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STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HARRY,

Respondent,

v.

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

Petitioners.

**SUPPLEMENTAL BRIEF
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Donald Harry filed a workers' compensation claim in 2001 for noise-induced hearing loss incurred from 1974 to 2001. Harry received compensation for all his hearing loss. Compensation schedules have changed between 1974 and 2001, and the question here is what compensation rate applies to Harry's claim. RCW 51.32.180(b) sets the compensation rate for an occupational disease claim 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*." Harry had "an occupational hearing loss" (an uncontested finding) that was first disabling in 1974 (another uncontested determination). *See* BR 18 (FF 2-3, CL 2).¹ Because Harry's hearing loss *first* became disabling in 1974, the 1974 schedule of benefits establishes the compensation rate for his *claim*. RCW 51.32.180(b).

Contrary to the directives in RCW 51.32.180(b), the Court of Appeals created a "tiered approach" that allows *multiple* compensation rates in a single *claim*, instead of the *single* rate set as of the date the disease *first* became disabling. The Court of Appeals unambiguously explained that its ruling was designed to avoid what it perceived as

¹ "BR" refers to the certified appeal board record. "FF" and "CL" refer to the findings and conclusions of the Board of Industrial Insurance Appeals (Board). L&I refers to the Department of Labor and Industries.

inequities. This Court should reverse and, like L&I, the Board, and the Superior Court, use the same standard applied to all occupational diseases, which means applying a single compensation rate in a claim for an occupational disease.

II. ARGUMENT

A. RCW 51.32.180(b) Sets a Single Compensation Rate for Each Claim of Occupational Disease

The plain language of RCW 51.32.180 authorizes a *single* rate of compensation for the claimed “occupational disease” sustained in the “course of employment.” RCW 51.32.180 provides that:

Every worker who suffers disability from *an occupational disease in the course of employment* . . . shall receive the same compensation benefits . . . as would be paid and provided for a worker injured . . . , *except* as follows . . . (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*. (Emphasis added.)

RCW 51.32.180(b) thus provides that for “claims filed” after July 1, 1988 “the rate of compensation” shall be established as “of the date the disease” requires medical treatment or becomes partially disabling “whichever occurs first,” without regard to the date of filing the “claim.” The statute unambiguously precludes what the Court of Appeals has decreed: the statute does not provide for multiple dates that set multiple

rates of compensation for an occupational disease claim. To the contrary, the statute plainly directs setting a single rate of compensation for a claim as indicated by the terms “*the* rate of compensation” for “*the* disease” and “*the* claim” combined with the word “first” in the phrase, “the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first.”

Harry argues that the statutory language does not establish a compensation rate at the date of first partial disability. *See* Harry Answer at 10. To make this argument, Harry asserts that “the comma before ‘whichever occurs first’ shows the Legislature was differentiating between requiring medical treatment and becoming disabling . . . [and] does not establish manifestation on the date of first disability.” Harry Answer at 11. Such an interpretation is inconsistent with the statute’s plain language. The phrase “whichever occurs first” modifies the entire phrase “the date the disease requires medical treatment or becomes totally or partially disabling.” This wording establishes that only two options exist for determining the date that sets the compensation rate, treatment date or disability date.

This reading of RCW 51.32.180(b) is also appropriate because the statute covers a broad array of claims for occupational disease, including hearing loss. By use of the word “first,” the Legislature shows that it

contemplated multiple instances of treatment or partial disability for an occupational disease sustained “in the course of employment,” but elected to use the “first” occurrence to set the compensation rate. Thus, under the plain language of RCW 51.32.180(b), only one compensation rate applies to an occupational disease claim, including a claim for hearing loss.

B. The Legislature Is Aware of the Attributes of Hearing Loss and Has Not Created a Special Tiered Compensation Rate for this Disease

RCW 51.32.180(b) treats all occupational diseases the same. The Court of Appeals created a “tiered approach,” which treats hearing loss differently from other occupational diseases, because it believed hearing loss was unique. *Harry v. Buse Timber & Sales, Inc.*, 134 Wn. App. 739, 745, 750, 132 P.3d 1122 (2006), *review granted* (2007). When construing RCW 51.32.180(b), this Court has rejected treating hearing loss differently from other occupational diseases. *See Boeing Co. v. Heidy*, 147 Wn.2d 78, 88, 51 P.3d 793 (2002).

In *Heidy*, the Court declined to add a worker-knowledge element 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.” 147 Wn.2d at 88. The Court applied the same compensation rate standard to hearing loss that is applied to other occupational diseases despite the sometimes

hidden nature of hearing loss. “Nonetheless, that is exactly what the term ‘partially disabling’ does when applied to workers afflicted by a progressive condition with easy to miss symptoms.” *Heidy*, 147 Wn.2d at 88.

The Court of Appeals justified its tiered approach by reasoning that such a system would treat workers with noise-related hearing loss the same as workers with industrial injuries. *Harry*, 134 Wn. App. at 742. The Court of Appeals erred by reasoning that if hearing loss shares attributes with an industrial injury, then application of RCW 51.32.180(b) is unfair. 134 Wn. App. at 744-46, 750. Similarly, Harry argues that a worker who has an industrial injury does not have a benefits schedule from before the injury and so “a claimant suffering from an occupational disease should not have their schedule of benefits established before their date of injury.” Harry Reply at 15-16. But noise-induced hearing loss is not an injury; it is an occupational disease. *See* FF 1-2; *see also* RCW 51.28.055.² Because it is an occupational disease, RCW 51.32.180(b) applies to set the compensation rate, which means viewing the hearing loss

² The Court of Appeals noted that some other jurisdictions treat noise-induced hearing loss as an injury. *Harry*, 134 Wn. App. at 744 n.13. This is irrelevant because Washington treats it as a disease. *See* RCW 51.28.055. It is, as Harry concedes, “impossible to determine exactly when [an auditory] hair cell dies.” Harry Answer at 9. Thus, hearing loss is not treated like an industrial injury, which requires a “sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result” (RCW 51.08.100), but rather as an occupational disease because it “arises naturally and proximately out of employment.” RCW 51.08.140.

disease as a whole during the course of employment (like other occupational diseases) and using the schedule in effect on the date of first treatment or first disability. The Legislature did not amend RCW 51.32.180(b) after the *Heidy* decision, which reflects acquiescence to this Court's interpretation of the statute. *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988).

Furthermore, the Legislature has already decided how to address occupational diseases and industrial injuries. See RCW 51.32.080(7), .180; RCW 51.16.040; RCW 51.28.050, .055. For occupational diseases, establishing the compensation rate depends on the date the occupational disease either first becomes partially disabling or requires treatment. RCW 51.32.180(b). In contrast, the compensation rate for an industrial injury is set as of the date of injury. RCW 51.32.080(7).

The statutes of limitation are also markedly different for industrial injuries and occupational diseases. Workers must file a workers' compensation claim within one year of an industrial injury, but they have two years from notification in writing by a doctor regarding the existence and right to file an occupational disease claim. RCW 51.28.055(1). For hearing loss, workers have two years from the date of the last injurious exposure to occupational noise to file a claim. RCW 51.28.055(2). If their claim is untimely they will receive medical benefits, such as hearing

aids, but not disability compensation. RCW 51.28.055(2). This legislative system addresses the potential for latency periods or delays in becoming aware of one's condition.

For example, the Legislature amended RCW 51.28.055 in 2003, a year *after Heidi*. Laws of 2003, 2d Spec. Sess. ch. 2, § 1.³ The Legislature is presumably aware of *Heidi* and the holding on worker-knowledge of hearing loss, the fact that noise-induced hearing loss stops when the worker is removed from source, and the potential for claims that cover decades of hearing loss. The Legislature has chosen not to provide a special hearing loss exception to RCW 51.32.180(b).

Instead, RCW 51.28.055(2) shows that the Legislature views occupational hearing loss as a singular condition. It used the language "last injurious exposure," reflecting the fact that exposure to noise may occur over a long time period. It placed limits on filing hearing loss claims, balanced by providing hearing aids when a worker files a claim after the time limit. The Legislature has not, however, provided multiple compensation rates for workers unaware of their hearing loss.

The Legislature has decided this system is fair, and the Court of Appeals erred by addressing itself to the perceived unfairness.

³ These amendments did not apply to Harry's claim, which was filed before passage of the legislation. However, RCW 51.28.055(2) demonstrates the Legislature's policy choices about hearing loss.

C. Occupational Hearing Loss Is a Single Disease, Not “Separate and Pathologically Distinct Occupational Diseases”

RCW 51.32.180(b) contemplates a single compensation rate for an occupational disease claim, with a limited exception in the fact-specific area of asbestos. See *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 229-31, 883 P.2d 1370, 915 P.2d 519 (1994) (asbestos exposure causes three separate and pathologically distinct diseases, asbestosis, lung cancer and mesothelioma, each with different latency periods). Each asbestos-related disease in *Kilpatrick* involved a “unique pathology” with their “own set of symptoms and treatment.” *Id.* at 230-31. *Kilpatrick* allowed different rates of compensation in a single occupational disease claim for “separate and distinct diseases” that have different pathologies, symptoms, and treatments. *Id.* at 230.

Kilpatrick specifically ruled that the pathologically “separate and distinct diseases” standard was not a “symptom-by-symptom” standard. 125 Wn.2d at 231. Instead, the standard addressed the narrow facts where “years after the original asbestos-related condition, each worker suffered the onset of an entirely different disease with its own set of symptoms and treatment.” *Id.* at 231.

Hearing loss in a single claim does not fall under *Kilpatrick* because the worker has not shown separate and pathologically distinct

occupational *diseases* that trigger separate dates for the compensation rate. *See Kilpatrick*, 125 Wn.2d at 230-31. Under the unchallenged facts, Harry's gradual decline in hearing during the time covered by his single claim does not constitute separate and pathologically distinct diseases.

The Court of Appeals used the very "symptom-by-symptom" approach rejected in *Kilpatrick* to justify its "tiered approach," with a different benefits schedule for each incremental increase in hearing loss. But the facts here do not show that each "tier" of hearing loss is an "entirely different disease." Each increase in hearing loss does not have a "unique pathology," nor does it involve different symptoms or different treatment as in *Kilpatrick*. 125 Wn.2d at 229-31.

The Court of Appeals also relied on *Pollard*, where the worker filed two different claims for hearing loss: the first claim paying for hearing loss incurred before 1982 and the second claim encompassing further hearing loss disability from 1982 to 1999. *Pollard v. Weyerhaeuser Co.*, 123 Wn. App. 506, 508-509, 98 P.3d 545 (2004), *review denied*, 154 Wn.2d 1014 (2005). 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 it was appropriate to apply two different compensation rates. *See Pollard*, 123 Wn. App. at 512-14. *Pollard* is

consistent with RCW 51.32.180(b) in that a single rate applies to each separate claim for an occupational disease.

A worker can file separate claims for hearing loss if the worker wishes to obtain a higher benefit level. *Pollard*, 123 Wn. App. at 513-14. The Court of Appeals in *Harry* reasoned that it was “not practical to require claims to be filed each time testing reveals a compensable hearing loss.” *Harry*, 134 Wn. App. at 749. That may be true, but it is immaterial. The Legislature selected the date *the disease* becomes disabling to govern all types of occupational disease claims. The *Pollard* Court had no difficulty with one claim having a single compensation rate even though the hearing loss increased over time:

Weyerhaeuser hypothesizes two workers, each of whom “sustain[s] progressively increasing hearing loss while working 20 years for the same employer,” and asserts that DLI’s construction of RCW 51.32.180(b) will “disadvantage[]” one. We perceive no legally significant disparity because each worker has equal *opportunity*, whether or not he takes advantage of it, and further, because a worker who chooses to delay cannot complain when benefit levels change due to intervening legislation.

123 Wn. App. at 513-14 (footnotes omitted).

The Court of Appeals incorrectly relied on *Pollard* for the proposition that each increase in noise-induced hearing loss is a separate and independent disease. *Pollard* did not hold that each instance of hearing loss shown by an audiogram is a separate and distinct disease, as

asserted by Harry. Harry Answer at 6. To the contrary, the worker in *Pollard* had several audiograms and one compensation rate for each of the two claims. 123 Wn. App. at 508-509.

In *Harry*, the Court of Appeals adopted a legal fiction that increased hearing loss constituted multiple diseases. 134 Wn. App. at 746. Instead, the facts and undisputed medical testimony show that Harry's noise-induced hearing loss did not comprise multiple diseases. As contrasted with *Kilpatrick*, in which three different diseases were diagnosed (asbestosis, lung cancer, and mesothelioma), Harry had only one disease, namely "relatively symmetrical down-sloping sensory neural hearing loss." BR Riddell 11. This testimony supports the uncontested finding that Harry had, in the singular, "an occupational hearing loss" (FF 2), not multiple diseases. There is one claim for one disease, and the 1974 schedule of benefits applies since partial disability existed as of that date.

D. Increased Occupational Disability Does Not Lead to a Different Compensation Rate

Harry argues that because he had increased disability and because noise exposure can immediately cause hearing loss, then new benefit schedules should apply. See Harry Answer at 8-9. He asserts that a worker with an occupational disease should not have the schedule of benefits established before the later, damaging noise exposure. Harry

Answer at 8. This argument is flawed for multiple reasons. First, it ignores that in 1974, he was exposed and there was partial disability, which triggers the plain statutory language. Second, it disregards a material fact: Harry filed a claim in 2001 for hearing loss that had already occurred during the course of his employment. Harry received an award for his complete disability of 38.12% hearing loss. BR 18. Under RCW 51.32.180(b), only one rate applied to this disease because Harry had only one claim for hearing loss. *In re Gerald Woodard*, Dckt. No. 03 22924, 2004 WL 3218290, at *3 (Bd. Ind. Ins. App. 2004).

And third, Harry's arguments rely on the flawed premise that if a worker files a claim for a disease with increasing disability levels, it means the person has suffered separate diseases. Unfortunately, it is not uncommon for workers to worsen after an industrial injury or contraction of an occupational disease. A person can have a relatively mild initial condition and then over the years the condition can worsen, resulting in increased disability. Even if a worker develops new symptoms (either before filing or during the claim) that lead to more disability, the rate is set as of the date of the first treatment or disability. RCW 51.32.180(b).

Hearing loss is not unique in the fact that on-going physical consequences can be caused by on-going exposure. As this Court observed recently, the assignment of liability in occupational disease

claims “is particularly difficult because the worker often received multiple exposures over a long period of time.” *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 576, 141 P.3d 1 (2006) (quotations omitted); see *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 469, 483, 745 P.2d 1295 (1987) (38 years of continued use of tin snips exacerbated pre-existing osteoarthritis). It is common for workers to file an occupational disease for a condition that goes back years, where on-going workplace exposure caused on-going 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). For example, a worker may incur multiple instances of lung damage from multiple exposures to chemicals.⁴ The “tiered approach” would treat such an occupational disease differently than other occupational diseases under RCW 51.32.180(b), with a new compensation rate each time a new exposure was documented.

One distinctive aspect to hearing loss is the testing method, audiograms, which can measure and document the progression. The method of testing and evaluating an occupational disease, however, is not

⁴ The Court of Appeals also apparently believed that only workers with hearing loss can be partially disabled without being fully aware of their condition. This reasoning, however, rests on speculation. For example, chemical exposure can cause permanent damage long before a worker knew about or felt impaired by the exposure.

material and should not create an exception to RCW 51.32.180(b). If true, it would mean that as technology advances to measure the damage of another disease precisely as is possible with an audiogram, then the compensation rate would change with each new test for that disease.⁵ RCW 51.32.180(b), however, applies to all occupational diseases regardless of the testing method.

E. Policy Decisions About Hearing Loss Should Be Left to the Legislature

The Court of Appeals also supported its “tiered approach” based on its desire to “encourage[] employers to administer regular audiograms, disclose the result, provide hearing protection, and tell the worker to see a doctor before the condition worsens.” *Harry*, 134 Wn. App. at 751. While laudable, these are not elements of RCW 51.32.180(b). Even if these points were relevant, they do not support the Court of Appeals interpretation of the statute. The Legislature has decided how to encourage employers to address hearing protection. First, RCW 51.32.180(b) sets the compensation rate as of the date the disease becomes disabling. This gives the employer an incentive to test for hearing loss and to provide hearing protection against future loss. Second, the Washington Industrial Safety and Health Act, RCW 49.17, addresses employers who

⁵ The employer, Buse Timber & Sales, Inc., makes this point about EMG studies that document nerve damage, which under the Court of Appeals rule would mean the compensation rate would change with each new study. See Buse Timber Petition at 16.

create an unsafe workplace. WISHA rules require employers to perform audiograms as part of hearing conservation programs. See WAC 296-817-100; WAC 296-817-400. L&I may institute enforcement actions if employers fail to comply with these regulations. RCW 49.17.120.

Third, RCW 51.28.025 requires employers to report injuries and occupational diseases, with a penalty for noncompliance. Additionally, RCW 51.28.015 created a pilot project specifically to develop new methods to “encourage” reporting of injuries and occupational diseases. And finally, the judicial exception for hearing loss that the Court of Appeal’s inserts into RCW 51.32.180(b) cannot be justified by the Court’s concern that hearing loss may be partially disabling before some workers are perceptibly impaired.⁶ See *Heidy*, 147 Wn.2d at 88. Harry received copies of each of his 21 audiograms. BR Harry 21. He could have consulted a physician about his audiograms and could have filed an occupational disease claim at any time.

Furthermore, the “tiered approach” is not simply a “little more math.” *Harry*, 134 Wn. App. at 749. Harry had 21 audiograms, and the 12 choices for schedules of benefits during the time frame (1974 through 2001) of Harry’s claim were 1971, 1979, 1986, 1993, 1994, 1995, 1996,

⁶ Notably a worker has an objectively identified partial disability when the loss impairs the ability to perceive speech. See American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 250 (5th ed. 2001).

1997, 1998, 1999, 2000, and 2001. *See* RCW 51.32.080(1)(b)(ii); Laws of 1971, Ex. Sess., ch. 289, § 10; Laws of 1979, ch. 104, § 1; Laws of 1986, ch. 58, § 2. Many more options for compensation rates exist in other claims because RCW 51.32.080(1)(b)(ii) sets a new rate each year.

Selecting a schedule of benefits is already a complex inquiry. *See* L&I Brief of Respondent at 24-27. Establishing a new schedule with each small change in subsequent audiograms will create confusion and an undue administrative burden. The validity of each of the audiograms in question would be subject to litigation. But, by providing a single compensation rate for an occupational disease claim in RCW 51.32.180(b), the Legislature did not intend to impose such a burden to set the compensation rate.

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III. CONCLUSION

L&I requests the Court reverse the Court of Appeals decision and affirm the February 16, 2005 decision of the superior court.

RESPECTFULLY SUBMITTED this 3rd day of December, 2007.

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