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COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

DONALD HARRY,

Appellant,

v.

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

Respondent.

APPELLANT'S BRIEF

Nicole A. Hanousek
WSBA # 29935
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

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ASSIGNMENT OF ERRORS

A. Assignment of Errors

1. The trial court erred in upholding the Board of Industrial Insurance Appeals decision dated July 3, 2003 setting Mr. Harry's permanent partial disability award based on the schedule of benefits in place in 1974.

2. The trial court erred in holding as a matter of law that Mr. Harry's permanent partial disability award should be based on the schedule of benefits in place in 1974.

B. Issues Pertaining to Assignment of Errors

1. Should the Department use the 2001 schedule of benefits, instead of the 1974 schedule, in awarding Permanent Partial Disability (PPD) to Mr. Harry for his hearing loss, as each exposure to injurious noise is a separate and distinct disease entitled to separate dates of manifestation?

2. Did the Superior Court err in holding that Mr. Harry failed to meet his burden in proving that the Department's order was not prima facie correct?

STATEMENT OF THE CASE

Donald Harry worked as a truck driver for Buse Timber and Sales, Inc. (Buse) from 1957 until his retirement in 1990. During the course of this employment, Mr. Harry was under the protection of Buse Timber's Hearing Conservation Program. This meant that Mr. Harry's occupation potentially exposed him to injurious noise, such that Buse, through WISHA regulations, was required to monitor and protect Mr. Harry's hearing. As part of this hearing conservation program, Mr. Harry underwent yearly industrial screening audiograms. These audiograms were done at Buse Timber, in a van, and Buse was notified and given the results of the yearly audiograms. However, the audiograms were never given to Mr. Harry nor was he ever told the results. Nor were the results of these screening audiograms used to encourage Mr. Harry to receive medical treatment or file any claim for his hearing loss. Per WAC 296-27-031, the Employer *must* report injuries timely. See also WAC 296-27-00101. These statutes are there to protect injured workers from exactly what occurred here. Buse knew about the injuries happening to Mr. Harry, and just hoped that Mr. Harry would never file a claim for them.

On April 20, 2001, Mr. Harry filed an application for benefits with the Department of Labor and Industries for occupationally related hearing loss occurring while acting in the course of his employment with Buse

Timber and Sales, Inc. (Buse). The Department issued an order allowing the claim on October 31, 2001. On November 13, 2001, the Department issued an order requiring the Self Insured Employer (Buse) to accept the claim for hearing loss, pay the claimant 38.13.% PPD for complete hearing loss in both ears, and pay the claimant for the purchase and maintenance of hearing aids. This decision relied on the results of an audiogram conducted on August 28, 2001 and closed the case.

Buse filed a Protest and Request for Reconsideration on December 12, 2001. CABR 23. Its reason was that Mr. Harry's industrial audiograms, done for purposes of the Hearing Conservation Program, indicated that Mr. Harry had a ratable loss of hearing as early as 1974, therefore, Mr. Harry's 2001 claim, should be paid according to the 1974 Department of Labor and Industries schedule of benefits.

On January 14, 2002, the Department reversed its November 13, 2001 order, identified August 26, 1974 as the date of injury, and again closed the claim. On February 6, 2002, the Claimant timely filed a Notice of Appeal with the Board of Industrial Insurance Appeals (BIIA) which was granted on March 6, 2002 and assigned Docket No. 02-10666. CABR 27. On March 27, 2003, Buse filed a motion to dismiss alleging that the Claimant had failed to present a prima facie case. CABR 62.

On May 6, 2003, Industrial Appeals Judge Carol A. Molchior (IAJ) issued a Proposed Decision and Order affirming the Department's Order dated June 14, 2002 and the use of the 1974 schedule of benefits. CABR 14, 21. The Claimant had presented two arguments before the IAJ. One, that the industrial screening audiograms were not medically reliable to establish disability and two, that if they were, then each audiogram (each showing an increase of hearing loss), should be used to establish the schedule of benefits, not just the first one.

The IAJ decided that Mr. Harry failed to present prima facie case as he did not present affirmative evidence in support of his claim that the August 26, 1974 audiogram was not valid. CABR 5. The judge could not, at that time, address whether the Pollard or Brooks decisions applied because the decisions were not final, there was no authority for the judge to follow, and the judge was left with whether the industrial screening audiograms were reliable enough to establish medical disability per the AMA Guidelines. On July 3, 2003, the BIIA denied review. CABR 1. The claimant then appealed to the Snohomish County Superior Court and, on February 16th, 2005, Judge Kenneth L. Cowser affirmed the IAJ's Decision on Summary Judgment.

SUMMARY OF THE ARGUMENT

If Buse's audiograms are medically reliable to establish ratable impairment, and each audiogram indicates an increase in that hearing loss, then each of the audiograms triggers the schedule of benefits at the time that each audiogram indicates an increase in hearing loss.

Both the courts and the Board have determined that each exposure to injurious levels of noise constitutes a separate and distinct disease that creates a separate date of manifestation. Pollard v. Weyerhaeuser, 123 Wn. App. 506 (2004); In re Paul J. Brooks, BIIA No. 02 17331 (2003). In denying to pay Mr. Harry benefits according to the latest schedule of benefits, the Department is not fully compensating workers for their disability. This is in violation of RCW 51.16.040 and RCW 51.32.180 requirement that compensation be paid to workers disabled by occupational diseases in the same manner as is provided to workers disabled by injury. Clauson v. Dep't of Labor & Indus., 130 Wn.2d 580, 584 (1996). Furthermore, the Department's decision disadvantages a worker because that audiograms did not result in medical treatment and the Employer withheld the testing and its results from the worker. Finally, the Department's order in this case violated two strong policy rationales behind the Industrial Insurance Act: (1) that ambiguities in the Act be resolved in favor of the worker and (2) that the employer pay the full cost of doing business. Finally, the Superior Court erred in granting in finding

that Mr. Harry failed to prove a prima facie case as the claimant presented a legal issue not requiring him to produce additional evidence.

ARGUMENT

A. Appellate Courts review questions of law from the Board of Industrial Insurance Appeals de novo.

RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act. RCW 51.52.115 states:

The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110.... In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attaching the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed....

When a party appeals from a Board of Industrial Insurance Appeals decision, the superior court grants summary judgment affirming that decision, the appellate court's inquiry is the same as that of the superior court. Bennerstrom v. Dep't of Labor & Indus. 120 Wn. App. 853, 858 (2004)(citing Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 451 (1993)). Summary judgment is properly granted when the evidence on file demonstrates that there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The appellate court may substitute its own judgment for that of the agency regarding issues of law. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5-6 (1999). While the court may defer to an agency's interpretation of a statute, such an interpretation is not binding. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 813 (2001). It is the providence of the judicial branch to say what the law is and to determine the purpose and meaning of statutes. Id. Statutory interpretation is a question of law and, as such, is reviewed *de novo*. Id. at 807. In reviewing a statute, the primary goal is to carry out the legislative intent behind the statute. Id. (citing Rozner v. City of Bellevue, 116 Wn.2d 342, 347 (1991)).

B. The Department should use each Schedule of Benefits in effect at the time of each increase of documented hearing loss in awarding Permanent Partial Disability to Mr. Harry for his occupational hearing loss.

Benefits for workers disabled by occupational diseases should be paid in the same way as benefits for those who suffer discrete injury on the job. RCW 51.16.040. Under Clauson v. Dept' of L&I, all similar cases should be treated similarly, 130 Wn.2d 580, 925 P.2d 624 (1996)

When two discrete injuries occur, each unrelated to the other, the claimant's rights are governed by the law in force on the date of each

injury. See generally Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 231 (1994). The date of injury does not have a corollary for workers who suffer from occupational diseases, as occupational disease do not manifest themselves immediately after the worker is expose to the harmful material or stimuli. Id. Rather, it takes time for the disease to fully manifest itself. Therefore, a claimant should be paid benefits according to the schedule of benefits in affect at the time that his or her disease manifests itself. Landon v. Dep't of Labor & Indus., 117 Wn.2d 122, 123-124 (1991).

The Washington Legislature codified this rational in the 1988 amendment to RCW 51.32.180. This statute provides:

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective provisions of this title ...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: ... (b) ...the rate of compensation for occupational disease 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) cannot be interpreted using its plain language because it is unclear as to when a person becomes totally or partially

disabled.¹ While the schedule of benefits is determined when treatment occurs or when a condition becomes disabling, the statute does not clarify exactly when a condition becomes disabling. This is particularly distressing when, as in hearing loss, an employer can use a test to diagnose the disease early on, but the "total disease" does not stop progressing until the worker is removed from the dangerous stimuli or condition. Where statutory language is susceptible to more than one interpretation, it is considered ambiguous. Harmon v. Department of Social & Health Services, 134 Wn.2d 523, 530 (1998). Either the "medical verification" or the "date of last exposure" doctrines require the Court to interpret the meaning of becomes totally or partially disabling; therefore, this statute is ambiguous.

In this case, it is clear that each exposure to occupational noise is a separate and distinct occupation disease and thus a new schedule of benefits should be applied. There are three reasons for this conclusion: (1) it has been legally determined that each exposure to injurious noise constitutes a discrete disease worsening a worker's hearing; (2) statutory language requires that all workers be compensated similarly; and (3) statutory and public policy requires this result. As such, the Department

¹ The Court in Pollard v. Weyerhaeuser Co., 123 Wn. App. 506, 513 (2004), held that RCW 51.32.180(b) "is ambiguous and must be construed liberally in favor of the worker."

should pay Mr. Harry's hearing loss compensation according to the 2001 schedule of benefits.

1. Each exposure to injurious levels of noise constitutes discrete diseases with discrete disabilities because each exposure to noise worsened Mr. Harry's hearing loss.

The inner ear is an extremely sensitive structure that includes around sixteen thousand sensory hair cells. A sensory nerve connects each of these hairs, thus making it possible to transmit sound signals to the brain. These hair cells are lost during prolonged and excessive noise. Once the cell dies, scar tissue replaces the cell and it is unable to transmit its sound signals. This condition is irreversible because the hair cells cannot regenerate. In re Eugene Williams, BIIA Dec. 95378 (Significant Decision, 1998). While it is impossible to determine exactly when a hair cell dies, hair cell loss can be shown by audiograms showing additional exposure. As each exposure to injurious noise creates each additional hearing loss recorded by way of an audiogram, each injurious exposure is a separate and discrete disease needing a separate schedule of benefits.

Both the Board of Industrial Insurance Appeals and Division II of the Washington State Court of Appeals have found that this is the proper and fair way to establish benefits schedules in noise induced hearing loss claims. Pollard v. Weyerhaeuser, 123 Wn. App. 506 (2004); In re Paul J.

Brooks, BIIA No. 02 17331 (2003). As the reasoning in these cases apply equally to Mr. Harry's case, there is no reason to deviate from this firmly established precedent.

In Pollard, the claimant worked at Weyerhaeuser from 1961 to 2000 or for a total of 39 years. During that period, the claimant was continually exposed to industrial noise. By 1982, the claimant was diagnosed with a 10% hearing loss. He filed a claim and was awarded the 10% loss using the schedule of benefits that was effective from 1979 to 1986. Id. at 508-509. By 1998, the claimant noticed his hearing loss increasing. In 1999, the claimant filed another claim and was awarded compensation for an additional 35.9% hearing loss. The Department used the 1999 schedule of benefits for the second award rather than use the 1979 schedule of benefits, which was used in the earlier claim. Weyerhaeuser appealed saying the Department should have used the 1979 schedule of benefits that was in effect when, in 1982, the claimant first sought treatment for noise-related hearing loss. Id.

The court disagreed, holding that each exposure to occupational noise is a separate and distinct occupational disease, and thus a new schedule of benefits should be applied. Id. at 514. See also Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 231 (1994). According to the court, once noise exposure stops, so does the progression of hearing loss

unless there is additional exposure. Pollard, 123 Wn. App. at 512, citing Blackburn v. Workers' Comp. Div., 212 W.Va. 838, 847 (2002). When there are multiple dates of injury, each unrelated to the other, the rights of the claimant are governed by the law in force on the date of each injury. RCW 51.16.040; Pollard, 123 Wn. App. at 514. Therefore, as each audiogram displayed a separate and distinct hearing loss, a different schedule of benefits applied. Id.

The court in Pollard relied on the Board's Significant Decision In re Paul J. Brooks in concluding that distinct noise exposures constituted separate and distinct occupational diseases. In re Paul J. Brooks, BIIA No. 02 17331 (2003). In Brooks, the claimant worked for Weyerhaeuser from 1971 through July 2001, when he retired. During this time, the claimant was exposed to industrial noise. This noise exposure resulted in the claimant filing two claims for occupational hearing loss: one in 1984 and a second in 2001. The self-insured employer, in this case, argued the exact same thing as was argued in Pollard, that hearing loss is one disease and therefore the date of manifestation must be that which was used in the earlier claim.

The Board also disagreed. But for the additional noise exposure, the claimant would not have had additional hearing loss. Brooks at 4. As such, the Board held that RCW 51.32.180 did not require one

manifestation date in the case of noise-induced hearing loss claims based on the earliest manifestation of noise induced hearing loss. Id. Therefore, the Board reasoned that it is inconsistent with the goals of the Industrial Insurance Act to compensate a person at a rate in effect long before either the exposure or damage occurred. Id.; see also Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122 (1991).

The determination in Pollard that a worker suffering from one medical condition can have separate and distinct disease is not a new concept. Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 231 (1994). In Kilpatrick, the Supreme Court made a similar determination for a different kind of occupational disease. Kilpatrick involved workers exposed to asbestos at work and who later developed two separate and distinct diseases from this exposure. The Court has held "just as multiple dates of injury will give rise to multiple industrial injury claims, so also will the worker who establishes separate and distinct diseases from asbestos exposure be able to claim separate date of manifestation." Kilpatrick, 125 Wn.2d at 224. In doing so, the court in Kilpatrick was concerned that the Department's interpretation of the statute, restricting the date of manifestation to the first disease merely because it occurred from the same exposure, resulted in the application of outdated schedules. Id. at 231. The same reasoning applies here. Confining a worker to the

original date of his or her first noise-induced disability results in the determination of benefit schedules that may be decades obsolete by the time a worker retires.

Both Pollard and Brooks firmly establish that noise-induced hearing loss is the result of multiple dates of injury and therefore establishes separate and distinct diseases. Mr. Harry's situation is similar to the claimants in both Pollard and Brooks. Mr. Harry worked for 33 years for Buse during which he was continually exposed to noise. Dr. Lipscomb testified that the Buse screening tests show that Mr. Harry's hearing loss increased as he was continually exposed to noise. CABR 5. Deposition of Dr. Lipscomb, p. 32, lines 8-11. Buse screening tests confirm that Mr. Harry suffered a permanent progression of increase in his hearing loss during his entire career.

The only difference between Mr. Harry and the claimants in Pollard and Brooks is that Mr. Harry filed a claim once. This distinction is inconsequential to the reasoning applied in Pollard and Brooks. In Pollard, the court is very clear that it is relying on the audiograms as establishing dates of disability, not the claim filing itself. Likewise in Mr. Harry's case, if filing the claim established the date of manifestation, then 2001 (the date he filed for benefits) would be the only date used in establishing his disability.

Applying Pollard and Brooks reasoning, Mr. Harry is entitled have multiple schedule of benefits based on the disease manifestation as expressed in each audiogram.

2. *Statutory language directs the Department of Labor and Industries to compensate workers, whether suffering injuries or occupational diseases, in a like manner.*

A rule that requires multiple rates of compensation for multiple injurious exposures to noise is the best interpretation of the Industrial Insurance Act. RCW 51.16.040 and RCW 51.32.180 require that the Department pay compensation to workers disabled by occupational diseases in the same manner that is provided to workers disabled by injury. Specifically, RCW 51.16.040 states, "the compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title." At the same time, RCW 51.32.180 requires, "every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective provisions of this title . . . shall receive the same compensation benefits . . . as would be paid . . . for a worker injured or killed in employment under this title."

Treating workers who suffer hearing loss differently from those whose hearing loss results from traumatic injury is contrary to the

directive of the Industrial Insurance Act, requiring that occupational disease disabilities be treated similarly to disability resulting from injury. RCW 51.16.040; RCW 51.32.180. For example, take a worker who unfortunately suffers two knee injuries while working in a factory, but not at the same time. If the accidents were separated in time sufficiently for a new schedule of benefits to be adopted, no one would question that different compensation rates for the incremental increase in disability resulting from the discrete accidents would be required by the Act. Another example would be a worker whose suffers a head injury and partial loss of hearing because of a fall. If that worker fell again ten years later and lost more hearing, there would be little doubt that a new rate of compensation would be established. There should be no difference between these instances and noise induced hearing loss.

Applying a single compensation rate also creates an absurd result, something that courts must avoid when interpreting statutes. See State v. Naher, 112 Wn.2d 347, 351 (1989). In this case, the absurd result would be establishing a schedule of benefits based on a date of manifestation that is before the disability fully manifests itself. Such a result is easily avoided if each successive exposure documented by reliable audiograms is treated as an independent disease with independent disabilities.

3. A worker should not be disadvantaged because of the timing of a test, when that test was not as a result of the worker seeking medical treatment and did not result in earlier treatment and compensation for a disability.

A worker should not be disadvantaged by an audiogram suggesting that the worker may be suffering from a disease that may be partially disabling when that treatment does not result in treatment and/or compensation for that partial disability. This would allow a worker to be disadvantaged by timing and circumstances unrelated to their entitlement to benefits under the Industrial Insurance Act.

If Buse tests are determined to be medically valid, then each test is medically valid and each test establishes disability. Then to fairly calculate Mr. Harry's disability, each year that his hearing permanently increased would be the date that the injury would be manifested. Therefore Mr. Harry's hearing loss can be calculated each year per each audiogram until 2001, when he reached his total occupational hearing loss upon his retirement.

An injured worker, who files a claim in the year 2001, should not be paid in 1974 dollars. There is no justice or fairness in that, especially since the facts reveal that the Employer, Buse Timber, took a series of audiograms, and simply watched Mr. Harry's hearing decrease. Now, by arguing that he should be paid in 1974 dollars, Buse wants to penalize Mr.

Harry for not filing his claim earlier, when Mr. Harry had no access to those audiograms like Buse did. By reversing its November 13, 2001 Decision and Order, which directed Buse to pay the 38.13% in 2001 dollars, to the January 14, 2002 Order, which directed that the claim be paid in 1974 dollars, the Department is supporting Employers to not disclose injuries timely. Per WAC 296-27-031, the Employer *must* report injuries timely. See also WAC 296-27-00101.

Further, the Court in Clauson v. Dep't of Labor & Indus., refused to allow a similar disadvantage regarding the Department's timing in closing two unrelated claims.

Clauson involved a worker who injured his hip and then subsequently injured his back. Clauson, 180 Wn.2d at 682-583. The Department placed the worker on a pension for the back claim before resolving the preexisting hip claim and was now denying the worker benefits for his hip claim as he was already on pension. Id. Had the worker's hip claim closed before being placed on pension he would have been entitled to the full pension even though he received a lump PPD award for his hip injury pursuant to RCW 51.32.060(4). Clauson, 130 Wn.2d at 586. The court held that the worker should not be denied benefits simply because his hip condition was not medically fixed and stable until one week after his back claim was resolved. Id.

Similarly, a worker should not be disadvantaged merely because of the timing of an audiogram. A worker, who is exposed to injurious noise for an entire work-life and who sustains substantial hearing loss but whose hearing loss was diagnosed in the first few years of employment, should receive the same compensation as a person with a similar history of noise exposure and similar disability but whose hearing loss is not diagnosed until retirement.

Mr. Harry was exposed to injurious noise for his entire work-life. Each exposure resulted in separate and distinct hearing loss. Pollard, 123 Wn. App. at 514. This noise exposure would likely have gone undiagnosed until 2000, when his hearing loss bothered him enough to see a doctor regardless of the fact that his employer instituted a hearing conservation program. The conservation program did not result in early treatment, compensation, or even protection from injurious noise for Mr. Harry. What the Buse audiograms disclose is that after beginning the screening tests for hearing loss, Mr. Harry continued to be exposed to injurious noise leading to further damage. Now Buse argues that Mr. Harry should be paid for this loss at a discounted rate because of a fortuitous test scheme.

4. *The public policy behind the Industrial Insurance Act requires that Mr. Harry be paid benefits according each date the disability manifests itself.*

According to RCW 51.12.010, the Industrial Insurance Act's purpose is to reduce suffering and economic loss arising from injuries and death occurring in the course of employment. See RCW 51.12.010. As a result, the legislature established that the Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. All ambiguities and doubts in the language of the Act and implementing regulations must be resolved to the advantage of the injured worker. Clauson v. Dep't of Labor & Indus., 130 Wn.2d 580, 584 (1996); Sacred Heart Medical Ctr. v. Carrado, 92 Wn.2d 631 (1975); Gaines v. Dep't of Labor & Indus., 1 Wn.App. 547, 552 (1969).

As the court in Pollard reasoned, RCW 51.32.180(b) does not address whether one schedule of benefits should apply to noise-related hearing loss. Therefore, RCW 51.32.180(b) is ambiguous and must be construed liberally in favor of the worker. Pollard, 123 Wn. App. at 513. A liberal construction requires that workers not be compensated using rated "in effect long before either the exposure or the damage occurred." Brooks at 4.

To allow Buse to compensate Mr. Harry for a hearing loss not fully realized until 2001 at the 1974 schedule of benefits would result in Mr. Harry receiving benefits in effect before he suffered all of his injury because of this job. This construes the statute in a manner that does not meet RCW 51.12.010's requirement that any statutory doubts be resolved in favor of the worker.

Furthermore, the policy that compensation for industrial injuries is part of the cost of doing business and should be born by employers (and ultimately consumers) is basic to the underlying theory of worker's compensation. See Dep't of Labor & Industries v. Landon, 117 Wn.2d 122 (1991), citing Grain Handling v. Sweeney, 102 F.2d 464, 465 (1939). Where an employer can compensate a worker for disabilities sustained decades after the applicable schedule is set, the employer is not bearing the true cost of doing business. Such employers are in effect paying at a discounted rate because a worker has, early in his or her career, established compensable hearing loss.

Buse wishes to compensate Mr. Harry at a schedule of benefits that is set seventeen years before the date of last injurious exposure. This would result in Buse not having to fully compensate Mr. Harry. Furthermore, this would encourage employers, such as Buse, to not inform workers of their noise induced hearing loss per WAC 296-27-031,

allowing employers to establish low rates of compensation. This would not hold Buse fully accountable for the cost of doing business.

Applying Pollard and Brooks to Mr. Harry's claim can support public policy for both Buse Timber and Mr. Harry.

Buse has argued and there is medical evidence presented that its industrial audiograms from 1974 to 1999 are medically reliable. If so, then it is only fair to both the Employer and the Claimant to apply the reasoning in Pollard and Brooks, to use each reliable audiogram to establish the date of disability benefits that are paid. In this way the Claimant is not taken advantaged of by an Employer hiding the results of the audiograms, and the Employer does not have to necessarily pay extra for a Claimant, who files a claim later than when the disability first occurred.

In Mr. Harry's case he has a series of audiograms from 1974 to 1999. In August 1974, he had 5.6% monaural (single ear) loss, which slowly increased until in 1999, he had a 45% binaural (both ears) loss. CABR 5, Exhibits 3-4

Applying Pollard, each year that Mr. Harry's loss increased per the Buse audiograms, each year is paid according to that schedule of benefits, minus the dollar amount of what was previously paid.

To use the schedule of benefits used in 1974 for a disability that did not fully manifest itself until 2001 is greatly unfair to Mr. Harry. This concern was specifically addressed by the Board in Brooks. Brooks at 4. But also, to only use the date of claim as establishing the schedule of benefits is unfair to the Employer, for as in Mr. Harry's case, his 45% would be paid in full according to the 2001 schedule of benefits, and Buse would not have the benefit of deducting the amounts of disability established in the earlier audiograms.

C. It was an error to grant the employer's summary judgment motion as Mr. Harry presented sufficient evidence to prove a prima facie case and the only legal issue in the case is the appropriate benefits under the Industrial Insurance Act.

The plaintiff has the burden of proving that the Department's order is not prima facie correct. Reid v. Dep't of Labor & Indus., 1 Wn.2d 430, 436 (1939). Mr. Harry has met this burden. Mr. Harry has pointed to legal authority questioning the validity of the Department's order in this claim. The employer and judge, however, incorrectly determined that Mr. Harry's burden by requiring that he had to prove that the 1974 audiogram was not valid or reliable in order to prove a prima facie case. As the validity of the 1974 is not statutorily required in RCW 51.32.180, it was incorrect for the Industrial Appeals Judge to require that evidence to prove a prima facie case. This was merely one of the theories advanced by Mr.

Harry. By granting the Employer's summary judgment motion on this issue, the Industrial Appeals Judge never resolved an entirely legal issue that Mr. Harry presented – whether the Pollard decision requires that Mr. Harry be paid according to each audiogram establishing increased disability.

As the issue of whether Mr. Harry is entitled to benefits under the 1974 or 2001 schedule of benefits does not necessarily require the claimant to present factual evidence, the Industrial Appeals Judge and the Superior Court erred. Instead the claim should have been remanded for the factual determination under the Pollard decision.

CONCLUSION

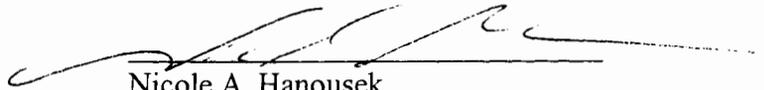
The Department should compensate Mr. Harry for his occupational hearing loss according to each schedule of benefits in effect for each disability he occurred at Buse Timber, as this is the only way that meets the requirements of the Industrial Insurance Act and compensates the claimant for his full disability. Furthermore, the Superior Court erred in finding that the claimant failed to present a prima facie case as Mr. Harry questioned the Department's legal interpretation of RCW 51.32.180. Therefore, Mr. Harry respectfully requests that this Court reverse the Superior Court's decision and remand the matter to the Department to

apply the schedule of benefits in effect for each disability established by
Buse audiograms.

Mr. Harry also requests his attorneys fees and costs under RCW
51.52.130.

Respectfully submitted this 23 day of May, 2005.

THE LAW OFFICE OF WILLIAM D. HOCHBERG



Nicole A. Hanousek
Attorney for the Appellant
WSBA #29935

APPENDIX

RCW 51.12.010	Exhibit 1
RCW 51.16.040	Exhibit 2
RCW 51.32.180	Exhibit 3
RCW 51.52.110	Exhibit 4
RCW 51.52.115	Exhibit 5
RCW 51.52.130	Exhibit 6
WAC 296-27-031.....	Exhibit 7
WAC 296-27-00101.....	Exhibit 8

RCW 51.12.010

Employments included -- Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

RCW 51.16.040

Occupational diseases.

The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.

[1971 ex.s. c 289 § 83; 1961 c 23 § 51.16.040. Prior: 1959 c 308 § 12; 1941 c 235 § 2; Rem. Supp. 1941 7679-1.]

NOTES:

Effective dates -- Severability -- 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

EXHIBIT 2

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.

[1988 c 161 § 5; 1977 ex.s. c 350 § 53; 1971 ex.s. c 289 § 49; 1961 c 23 § 51.32.180. Prior: 1959 c 308 § 19; prior: 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

NOTES:

Benefit increases -- Application to certain retrospective rating agreements -- 1988 c 161: See notes following RCW 51.32.050.

Effective dates -- Severability -- 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

RCW 51.52.110**Court appeal -- Taking the appeal.**

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

[1988 c 202 § 49; 1982 c 109 § 6; 1977 ex.s. c 350 § 80; 1973 c 40 § 1. Prior: 1972 ex.s. c 50 § 1; 1972 ex.s. c 43 § 36; 1971 ex.s. c 289 § 24; 1971 c 81 § 122; 1961 c 23 § 51.52.110; prior: 1957 c 70 § 61; 1951 c 225 § 14; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

NOTES:

Rules of court: Cf. Title 8 RAP, RAP 18.22.

***Reviser's note:** RCW 51.48.070 was repealed by 1996 c 60 § 2.

Severability -- 1988 c 202: See note following RCW 2.24.050.

EXHIBIT 4

RCW 51.52.115

Court appeal -- Procedure at trial -- Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

[1961 c 23 § 51.52.115. Prior: 1957 c 70 § 62; 1951 c 225 § 15; prior: (i) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (ii) 1949 c 219 § 6; 1939 c 184 § 1; Rem. Supp. 1949 § 7697-2.]

RCW 51.52.130**Attorney and witness fees in court appeal.**

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

[1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § 51.52.130. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

NOTES:

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

EXHIBIT

WAC 296-27-031 Reporting fatality, injury, and illness information. (1) Basic requirement. You must report fatalities, injuries and illnesses information as required by WAC 296-800-32005.

(2) Implementation.

(a) **If the local L&I office is closed, how do I report the incident?** If the local office is closed, you must report a fatality or multiple hospitalization incident by calling either the department at 1-800-4BE-SAFE (1-800-423-7233) or by contacting the Occupational Safety and Health Administration (OSHA) by calling its central number at 1-800-321-6742.

(b) **What information do I need to give about the incident?** You must give the following information for each fatality or multiple hospitalization incident:

- Name of the work place;
- Location of the incident;
- Time and date of the incident;
- Number of fatalities or hospitalized employees;
- Names of injured employees;
- Contact person and phone number; and
- Brief description of the incident.

[Statutory Authority: RCW 49.17.010, [49.17.040], and [49.17.050]. 02-01-064, § 296-27-031, filed 12/14/01, effective 1/1/02.]

EXHIBIT 7

WAC 296-27-00101 Purpose and scope. (1) Purpose. The purpose of this standard is to require employers to record and report work-related fatalities, injuries and illnesses.

Note: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that a rule has been violated, or that the employee is eligible for workers' compensation or other benefits.

(2) Scope. All employers covered by the Washington Industrial Safety and Health Act (WISHA) are covered by this standard. However, most employers do not have to keep injury and illness records unless WISHA, OSHA, or the Bureau of Labor Statistics (BLS) informs them in writing that they must keep records. For example, employers with ten or fewer employees and business establishments in certain industry classifications are partially exempt from keeping injury and illness records.

Note: The recordkeeping and reporting requirements of this chapter are separate and distinct from the recordkeeping and reporting requirements under Title 51 RCW (the Industrial Insurance Act) unless otherwise noted in this chapter.

[Statutory Authority: RCW 49.17.010, [49.17].040, and[49.17].050 . 02-01-064, § 296-27-00101, filed 12/14/01, effective 1/1/02.]

EXHIBIT 8

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CERTIFICATE OF MAILING

CLAIMANT: Donald Harry
CAUSE NO.: 03 2 09393 7
CASE NO.: 55902-8

COPY OF APPELLANT'S BRIEF MAILED TO:

Amy Arvidson, Esq.
Keehn Arvidson PLLC
701 Fifth Avenue, Suite 3470
Seattle, WA 98104

Nancy Hovis, AAG
Office of the Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164

I certify that either a copy of the document attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 23 day of May, 2005.



Amie C. Peters
Rule 9 Legal Intern

FILED
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STATE OF WASHINGTON
2005 MAY 23 PM 4:20