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No. 79613-1

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.

SUPPLEMENTAL BRIEF OF THE RESPONDENT, DONALD HARRY

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

ISSUES PRESENTED FOR REVIEW..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 3

 I. The mandate of RCW 51.12.010 that ambiguities in the Industrial Insurance Act be interpreted in favor of injured workers requires individual compensation rates for each manifestation of Mr. Harry’s hearing loss. 3

 A. *When reading the Industrial Insurance Act as a whole, it is improper to interpret RCW 51.32.180 as allowing workers suffering from an occupational disease to be compensated differently from other workers under the Act..... 6*

 B. *As Mr. Harry’s hearing loss could not have occurred before his exposure to occupational noise, RCW 51.32.180 should be read as requiring each noise exposure as manifested on an audiogram as a separate and distinct occupational disease..... 12*

ATTORNEYS’ FEES AND COSTS 19

CONCLUSION 19

APPENDIX..... 21

TABLE OF AUTHORITIES

Cases

<u>Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs</u> , 506 U.S. 153, 165, 113 S. Ct. 692, 121 L. Ed. 2d 619 (1993)	17
<u>Blackburn v. Workers' Comp. Div.</u> , 212 W.Va. 838, 847, 575 S.E.2d 597 (2002).....	18
<u>Boeing Co. v. Heidy</u> , 147 Wn.2d 78, 88, 51 P.3d 793 (2002).....	17
<u>Brand v. Dep't of Labor and Indus.</u> , 139 Wn.2d 659, 670, 989 P.2d 1111 (1999).....	22
<u>Clauson v. Dep't of Labor & Indus.</u> , 130 Wn.2d 580, 584, 925 P.2d 624 (1996).....	5, 10
<u>Cockle v. Dep't of Labor & Indus.</u> , 142 Wn.2d 801, 807, 16 P.3d 583 (2001).....	4
<u>Dennis v. Dep't of Labor & Indus.</u> , 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).....	4, 15, 16
<u>Dep't of Labor & Indus. v. Estate of MacMillian</u> , 117 Wn.2d 222, 232, 814 P. 2d 194 (1991).....	12
<u>Department of Labor & Indus. v. Landon</u> , 117 Wn.2d 122, 127, 814 P.2d 626 (1991).....	9, 19
<u>Harmon v. Department of Social & Health Services</u> , 134 Wn.2d 523, 530, 951 P.2d 770 (1998).....	4
<u>Harry v. Buse Timber & Sales, Inc.</u> , 134 Wn. App. 739, 746, 132 P.3d 112 (Div. I 2006).....	2
<u>Kilpatrick v. Dep't of Labor & Indus.</u> , 125 Wn.2d 222, 231, 883 P.2d 1370 (1994).....	8, 16, 17
<u>McIndoe v. Dep't of Labor & Indus.</u> , 144 Wn.2d 252, 256-57, 26 P.3d 903 (2001).....	5, 10

<u>Pollard v. Weyerhaeuser</u> , 123 Wn. App. 506, 513, 98 P.3d 545 (2004)	passim
<u>Rozner v. City of Bellevue</u> , 116 Wn.2d 342, 347, 804 P.2d 24 (1991).	..... 4
<u>Ruse v. Dep't of Labor & Indus.</u> , 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).	3
<u>Simpson Logging Co. v. Dep't of Labor & Indus.</u> , 32 Wn.2d 472, 479, 202 P.2d 448 (1949).	..... 16
<u>Weyerhaeuser Co. v. Tri</u> , 117 Wn.2d 128, 133, 814 P.2d 629 (1991).	..... 7

Statutes

RCW 51.04.010	..... 4, 21
RCW 51.08.100	..... 7
RCW 51.08.140	..... passim
RCW 51.12.010	..... passim
RCW 51.12.010	..... 4
RCW 51.16.040	..... 5, 8, 12, 21
RCW 51.28.055	..... 10, 21
RCW 51.32.180	..... passim
RCW 51.52.110	..... 3, 21
RCW 51.52.115	..... 3
RCW 51.52.130	..... 19, 21

Other Authorities

<u>In re Eugene Williams</u> , BIIA Dec. 95378 (1998)	..... 15
<u>In re Paul J. Brooks</u> , BIIA No. 02 17331 (2003) (Significant Decision).	15, 16, 17, 18

ISSUES PRESENTED FOR REVIEW

At what rate of compensation should an injured workers permanent partial disability be calculated where an injured worker suffers distinct periods of injurious exposure resulting in additional hearing loss?

STATEMENT OF THE CASE

Donald Harry worked as a truck driver for Buse Timber and Sales, Inc. from 1968 until his retirement in 2001. During the course of this employment, Buse exposed Mr. Harry to loud injurious noise. This loud noise exposure required Buse to monitor and protect Mr. Harry's hearing under WISHA. As part of this hearing conservation program, Mr. Harry underwent yearly industrial screening audiograms.

Even though these audiograms demonstrated Mr. Harry suffered from compensable hearing loss in his left ear as early as 1974, Buse failed to have him to seek medical treatment, protect him from the loud noise or file a claim for benefits under the Industrial Insurance Act. From 1974 to 2001, Buse continued to expose Mr. Harry to loud noise. This additional injurious noise exposure furthered his hearing loss, as shown on a multitude of audiograms taken by Buse. By 1986, Mr. Harry's hearing loss progressed from just his left ear to both ears. Ultimately, Mr. Harry had 38.13% binaural hearing loss in 2001 because of his noise exposure.

As a result, Mr. Harry filed a claim under the Industrial Insurance Act. The Department of Labor and Industries originally issued an award of benefits equal to 38.13% hearing loss in both ears at the schedule of benefits in effect in 2001, the year when Mr. Harry's audiogram showed his full noise induced hearing loss. This would have entitled Mr. Harry to a permanent partial disability award of \$25,673.19. However, Buse protested, arguing the "partial disabling" language of RCW 51.32.180(b) requires Mr. Harry's compensation established when he had any hearing loss demonstrated on an audiogram. In response, the Department issued a revised order based on the schedule of benefits in effect in 1974, the year when the first audiogram showed that Mr. Harry suffered 5.6% hearing loss in only his left ear. This decision reduced Mr. Harry's permanent partial disability award to \$5,490.72.

Mr. Harry appealed this determination to both the Board of Industrial Insurance Appeals and the Snohomish County Superior Court. Both upheld the Department's determination. The Court of Appeals disagreed. It reasoned RCW 51.32.180(b) is ambiguous as it assumes only one disease exists for each claim, where in hearing loss claims each exposure to loud noise causing hearing loss is separate and distinct from prior losses. Harry v. Buse Timber & Sales, Inc., 134 Wn. App. 739, 746, 132 P.3d 112 (Div. I 2006). Therefore, it held an injured worker's rate of

compensation is established when additional disability is shown on an audiogram. Id. at 751.

ARGUMENT

- I. The mandate of RCW 51.12.010 that ambiguities in the Industrial Insurance Act be interpreted in favor of injured workers requires individual compensation rates for each manifestation of Mr. Harry's hearing loss.**

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:

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....

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, 977 P.2d 570 (1999).

Statutory interpretation is a question of law and is reviewed *de novo*. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Where statutory language is susceptible to more than one interpretation, it is ambiguous. Harmon v. Department of Social & Health Services, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). In reviewing a statute, the primary goal is to carry out the legislative intent. Cockle, 142

Wn2d at 807, citing Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).

The Industrial Insurance Act's purpose is to provide sure and certain relief from injuries occurring in the course of employment. RCW 51.04.010; Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). As a result, 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 must be resolved to the advantage of the injured worker. McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 256-57, 26 P.3d 903 (2001); Clauson v. Dep't of Labor & Indus., 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

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 or killed in employment under this title, except as follows: (a) ... (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) is ambiguous as it fails establish a rate of manifestation when there are separate and distinct diseases caused by noise exposure because it can be partially disabling on multiple dates. Pollard v. Weyerhaeuser, 123 Wn. App. 506, 513, 98 P.3d 545 (2004), review denied, 154 Wn.2d 1014 (2005). As RCW 51.32.180(b) can be interpreted to establish a separate rate of compensation for each increase in hearing loss, it would violate RCW 51.12.010 to interpret the statute so it would benefit the employer to the detriment of the worker. This is particularly the case when two provisions of the Act, RCW 51.16.040 and RCW 51.32.180, mandate workers with occupational disease be treated the same as workers with industrial injuries and the very definition of “occupational disease” requires exposure to occupational stimuli before establishing the date of manifestation.

Mr. Harry should be awarded multiple rates of compensation based on each increase in his noise induced hearing loss. While Mr. Harry had 5.6% hearing loss in his left ear in 1974, Buse continued to expose him to loud noise ultimately causing 38.13% hearing loss in both ears. The hearing loss subsequent to 1974 was caused by his additional loud noise exposure. To establish Mr. Harry’s rate of compensation as of 1974 would establish his hearing loss at a rate in effect before most of his hearing loss was caused by loud noise at Buse. This would treat him

differently from workers suffering from industrial injuries and even other workers with noise induced hearing loss who merely filed additional hearing loss claims.

A. When reading the Industrial Insurance Act as a whole, it is improper to interpret RCW 51.32.180 as allowing workers suffering from an occupational disease to be compensated differently from other workers under the Act.

RCW 51.32.180 fails to address when a disease is “partially disabling” if there are multiple occupational diseases all medically separate involving the same body part, such as hearing loss. Pollard, 123 Wn. App. at 513. As RCW 51.32.180 fails to make a contingency for such cases, it is ambiguous and must be interpreted with each provision read in relation to the other provisions, thus giving effect to the Industrial Insurance Act as a whole. Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 133, 814 P.2d 629 (1991). As other provisions of the Industrial Insurance Act require all workers are compensated similarly, regardless of whether they have an industrial injury or occupational disease, RCW 51.32.180 cannot be interpreted to provide Mr. Harry a lower rate of compensation than (1) workers who suffer occupational hearing loss but file multiple claims and (2) workers who suffer multiple industrial injuries to the same body part.

The definition of industrial injuries and occupational diseases as two distinct concepts require a conscious effort to ensure all workers are

compensated similarly. Industrial injury is “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result.” RCW 51.08.100. An occupational disease is “such disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140. Because occupational diseases are not immediately developed, there is no precise determination of when disability occurs. The legislature cured this defect by through RCW 51.32.180.

The rate of compensation for an occupational disease is determined as of the date of treatment or disability, whichever occurs first. RCW 51.32.180(b). However, before stating how to compensate an occupational disease, the language of RCW 51.32.180 requires all workers be similarly compensated:

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.

RCW 51.32.180. While the aforementioned language in RCW 51.32.180 provides there may be some exceptions where providing workers different rates of compensation may be allowed,¹ the legislature’s inclusion of this

¹ RCW 51.32.180 says all workers are to be compensated similarly, however, it then provides some exceptions including that the rate of compensation is established as of when the disease requires treatment or is disabling. That exception specifically prohibits

language suggests, when possible, all workers should be compensated similarly. Additionally, RCW 51.16.040 specifically requires "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." These provisions are violated if the rate of compensation for hearing loss claims is established differently than for other types of industrial injury and occupational disease.

For example, a worker who suffers two knee injuries is entitled to two different rates of compensation if the accidents were separated in time sufficiently for a new rate of compensation to be adopted. A different compensation rate for the increase in disability resulting from the discrete accidents is required by the Industrial Insurance Act. Kilpatrick v. Dep't of Labor & Indus., 125 Wn.2d 222, 231, 883 P.2d 1370 (1994). Another example is a worker who suffers a head injury and partial loss of hearing because of a fall. If that worker fell again ten years later losing more hearing, a new rate of compensation would be established. There should be no difference between these instances and noise induced hearing loss.

Requiring all workers to be compensated similarly is not a novel legal concept. This Court in Clauson v. Dep't of Labor & Indus. refused to allow a similar disparity. Clauson, 180 Wn.2d at 594. Clauson involved a

the establishment of the rate of compensation as of the date of last exposure. Department of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991).

worker who injured his hip and 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 then denied 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 permanent partial disability benefits for his hip injury pursuant to RCW 51.32.060(4). Id. at 586. This Court held 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.

This Court has similarly found a worker may recover a permanent partial disability award for hearing loss when the worker is already classified as permanently totally disabled. McIndoe v. Dep't of Labor & Indus., 144 Wn.2d at 266. The Court found permanent partial disability benefits are based on loss of body function rather than loss of wage-earning capacity, whereas permanent total disability benefits are based on loss of wage earning capacity. Id. at 262-263. As such workers should not be penalized for the sequence of filing claims. This Court allowed for the recovery of a permanent partial disability claim for body parts other than the part resulting in the total disability. Id. at 266.

Finally, workers all suffering similar noise induced hearing loss may be treated differently depending on whether the worker files multiple claims. The court in Pollard v. Weyerhaeuser allowed workers, who file multiple noise induced hearing loss claims, to have a new rate of compensation established on any additional claims even though they had previously been diagnosed with sensorineural hearing loss during the first claim. Pollard v. Weyerhaeuser, 123 Wn. App. at 513. The court in Pollard reasoned to not allow a new compensation rate would treat workers with an occupational disease differently from workers with industrial injuries. Id.

That rationale does not differ in cases where there is only a single claim versus multiple claims, regardless of dicta in Pollard that all workers have equal opportunity to file multiple claims. Workers are only mandated to file claims for occupational diseases within two years of when the worker receives written notification from a medical provider of the existence of an occupational disease and a right to file a claim.² RCW 51.28.055(1); Dep't of Labor & Indus. v. Estate of MacMillian, 117 Wn.2d 222, 232, 814 P. 2d 194 (1991). Opportunity to file a claim is an irrelevant distinction in light of the statutory requirement establishing when workers must file claims. This is supported by the fact that

² RCW 51.28.055 has the added requirement that a hearing loss claim must also be filed within two years of the date of the workers' last injurious exposure. RCW 51.28.055(2).

opportunity to file claims is not universal: workers who lack the results of audiograms do not have an equal opportunity to file a claim as a worker provided the results by a physician. This is particularly the case with noise induced hearing loss, where in most instances the employer is required by law to provide regular audiograms, which workers may not receive or understand. The Pollard court's determination all workers have equal opportunity to file claims ignores RCW 51.28.055(1).

As an example take two workers each having two audiograms, one in 1990 showing 10% hearing loss and one in 2000 showing 30% hearing loss. The first worker filed a claim in 1990. The second worker did not. Both filed a claim in 2000. The first worker, who filed a claim in 1990, is compensated for 20% of her disability at a higher rate of compensation using Pollard. In contrast, the second worker receives all benefits using the lower 1990 schedule of benefits, based on Buse's contentions. Workers with the same amount of disability should be treated the same.

Mr. Harry's audiograms all show a progression in his hearing loss. The first audiogram showing any hearing loss occurred in 1974, where he had 5.6% hearing loss in only his left ear. Mr. Harry's hearing loss progressed after that time as a result of his loud noise exposure at Buse, as shown in the 2001 audiogram. To compensate Mr. Harry at the 1974 rate of compensation because he had some hearing loss at that time will treat

him differently than workers who have industrial injuries and are compensated based on when the disability effected them. Mr. Harry will even be compensated unlike workers similarly suffering from noise induced hearing loss, as other workers may have filed previous claims, such as the claimant in Pollard. This disparate treatment is not allowed under RCW 51.32.180 and RCW 51.16.040, and as such, Mr. Harry should not have his benefits established before other similar workers.

B. As Mr. Harry's hearing loss could not have occurred before his exposure to occupational noise, RCW 51.32.180 should be read as requiring each noise exposure as manifested on an audiogram as a separate and distinct occupational disease.

RCW 51.32.180 is ambiguous because an interpretation of its "whichever occurs first" language may require workers with occupational hearing loss be compensated different than other workers. Pollard, 123 Wn. App. at 508. That is, if RCW 51.32.180 is read as defining noise induced hearing loss as a single disease, noise induced hearing loss cannot be compensated the same as all other occupational diseases and industrial injuries. However, such a reading of the statute is contrary to the definition of an "occupational disease", as one cannot occur before exposure to stimuli at work. RCW 51.08.140. Therefore, Mr. Harry must be compensated based on the rate of compensation in effect during each manifestation of his hearing loss as recorded on an audiogram.

RCW 51.32.180 requires an occupational disease, which necessitates medical treatment or causes disability, to establish the rate of compensation. RCW 51.32.180. Absent an occupational disease, there is no need for medical treatment. Nor would disability arise. Inherent in an occupational disease is exposure to occupational stimuli. For noise induced hearing loss, there must be noise. Without the presence of noise, the noise induced hearing loss would remain static. Occupationally, this requires noise at work. As RCW 51.32.180 requires hearing loss caused by occupational noise exposure for compensation, the rate of that compensation cannot be established before noise exposure occurs.

The definition of an occupational disease necessarily requires the existence of occupational stimuli causing the disability. 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. The requirement for occupational stimuli is implicit in the statutory language demanding the disease arise "out of employment." By requiring the disease "arise naturally and proximately" to working conditions, the necessity for occupational stimuli is even clearer. See generally Dennis v. Dep't of Labor & Indus., 109 Wn.2d at 476-483.

For an occupational disease to arise "proximately" out of employment there must be medical testimony that it is probable, not

merely possible, the condition was the result of occupational stimuli. Dennis, 190 Wn.2d at 477. Almost sixty years ago, this Court found a cause proximate if “the disease would not have been contracted but for the condition existing in the [employment].” Simpson Logging Co. v. Dep’t of Labor & Indus., 32 Wn.2d 472, 479, 202 P.2d 448 (1949). Absent testimony but for occupational stimuli the claimant would probably have an occupational disease, there would be no disease.

More explicit is the requirement an occupational disease arises “naturally” out of employment. In order for an occupational disease to arise “naturally”, it must come about as a natural consequence of distinct conditions of employment that are more than a mere coincidental occurrence. Dennis, 190 Wn.2d at 481. The “distinctive condition” requirement is the same as a requirement for occupational stimuli. Without occupational stimuli a disease fails to meet the definition of an occupational disease as defined in RCW 51.08.140.

It would similarly defy common understanding of an occupational disease to eliminate the requirement of occupational stimuli. The common definition of an occupational disease is “a disease that is contracted as a result of exposure to debilitating conditions or substances in the course of employment.” Bryan A. Garner, ed., Black’s Law Dictionary 883 (Abridged 7th Edition 2000). Inherent in this meaning of occupational

disease is exposure to a condition or substance, a stimulus. Without this exposure, there is no occupational element to the disease – it is merely a disease, occurring without recourse under any workers’ compensation law.

Under the Industrial Insurance Act, noise induced hearing loss is an occupational disease. Boeing Co. v. Heidy, 147 Wn.2d 78, 88, 51 P.3d 793 (2002); Pollard, 123 Wn. App. at 508. Noise induced hearing loss only occurs with noise exposure. See 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); Pollard, 123 Wash. App. at 512-513; In re Paul J. Brooks, BIIA No. 02 17331 (2003) (Significant Decision). According to the West Virginia Supreme Court, “once noise exposure stops, so does the progression of the hearing loss unless other factors are involved. Damage to hearing is permanent: Once the hair cells in the cochlea are destroyed the cells cannot be rejuvenated.” 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). While impossible to determine exactly when a hair cell dies, hair cell loss is illustrated by audiograms showing additional loss.

As it is possible for workers to have an occupational disease before their noise exposure stops, separate noise exposures result in separate and distinct disabilities. See Pollard, 123 Wn. App. at 508. In Pollard, the

claimant was continually exposed to industrial noise while working at Weyerhaeuser from 1961 to 2000. By 1982, the claimant was diagnosed with 10% hearing loss. He filed a claim and was awarded the 10% loss using the current rate of compensation. Id. at 508-509. By 1998, the claimant noticed his hearing loss increasing. In 1999, a second claim was filed and he was awarded compensation for a 35.9% hearing loss. The court in Pollard held each exposure to occupational noise is a separate and distinct occupational disease, applying a new rate of compensation. Id. at 514; See also Kilpatrick, 125 Wn.2d at 231.

In making such a decision, the court in Pollard relied on a Board of Industrial Insurance Appeals' decision, 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 injurious occupational noise resulting in the claimant filing two claims for occupational hearing loss: one in 1984 and a second in 2001. The self-insured employer in Brooks used the same argument as in Pollard, hearing loss is one disease and must be compensated using the rate of compensation established in the earlier claim.

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

compensation. Id. Therefore, the Board reasoned it is inconsistent with the goals of the Industrial Insurance Act to compensate use a rate in effect long before either the exposure or damage occurred. Id.; RCW 51.12.010 (to provide prompt compensation to injured workers); see also Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 126-127, 814 P.2d 626 (1991).

The Pollard and Brooks holdings are not groundbreaking; separate and distinct occupational diseases are found even when there is not additional exposure to occupational stimuli causing the second disease. Kilpatrick, 125 Wn.2d at 231. In Kilpatrick, this Court found the same asbestos exposure could result in two separate and distinct diseases. The Court 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 ... be able to claim separate dates of manifestation." Kilpatrick, 125 Wn.2d at 231. The name of the disease is not important in determining whether it is a separate and distinct. Instead, it is the pathology behind the disease. In noise induced hearing loss claims, that pathology is additional noise exposure; without it the hearing loss remains the same. To hold otherwise would result in the application of outdated rates of compensation. Id.

Mr. Harry's continued loud noise exposure from the time he was hired until his retirement precludes him from having a single occupational

disease with a rate of compensation established when only one ear showed a ratable disease. While he had an occupational disease in 1974, Mr. Harry had additional losses after that date. An example is when a 1986 audiogram showed he suffered hearing loss in both ears. But for the additional noise exposure between 1974 and 1986, Mr. Harry's disability would not have progressed; therefore, his hearing loss as established on the 1986 audiogram is not the same occupational loss.

This cycle only stopped when Mr. Harry retired, thus removing him from the injurious stimuli. An audiogram at that time showed 38.13% hearing loss in both ears. This disability would not have occurred but for his continued noise exposure. Pursuant to the definition of an occupational disease and Pollard and Brooks, the totality of Mr. Harry's hearing loss cannot be part of the 1974 occupational disease.

Furthermore, Buse had knowledge of the nature and extent of Mr. Harry's hearing loss increases. It knew it was required by state law to have a hearing conservation program. Under the auspicious of that program, it conducted screening audiograms showing the progression of Mr. Harry's hearing loss. It failed to instruct Mr. Harry to seek medical attention or file a claim. Now Buse attempts to use its unclean hands to seek a rate of compensation established before the full effect of Mr. Harry's noise exposure was evident, saving itself thousands of dollars.

Buse should not be able to benefits from its bad faith. Mr. Harry should have multiple rates of compensation based on when his audiograms show an increase in noise induced hearing loss.

ATTORNEYS' FEES AND COSTS

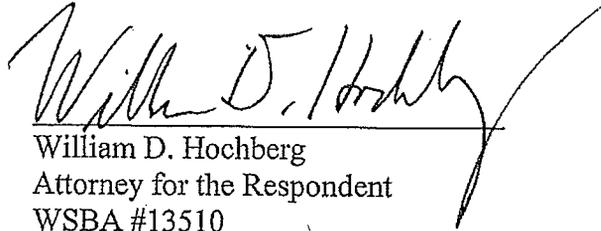
Mr. Harry requests his attorneys' fees and costs pursuant to RAP 18.1 and RCW 51.52.130. Further, an award for attorneys' under RCW 51.52.130 shall be calculated without regard to the worker's overall recovery on appeal, and shall not exclude fees for work done on unsuccessful claims. Brand v. Dep't of Labor and Indus., 139 Wn.2d 659, 670, 989 P.2d 1111 (1999). Mr. Harry respectfully requests, should this Court uphold the decision of the Court of Appeals, an award of attorney's fees and costs incurred before this Court be specifically ordered as well.

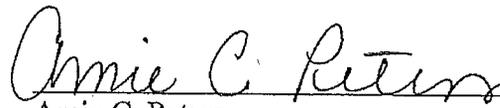
CONCLUSION

Mr. Harry should have tiered rates of compensation based on when increases in his hearing loss were manifested on an audiogram. To hold otherwise would treat many workers with noise induced hearing loss differently from other workers. Also, the rate of compensation cannot be established before exposure to the noise causing hearing loss. Therefore, 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 this 3rd day of December, 2007.

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APPENDIX

RCW 51.04.010 Attachment A

RCW 51.08.100 Attachment B

RCW 51.08.140 Attachment C

RCW 51.12.010 Attachment D

RCW 51.16.040 Attachment E

RCW 51.28.055 Attachment F

RCW 51.32.180 Attachment G

RCW 51.52.110 Attachment H

RCW 51.52.155 Attachment I

RCW 51.52.130 Attachment J

Attachment A

51.04.010

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.04 GENERAL PROVISIONS

51.04.010 Declaration of police power -- Jurisdiction of courts abolished.

51.04.010 Declaration of police power -- Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

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Attachment B

51.08.100

Statutes and Session Law
Title 51 INDUSTRIAL INSURANCE
Chapter 51.08 DEFINITIONS
51.08.100 Injury.

51.08.100 "Injury."

"Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

[1961 c 23 § 51.08.100. Prior: 1959 c 308 § 3; 1957 c 70 § 12; prior: 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part.]

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Attachment C

51.08.140

Statutes and Session Law
Title 51 INDUSTRIAL INSURANCE
Chapter 51.08 DEFINITIONS
51.08.140 Occupational disease.

51.08.140 "Occupational disease."

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

[1961 c 23 § 51.08.140. Prior: 1959 c 308 § 4; 1957 c 70 § 16; prior: 1951 c 236 § 1; 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

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Attachment D

51.12.010

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.12 EMPLOYMENTS AND OCCUPATIONS COVERED

51.12.010 Employments included -- Declaration of policy.

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.

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

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Attachment E

51.16.040

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.16 ASSESSMENT AND COLLECTION OF PREMIUMS -- PAYROLLS AND RECORDS

51.16.040 Occupational diseases.

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.

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Attachment F

51.28.055

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.28 NOTICE AND REPORT OF ACCIDENT -- APPLICATION FOR COMPENSATION

51.28.055 Time limitation for filing claim for occupational disease -- Notice -- Hearing loss claims -- Rules.

51.28.055 Time limitation for filing claim for occupational disease -- Notice -- Hearing loss claims -- Rules.

(1) Except as provided in subsection (2) of this section for claims filed for occupational hearing loss, claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed. The notice shall also contain a statement that the worker has two years from the date of the notice to file a claim. The physician or licensed advanced registered nurse practitioner shall file the notice with the department. The department shall send a copy to the worker and to the self-insurer if the worker's employer is self-insured. However, a claim is valid if it is filed within two years from the date of death of the worker suffering from an occupational disease.

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

(b) A claim for hearing loss due to occupational noise exposure that is not timely filed under (a) of this subsection can only be allowed for medical aid benefits under chapter 51.36 RCW.

(3) The department may adopt rules to implement this section.

[2004 c 65 § 7; 2003 2nd sp.s. c 2 § 1; 1984 c 159 § 2; 1977 ex.s. c 350 § 34; 1961 c 23 § 51.28.055. Prior: 1959 c 308 § 18; prior: 1957 c 70 § 16, part; 1951 c 236 § 1, part.]

NOTES:

Report to legislature -- Effective date -- Severability -- 2004 c 65: See notes following RCW 51.04.030.

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Attachment G

51.32.180

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.32 COMPENSATION – RIGHT TO AND AMOUNT

51.32.180 Occupational diseases – Limitation.

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.

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Attachment H

51.52.110

Statutes and Session Law

TITLE 51 INDUSTRIAL INSURANCE

Chapter 51.52 APPEALS

51.52.110 Court appeal -- Taking the appeal.

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.]

Attachment I

51.52.115

Statutes and Session Law

TITLE 51 INDUSTRIAL INSURANCE

Chapter 51.52 APPEALS

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

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.]

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Attachment J

51.52.130

Statutes and Session Law

Title 51 INDUSTRIAL INSURANCE

Chapter 51.52 APPEALS

51.52.130 Attorney and witness fees in court appeal.

51.52.130 Attorney and witness fees in court appeal.

(1) 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.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

[2007 c 490 § 4; 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.

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CERTIFICATE OF MAILING

CLAIMANT: Donald Harry

NO: 79613-1

ORIGINAL SUPPLEMENTAL BRIEF OF THE RESPONDENT, DONALD HARRY SENT VIA MAIL AND FILED AS PDF VIA EMAIL TO:

Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

COPIES OF SUPPLEMENTAL BRIEF OF THE RESPONDENT, DONALD HARRY SENT VIA MAIL TO:

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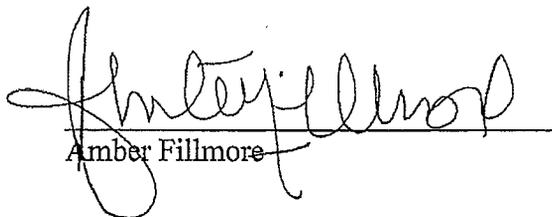
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I certify that either the original, via personal delivery, or a copy of the document attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 3rd day of December, 2007.


Amber Fillmore