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STATE OF WASHINGTON

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Court of Appeals No. 55902-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HARRY,

Respondent,

v.

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

Petitioner.

RESPONDENT, DONALD HARRY, BRIEF IN ANSWER TO THE
BRIEF OF AMICUS CURIAE FOR THE WASHINGTON SELF-
INSURERS ASSOCIATION

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ARGUMENT

- A. Legally and scientifically, noise induced hearing loss results in multiple medical conditions caused by independent noise exposures, and as such, requires the rate of compensation to be set after the date of the noise exposure.**

The Washington Self-Insurers Association argument noise induced hearing loss is “a singular occupational medical condition” ignores scientific evidence and the law. Scientifically, additional loud noise exposure causes an increase in the workers’ occupational hearing loss between audiograms, not some progression of a disease process. See Boeing Co. v. Heidy, 147 Wn.2d 78, 92, 51 P.3d 793 (2002). As new noise exposure results in the occupational disease, legally the schedule of benefits cannot be established before the exposure occurs. See RCW 51.08.140. To hold otherwise, would establish the rate of compensation before the right to benefits exists.

Noise induced hearing loss is caused by noise exposure. Absent noise exposure, there is no noise induced hearing loss. Workers removed from noise will solidify their medical condition. Once noise exposure is resumed, however, additional disability may occur because of the additional noise exposure, not because of a natural progression of the occupational disease. That condition would not have occurred absent the additional noise exposure. See Boeing Co. v. Heidy, 147 Wn.2d at 92,

Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 165, 113 S. Ct. 692, 121 L. Ed. 2d 619 (1993); Blackburn v. Workers' Comp. Div., 212 W.Va. 838, 847, 575 S.E.2d 597 (2002); Pollard v. Weyerhaeuser, 123 Wn. App. 506, 512-513, 98 P.3d 545 (2004), In re Paul J. Brooks, BIIA No. 02 17331 (2003) (Significant Decision); In re Eugene Williams, BIIA Dec. 95378 (1998).

Legally, noise induced hearing loss is an occupational disease. Washington's Industrial Insurance Act defines occupational disease as "such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. A disease arises "naturally" out of employment if it comes about as a natural consequence of distinct conditions of employment that are more than a mere coincidental occurrence. Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). A disease arises "proximately" if the employment conditions probably caused the disease. Id. at 477. Both the "naturally" and "proximately" requirements mandate an employment condition, which for noise induced hearing loss is loud noise. Absent that noise, there is no occupational disease and a worker cannot file for benefits.

The Self-Insured Association's arguments to establish workers' rates of compensation before the noise exposure causing the disability use "junk" science in a way that punishes the worker. According to Boeing

Co. v. Heidy, “when faced with a circumstance where either workers or employers will bear the burden of an imperfect science, the statute directs us to construe the Act in favor of workers.” 147 Wn.2d at 86, citing, RCW 51.12.010. In this case, it is not an imperfect science. Instead, science says exactly what workers’ hearing, whether the result of noise or some other cause, looked like on the date of the audiogram. However, the Self-Insurers are arguing to use science against the worker and have them compensated at a lower rate of compensation merely because science allows the ability to initially establish workers’ percentages of hearing loss before all of their noise exposure. This is particularly troublesome when it is the employer who has control of the scientific data discovered from its workers’ audiograms and the injurious loud noise in the work place.

The Self-Insurers want to ignore the precedent finding multiple rates of compensation are allowed when there are multiple diseases resulting in disability, by distinguishing asbestos related diseases from hearing loss. Kilpatrick v. Dep’t of Labor & Indus., 125 Wn.2d 222, 230, 883 P.2d 1370 (1994). However, the rationales for allowing multiple rates of compensation for asbestos cases are the same as those in noise induced hearing loss cases. First, in Kilpatrick, the court rejected the idea later manifesting diseases were an aggravation of the original condition even though each disease was separate and distinct. Id. at 230. Noise induced

hearing loss similarly involves separate and distinct diseases, in that absent additional noise exposure the disease would not progress. Pollard v. Weyerhaeuser, 123 Wn. App. 506, 513, 98 P.3d 545 (2004). As such, each exposure to noise creates a disability that is separately occurring, as was the case in Kilpatrick. The additional hearing loss is not a continuation of the disease process that began as a result of the original exposure; it is entirely independent of that exposure.

Second, the court in Kilpatrick found it inappropriate, when considering the purpose of workers' compensation benefits, to award benefits using an outdated schedule of benefits. Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d at 230. According to the court, there is a "statutory mandate of liberal construction to insure the fair compensation of disabled workers, with all doubts resolved in favor of the employee". Id. The application of outdated benefit schedules does not satisfy that statutory mandate. Id. Using only the schedule of benefits in effect when the earliest audiogram was taken results in the application of outdated benefit schedules, as workers will be compensated for their disability using a rate in effect before their injury occurred.

Furthermore, the Self-Insured Association ignores its duty to provide a safe working environment or to compensate its workers for their losses. See generally, Title 51 of the Revised Code of Washington. It is

the employers who control the noise their workers are exposed to by the choice of its equipment and working environment. It is the employers who control when their workers find out if their noise exposure is causing disability by giving industrial audiograms and disclosing the results of those audiograms to its workers. To establish workers' rates of compensation before the noise exposure causing disability results in an inappropriate windfall to employers, especially to those who give industrial audiograms and fail to reveal the results of those audiograms to its workers.

B. Treating workers suffering from occupational diseases similarly to those with industrial injuries does not create a class of claims not contemplated by the Industrial Insurance Act.

Allowing for multiple rates of compensation does not create a hybrid class of claims effectively combining industrial injuries and occupational disease. It is undisputed: hearing loss is an occupational disease. Boeing Co. v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002). An occupational disease is different from an industrial injury in that an occupational disease "may occur over a prolonged period of time during which a worker may receive multiple exposures." Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 135, 814 P.2d 629 (1991). While hearing loss results from noise exposure, there is no way to know what specific exposure

results in the death of the ear hair cell causing the disability. Continued noise exposure causes the hearing loss to progress. Blackburn v. Workers' Comp. Div., 212 W.Va. 838, 847, 575 S.E.2d 597 (2002); see also, In re Eugene Williams, BIIA Dec. 95378 (1998). However, on the date of an audiogram, the amount of hearing loss related to the worker's noise exposure so far is scientifically known.

Allowing for multiple rates of compensation will not create a need "to go back in time and determine the degree or extent to which each and every exposure affected the ultimate disability," as the court in Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 135, 814 P.2d 629 (1991), rejected with respect to occupational disease claims. Workers can be exposed to noise multiple times every work day. It would be impossible to determine which noise exposures caused increased disability and when. However, on the date of their audiograms, the effect of workers' noise exposure on their hearing is known.

In fact, the court in Weyerhaeuser Co. v. Tri addressed the issue of rate of compensation when it determined that segregation is not allowed between employers. Specifically, the court distinguished the responsibility for paying benefits from the amount of compensation. Id. at 132-133. In so doing, the court refused to find RCW 51.16.040, which requires the "amount of benefits paid [must] be the same regardless of

whether the underlying cause of disability is an injury or an occupational disease”, addressed whether responsibility for payment of benefits could be apportioned between multiple employers. Instead, it specified that RCW 51.16.040 applied only to the amount of benefits paid. Id. at 133. The Self-Insurers arguments would effectively eliminate RCW 51.16.040 from the Act, even for claims involving payment of benefits, like Mr. Harry’s.

This failure to recognize the “amount of benefits paid” language in RCW 51.16.040 is what allows the Self-Insurers to argue for workers to have their rates of compensation established before the industrial exposure resulting in disability. Had the Legislature wanted to carve out an exception to RCW 51.16.040, as it did when establishing the statute of limitations for filing a hearing loss claim in RCW 51.28.055, it surely would have done so. See Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 134, 814 P.2d 629 (1991) (holding the Legislature’s failure to approve apportionment among successive insurers in occupational disease cases is intentional where elsewhere it authorized apportionment). Instead, workers with hearing loss must be treated the same as all other workers with occupational diseases, and must have their rate of compensation established after the noise exposure resulting in disability.

C. RCW 51.32.180 is ambiguous, as the decision in Boeing Co. v. Heidy does not establish the meaning of “partially disabling”.

Washington Self-Insurers contorts the holding in Boeing Co. v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002), that RCW 51.32.180 (b) does not require a worker have knowledge of an occupational disease to establish the rate of compensation, to mean RCW 51.32.180(b) is unambiguous. The court in Boeing Co. v. Heidy never answered the question of whether RCW 51.32.180 (b) is ambiguous.

Boeing Co. v. Heidy, in part, deals with the requirements necessary to establish workers’ rates of compensation. The court, when asked to add a “knowledge” requirement not present in the statutory language of RCW 51.32.180 (b), relied solely on the requirements as enunciated by the Legislature. They found RCW 51.32.180 (b) establishes a worker’s rate of compensation as of the date of treatment or when the disease became partially disabling, whichever occurs first. “RCW 51.32.180 (b) is clear - a worker's knowledge of his or her disabling condition does not affect when the rate of compensation is established.” Id. at 88. To hold otherwise, would have effectively read the “partially disabling” language out of the statute, in violation of the rules of statutory interpretation.

Awarding multiple rates of compensation does not in any way change the court’s decision in Boeing Co. v. Heidy – worker knowledge is

simply not required to establish a rate of compensation. Even though workers may not know their earlier audiograms show hearing loss, their rate of compensation will be established by those audiograms for the percentage of disability reflected on the audiogram.

The Court in Boeing Co. v. Heidy, however, did not address what the Legislature meant with the requirement of “partially disabling” in RCW 51.32.180. In so doing, the Court did not address whether the statute:

- Establish a rate of compensation before the worker is exposed to the occupational noise resulting in disability; or
- Allows an employer to control which rate of compensation applies to its workers by the manner it discloses the results of its own industrial audiograms.

It does not matter whether these issues were raised by the Amicus Curiae in Boeing Co. v. Heidy; it remains that “partially disabling” is undefined and as such RCW 51.32.180 is ambiguous.

D. Providing workers with multiple rates of compensation does not require this Court ignore any of the language in RCW 51.32.180; however, establishing only one rate based on the first audiogram may violate RCW 51.32.180’s prohibition of establishing a rate of compensation by the date a claim was filed.

According to the rules of statutory interpretation, statutes are interpreted so no language is rendered meaningless or superfluous. Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Additionally, the statutory language should not be construed to result in absurd or strained consequences. In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998). Allowing workers multiple rates of compensation does not require any language in RCW 51.32.180 be ignored; however, a rule establishing only one rate of compensation results in the absurd result that workers are compensated better when they file more claims.

The statutory language in RCW 51.32.180, “without regard to the date of the contraction of the disease or the date of filing of the claim,” is not rendered a nullity by requiring multiple rates of compensation. As it is impossible to know when each ear hair cell dies or the percentage of hearing loss related to single ear hair cell death, there is no way to determine the date of the contraction of the disease. A disease must be manifest before it is deemed to have occurred. Dep’t of Labor & Indus. v. Landon, 117 Wn.2d 122, 125, 814 P.2d 626 (1991). Hearing loss manifests itself on an audiogram. As such, workers must be compensated based on the rate of compensation in effect on the date of a valid audiogram showing their noise exposure up to that time.

Interestingly, if workers' rates of compensation are determined as of the first audiogram to show any disability, RCW 51.32.180's language "without regard to the date of the filing of the claim" is ignored. Workers who file more claims will be compensated with a higher dollar amount than their co-workers who wait until the end of their careers to file a single hearing loss claim. As such, the date of filing becomes an important part of the calculation of workers' benefits for their hearing loss. This is absurd in that it encourages the filing of multiple claims and increases the burden of administrating the Industrial Insurance Act.

E. Providing multiple rates of compensation insures the Industrial Insurance Act's mandate to provide sure and speedy relief to workers is carried out in a way that does not punish injured workers, and does not create insurance with full compensation.

Requiring all workers with occupational diseases be treated the same does not turn workers' compensation into something not intended by the Act. Instead, it does exactly what the Industrial Insurance Act was meant to do – provide "a sure and speedy relief for work[ers] ... from occupational diseases arising naturally and proximately from extrahazardous employment." Weyerhaeuser Co. v. Tri, 117 Wn.2d 128,138, 814 P.2d 629 (1991). The Industrial Insurance Act is a compromise between employers and workers, as indicated by the Self-Insurers. In exchange for limited liability, employers agreed to provide

statutorily-defined benefits promptly to its injured workers. Workers, in exchange, gave up their right to sue their employers under tort law, where they may have been entitled to greater benefits. Thus, the two goals of the Act are to provide sure and certain relief to injured workers while limiting employers' liability to its workers. Often these goals conflict with each other, creating tension. That tension, however, is to be resolved in favor of the injured worker. Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 140, 814 P.2d 629 (1991). The Self-Insurers, however, attempt to argue the ambiguities in RCW 51.32.180 should be resolve in their favor, contrary to the clear mandate of RCW 51.12.010.

Resolving that tension in favor of workers is not going to create an administrative nightmare. Allowing multiple rates of compensation requires a determination as to which audiograms are valid and then a little math. Determining valid audiograms is not a new requirement under the Industrial Insurance Act. Currently, the Department and/or Self-Insurers evaluate the validity of audiograms to establish whether there is disability, the rate of permanent impairment, and the rate of compensation. Once the valid audiograms are established, determining more than one rate of compensation requires the Department and/or Self-Insurer to subtract the earlier percentage of disability from the later percentage and multiply that new percentage by the rate of compensation in effect when the later

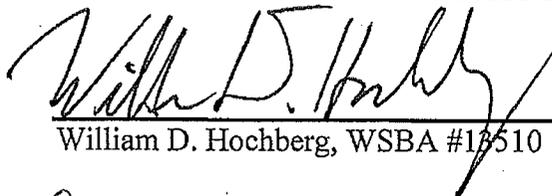
audiogram was taken. This basic arithmetic is simpler than many of the mathematical functions the Legislature mandates under the Industrial Insurance Act, such as determining loss of earning power benefits or a compensation rate. This mathematic exercise would be the same whether there were multiple claims with one audiogram or a single claim with multiple audiograms.

CONCLUSION

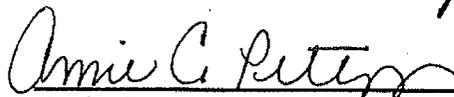
Mr. Harry respectfully requests this Court uphold the Court of Appeals' decision and remand the matter to apply the rate of compensation in effect for each increase in disability established by an audiogram.

RESPECTFULLY SUBMITTED on this 14 day of January, 2008.

LAW OFFICE OF WILLIAM D. HOCHBERG



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CERTIFICATE OF MAILING

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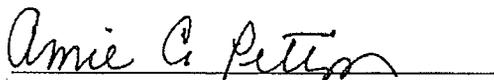
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29 I certify that either the original, via personal delivery, or a copy of the document attached
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