Appeals decision.

RESPECTFULLY SUBMITTED this <sup>C</sup>\_\_\_\_ day of January, 2008.

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