

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 The Department of Labor and Industries of  
the State of Washington, Appellants.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## **I. Introduction**

The Washington Legislature has made a policy decision to use only one schedule of benefits for occupational disease cases. RCW 51.32.180(b) clearly and unambiguously states that the schedule of benefits is established when 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 the filing of the claim. By using only one schedule of benefits for occupational hearing loss claims, progressive hearing loss is treated the same as any other occupational disease under RCW 51.32.180(b).

The Court of Appeals usurped the legislature's authority by creating a tiered schedule of benefits that is not supported by the Industrial Insurance Act and case law. This Court should hold that RCW 51.32.180(b) is clear and unambiguous and only one schedule of benefits shall be used in occupational hearing loss claims.

## **II. Assignments of Error**

1. The Court of Appeals erred in holding RCW 51.32.180 is ambiguous, and thus failed to apply the schedule of benefits in effect on the date Harry's hearing loss first became "partially disabling."
2. The Court of Appeals erred in relying upon *Pollard v. Weyerhaeuser* for the proposition that Harry's hearing loss constitutes multiple diseases instead of a single progressive condition.

### Issues Pertaining to Assignments of Error

1. Was it error for the Court of Appeals to adopt a tiered award system for applying the schedule of benefits in hearing loss cases when no prior court in the State of Washington has adopted such a system and there is no statutory basis to support a tiered award system?

2. Was it error for the Court of Appeals to conclude *Pollard v. Weyerhaeuser* requires each increase in noise-induced hearing loss to be characterized as a separate and independent disease thereby requiring multiple schedules of benefits when Harry suffered from only one disease, sensorineural hearing loss, and this Court has already characterized hearing loss as a progressive disease?

### III. Statement of the Case

Donald Harry (Harry) was employed with Buse Timber & Sales, Inc. (Buse) from 1968 until his retirement in March, 2001. CP, CABR, Tr. Harry 11, 16<sup>1</sup>. During Harry's employment he was exposed to loud noises which resulted in occupational hearing loss. Harry underwent 21 industrial audiograms pursuant to Buse's hearing conservation program from 1974 through 2000. CP, CABR, Lipscomb Tr. at 15, 43, 49. Following each audiogram Harry was given a copy of the results. CP, CABR, Harry Tr. at 19, 21. The 1974 audiogram revealed ratable loss in

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<sup>1</sup> Citations to the Clerk's papers are to CP with reference to the page numbers assigned by the Superior Court clerk. Citations to the Certified Appeal Board Record which was designated as part of the Clerk's papers are to CP CABR with reference to the machine stamped page number on the lower right corner. The CABR was not assigned page numbers by the Snohomish County Superior Court clerk and citations from the CABR are made with reference to the transcript (Tr.) with name of witness, and page number taken from transcript of testimony.

the left ear and by 1985 Harry had binaural ratable impairment. CP, CABR, Lipscomb Tr. at 52.

Despite being aware of his hearing loss Harry did not seek medical treatment until 2001 at which time another audiogram was performed and confirmed his hearing loss. Harry filed a claim for occupational hearing loss in April, 2001 with the Department of Labor & Industries (Department). CP, CABR 18, 59. Following filing of the claim Harry was seen in an Independent Medical Examination and another audiogram was performed on August 28, 2001 that documented a binaural impairment of 38.13%. CP, CABR at 18.

The Department issued an order which directed Buse to accept Harry's claim for hearing loss, pay Harry a permanent partial disability award equal to 38.13% of the complete loss of hearing in both ears (based on the August 28, 2001 audiogram), pay for the purchase and maintenance of hearing aids, and thereupon close the claim. CP, CABR at 59. The order assigned the schedule of benefits in effect on March 5, 2001. *Id.*

Buse timely protested requesting the award for hearing loss be paid based on the schedule of benefits in effect in 1974 since this was the date Harry first demonstrated ratable impairment. *Id.* In January, 2002 the Department issued a corrected order directing Buse to pay a permanent partial disability award equal to 38.13% of the complete loss of hearing in

both ears, using the schedule of benefits in effect on August 26, 1974. CP, CABR at 21. Harry appealed the Department order to the Board of Industrial Insurance Appeals (Board) and the issue presented before the Board was whether the Department should have used the 2001 schedule of benefits instead of the 1974 schedule. CP, CABR at 43. Harry presented the testimony of himself, his wife, and David Lipscomb, Ph.D. He did not present a medical expert. Buse presented the medical testimony of Dr. Duncan Riddell.

Buse filed a motion to dismiss arguing Harry failed to present a prima facie case Harry's hearing was not partially disabling as of 1974. CP, CABR at 71-79. In Harry's response he continued to maintain the industrial audiograms were not valid and therefore the 2001 schedule of benefits should be used to calculate the award. Harry for the first time proposed that if the Board found the audiograms to be valid his hearing loss should be calculated using a tiered approach. CP, CABR at 80-86.

On May 6, 2003, the Industrial Appeals Judge issued a Proposed Decision and Order concluding Harry failed to present a prima facie case that the use of the 1974 schedule of benefits was incorrect on the basis the August 26, 1974 audiogram was not valid and/or reliable. CP, CABR at 14-19. Accordingly the Industrial Appeals Judge dismissed the appeal. *Id.* Harry filed a Petition for Review, notably without taking exception to

any of the findings of fact in the Proposed Decision and Order. Moreover Harry failed to take exception to the Judge's finding he had "an occupational hearing loss." CP, CABR at 18 (emphasis added). The Board denied Harry's petition for review and adopted the Proposed Decision and Order as the final Decision and Order of the Board. CP, CABR at 1.

Harry appealed to Snohomish County Superior Court. CP 84-86. Buse moved for summary judgment. CP 66-83. During oral argument on the motion, Harry conceded the 1974 audiogram was valid and argued a tiered schedule of benefits should be used. CP 52-65. On February 16, 2005, the Superior Court granted Buse's motion for summary judgment. CP 7. Harry then appealed to the Court of Appeals.

On May 6, 2006, Division 1 of the Court of Appeals issued a published decision adopting Harry's tiered award theory, holding each additional compensable hearing loss shown by audiograms constituted a separate disease, and should be compensated according to the schedule of benefits in effect on the date of each such audiogram. *Harry v. Buse Timber & Sales, Inc. and Dep't of Labor & Indus.*, 132 Wn.App. 739, 132 P.3d 1122 (2006). Buse Timber and the Department of Labor and Industries filed a motion for reconsideration. On October 5, 2006 the

Court of Appeals granted in part the motion for reconsideration without overturning the central tenant of the original holding.

#### IV. Argument

A. **RCW 51.32.180(b) is clear and unambiguous and requires the schedule of benefits in effect in 1974 to be used to calculate Harry's award for benefits as this is the date Harry's occupational disease first became partially disabling.**

1. **RCW 51.32.180 sets the schedule of benefits as the date the occupational disease became "partially disabling."**

RCW 51.32.180 determines the rate of compensation for occupational disease claims. In relevant part, RCW 51.32.180 provides:

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.

RCW 51.32.180(b)(emphasis added). Following the 1988 amendments<sup>2</sup> to the statute, the Department promulgated WAC 296-14-350(3) which provides in pertinent part:

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<sup>2</sup> Prior to 1988, the Legislature had not defined the method of selecting a schedule of benefits for occupational disease cases, other than to say that "every worker who suffers disability . . . from an occupational disease . . . shall receive the same compensation benefits . . . as would be paid for a worker injured . . . under this title." Laws 1977, Ex. Sess., ch. 350 § 53, codified at 51.32.180 (1977).

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

The language of the statute and administrative rule is plain and unambiguous, therefore there is no need to resort to the rules of statutory construction since the meaning may be derived from the language of the statute itself. *State v. Douglas*, 50 Wn.App. 776, 779, 751 P.2d 311 (1988). The legislature clearly intended to use a single “rate” of compensation for “an occupational disease” as evidenced in the use of “rate” in the singular. Moreover, there is no confusion as to the term “partially disabling.” In the case at hand Harry’s disease first became partially disabling on August 26, 1974, as evidenced by a valid audiogram<sup>3</sup>.

In reaching its decision in *Harry*, the Court of Appeals has interpreted the statute to require multiple schedules of benefits each time the disease produces additional disability as shown on a valid audiogram. *Harry v. Buse Timber & Sales, Inc.*, 134 Wn.App. 739, 132 P.3d 1122 (2006). This type of tiered award system was first raised at the Board of

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<sup>3</sup> The American Medical Association defines “partially disabling” hearing loss as an average loss that exceeds 25 decibels across the 500, 1000, 2000, and 3000 Hz frequencies. *Guides to the Evaluation of Permanent Impairment*, 245-254. Harry’s

Industrial Insurance Appeals. *In re Carl Heidy*, Dckt. No. 961511, WL 226281 (1998). At that time the Board rejected the idea stating, “While this concept has a certain logic, we are unable to find any support for it in either the Industrial Insurance Act or accompanying case law. *Id.* It is an imaginative proposal that appears to be outside the province of the Board of Industrial Insurance Appeals.” *Id.* Therefore, the Board clearly recognized creating a tiered award system was outside of its authority and the Court of Appeals’ interpretation flies in the face of the long standing rules of statutory construction and to read into the statute a tiered award of benefits would usurp the legislative function through judicial activism.

**2. To accept the tiered schedule of benefits would read out the other portion of the statute, “when first sought medical treatment.”**

Assuming *arguendo* that the statute is ambiguous and open to interpretation, this Court has held that when interpreting a statute the Act must be read as a whole, giving effect to all language used. *State v. S.P.*, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988). By implementing a tiered award of benefits this virtually reads out the portion of the statute in which the rate of compensation is set by the date the disease first requires medical treatment. It is conceivable that a worker can seek treatment for their perceived hearing loss and they don’t actually have ratable loss

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1974 audiogram revealed an average of 28.75 decibels over the aforementioned

demonstrated on the audiogram. Based upon a clear reading of RCW 51.32.180(b) the worker's schedule of benefits would be the date they first sought treatment, even if the condition was not yet partially disabling. This raises the question of what impact the tiered award schedule of benefits would have on the language in the statute that clearly states the schedule of benefits is determine based on the date of medical treatment. The Court of Appeals' tiered award system would potentially create a disadvantage to those workers who quickly seek medical treatment by creating a different statutory scheme in which those workers are paid. This clearly is not what the legislature intended.

A tiered award system further raises the question of what happens in the case in which a worker seeks treatment for their hearing loss which is not yet partially disabling under the *AMA Guides* and then subsequently undergoes additional audiograms that reveal increased hearing loss? Do those workers still receive the benefit of a tiered award system despite the fact the statute is abundantly clear with respect to what it means when a worker first seeks treatment. Using a tiered award schedule for workers who have shown through audiograms that their hearing loss is "partially disabling" would treat those workers differently than the worker whose schedule of benefits is set by the date they first sought treatment.

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frequencies in the left ear.

**B. A tiered schedule of benefits is contrary to the findings of this Court in Boeing v. Heidi which characterized noise induced hearing loss as a progressive disease, not multiple diseases.**

Harry argues each exposure to occupational noise is a separate and distinct occupational disease and thus a new schedule of benefits should be applied on the grounds the statutory language requires all workers be compensated similarly. Harry AB at 8. Contrary to Harry's argument, the Legislature clearly contemplated treating workers who have occupational diseases differently than those with discrete injuries when it comes to establishing a rate of compensation, creating a specific exception within the statute. Furthermore, there are clear differences under the Industrial Insurance Act regarding compensation for occupational diseases versus industrial injuries.

RCW 51.32.180 requires the schedule of benefits for an occupational disease to be set when the condition first requires treatment or becomes partially or totally disabling. Whereas, the schedule of benefits used for an industrial injury is based upon the date of the injury. With respect to industrial injuries, if a worker sustains a back injury and goes back to work and that condition continues to deteriorate and produce additional disability and the claim is subsequently reopened the same schedule of benefits applies. If Harry and the courts truly want to treat occupational hearing loss claims the same as industrial injuries then the

only way to do so is to follow the plain language of the statute and set one schedule of benefits. Additional hearing loss is not a separate and distinct disease, it is simply an aggravation of the original condition and like industrial injuries, one schedule of benefits should be used.

- 1. The Court of Appeals reliance on *Pollard* and *Kilpatrick* is misplaced, there is no medical testimony in this record that hearing loss is a multiple disease process.**

The Court of Appeals relies upon *Pollard v. Weyerhaeuser Co.*, 123 Wn.App. 506, 98 P.3d 545 (2004) *rev. denied*, 154 Wn.2d 1014 (2005) for its proposition that different episodes of hearing loss are properly viewed as multiple diseases instead of a single progressive condition. *Harry* at 748. However *Pollard* interpreted the statute with respect to factual circumstances not present in Harry's case. *Pollard* concerned a claimant with two consecutive industrial insurance claims for hearing loss. In order to follow *Pollard*, the Court of Appeals first had to disregard this Court's decision in *Boeing v. Heidy*, 147 Wn.2d 78, 51 P.3d 794 (2002). In order to do this the Court of Appeals posits this Court erred. The Court of Appeals argues "*Heidy* erroneously describes noise-induced hearing loss as a progressive disease, and does not address the underlying problem in this area of the law: unlike any other occupational disease, hearing loss can be partially disabling long before the disease

actually has any noticeable deleterious effect on the worker, or has been diagnosed by a doctor.” *Harry*, 134 Wn.App. at 750.

In *Heidy* one of the main issues was whether or not the worker must have knowledge of their disease in order for the disease to be partially disabling and the schedule of benefits to be triggered. This Court expressly held knowledge was not required. Yet, the Court of Appeals appears to be rationalizing their tiered award system on the fact a worker is not aware their condition is partially disabling and therefore the current system is not equitable and a tiered award system must be implemented to prevent a “strange outcome.”

However, there is absolutely no testimony in the case at hand to support the proposition that hearing loss constitutes multiple diseases. The only medical doctor to testify in the case at hand was Dr. Duncan Riddell. Dr. Riddell diagnosed Harry with sensorineural hearing loss. BR, Riddell Tr. at 11. Dr. Riddell explained sensorineural hearing loss means that the damage to the ear that is causing the hearing loss is either within the nerve component of the ear or the nerve to the ear itself. *Id.* There is no testimony to indicate Harry’s sensorineural hearing loss was compromised of multiple diseases. Although Harry’s hearing loss continued to worsen over the years that does not mean he suffered from a separate and distinct disease.

Harry further argues and the Court of Appeals relies on *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222, 883 P.2d 1370 (1994) to support its position that multiple schedules of benefits should be used in hearing loss cases. *Kilpatrick* is factually distinguishable from cases involving occupational hearing loss. In *Kilpatrick* there was incontrovertible medical testimony and all the parties agreed that there are three separate and distinct asbestos-caused medical diseases: asbestosis, lung cancer, and mesothelioma. *Kilpatrick*, 125 Wn.2d at 229. Accordingly, sensorineural hearing loss can not possibly be compared and treated the same as asbestosis. In holding asbestos-related conditions involves different dates of injury and require different dates of manifestation the court focused on the fact that each asbestos-related disease involves a unique pathology, requires a different treatment, and is not, in fact, an aggravation or continuation of a different asbestos-related condition. *Kilpatrick*, 125 Wn.2d at 230. The court was careful to point out that the asbestos cases do not involve a worker who manifests additional symptoms of the *original* disease. *Id.* at 231 (*emphasis added*). Thus, the *Kilpatrick* court arguably would not have reached the same decision as *Pollard* and *Harry*. Sensorineural hearing loss does not involve a unique pathology or different type of treatment. Therefore hearing loss claims should only have one schedule of benefits, regardless

of whether there is a subsequent aggravation or worsening of the condition. This is the only way to treat occupational disease claims and injury claims in the same manner.

**2. Tiered Approach is not simply a little more math, it is virtually impossible to implement**

In an attempt to justify its decision, the Court of Appeals states, “with a tiered award system, the Department must simply do a little more math.” *Harry*, 134 Wn.App. at 749. The Court went on to explain their tiered award system would not require a worker to file a claim for each tiny, incremental loss in hearing, which would flood the Department with claims for negligible amounts of money. *Id.* at 751.

However, a tiered award system is not simply a little more math. In actuality the application of a tiered system would be virtually impossible to implement and would flood the system with additional litigation thereby delaying the benefits to the worker. Although Harry has conceded, and medical testimony has confirmed, all of the audiograms in this case are valid there is fluctuation from test to test in the amount of Harry’s impairment. This fluctuation is likely due to Harry being an inconsistent test taker or test/re-test variation. CP, CABR Lipscomb 13-14. The following table illustrates the amount of hearing loss documented

on the 18 out of 25 audiograms included in the Board record and highlights the difficulty in applying a tiered schedule of benefits<sup>4</sup>.

<b>Date of Audiogram</b>	<b>% of Binaural Impairment</b>
8/26/1974	0.94
10/17/1977	1.25
10/9/1978	1.25
9/11/1979	2.19
9/30/1980	1.88
9/27/1982	2.81
11/19/1985	15.00
9/23/1986	12.50
9/15/1988	20.31
9/18/1989	25.00
9/10/1990	29.38
9/16/1991	23.13
9/8/1992	24.06
9/13/1993	32.19
9/12/1994	28.13
12/6/99	45.00
3/16/2001	43.13
8/28/2001	38.13

As evidenced by the table above, Harry's hearing loss did not always show an increase from year to year. There are some years in which Harry tested lower the following year. However, hearing loss is permanent, and as such hearing loss can not improve. Therefore due to test/re-test variation implementing a tiered schedule of benefits may prove difficult, if not impossible in that it can not readily be determined what

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<sup>4</sup> Although Harry underwent 25 audiograms, only 18 of the audiograms are included as either illustrative exhibits (thus not substantive evidence) or contained within testimony in the certified appeal board record.

proportion of hearing loss occurred under a given schedule of benefits. If a tiered schedule was in place there would undoubtedly be increased litigation over the validity of each and every audiogram and whether the appropriate schedule of benefits was used. Therefore the Court of Appeals' tiered schedule approach is not one of judicial efficiency. It is not simply performing more math, it is instead creating additional litigation which would thereby create an additional delay to workers in receiving their benefits. It would be impossible to implement a tiered award system without significant rulemaking, which further highlights that the Court of Appeals did not just interpret a statute, but it engaged in making new law which was an improper request for judicial legislation. *See Soundgarden v. Eikenberry*, 123 Wn.2d 750, 766, 871 P.2d 1050 (1994); *State v. Enloe*, 47 Wn.App. 165, 170, 734 P.2d 520 (1987) (“the drafting of a statute is a legislative, not a judicial, function.”)

In addition to attempting to explain its decision on the grounds of judicial efficiency, the Court of Appeals also suggests a tiered award system is the most efficient way to treat similar claims similarly. *Harry*, 134 Wn.App. at 750. However, by creating a tiered award system the Court of Appeals has done exactly the opposite and opens the door to expand to other types of occupational disease conditions. The term “partially disabling” for establishing a date of manifestation of an

occupational disease does not apply only to hearing loss cases but applies to all occupational diseases. The *Pollard* court recognized this and cautioned that its resolution turned on the specific nature of noise related hearing loss and that it had not considered other occupational diseases, or even other kinds of hearing loss. *Pollard*, 123 Wn.App. at 514. However, *Harry* does not include the same cautionary language and adopting a tiered schedule of benefits could allow workers in other occupational disease cases to argue multiple schedules of benefits should be used every time they show an increase in permanent impairment or increased disability. For example, carpal tunnel syndrome has generally been accepted as an occupational disease. This raises the question of whether each time a worker undergoes an EMG/NCV that shows worsening whether a new schedule of benefits should be used. A tiered schedule of benefits could also create the potential to use multiple schedules of benefits for workers who have shown their degenerative disc disease is the result of an occupational disease. Does this mean every time a workers' condition is objectively worse on MRI or x-ray they are entitled to a new schedule of benefits? Clearly, the legislature did not intend for multiple schedules of benefits to be used in occupational disease claims and a tiered award system is not the most efficient way to treat similar claims similarly.

**V. Conclusion**

RCW 51.32.180(b) is clear and unambiguous and accordingly this Court should conclude Harry's hearing loss first became partially disabling in 1974 as evidenced by the audiogram performed on August 26, 1974. Therefore Buse respectfully request this Court affirm the superior court order on summary judgment, which affirmed the Board's order that affirmed the Department order that used the 1974 schedule of benefits.

RESPECTFULLY SUBMITTED this 3 day of December, 2007.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

---

DONALD HARRY, Respondent

V.

BUSE TIMBER SALES, INC., et al., Petitioners.  
Supreme Court No. 79613-1

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**CERTIFICATE OF SERVICE BY U.S. MAIL**

**PETITIONER, BUSE TIMBER SALES' SUPPLEMENTAL  
BRIEF**

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I certify that on December 3, 2007 I had filed via U.S. Mail the attached Supplemental Brief of Petitioner to The Supreme Court of the State of Washington and upon the parties to this proceeding, as listed below, by U.S. Mail a true copy thereof.

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DATED this 3<sup>RD</sup> day of December, 2007.

  
Kathy Gallagher